

## Judge Sonia Sotomayor

Judge Sonia Sotomayor is a federal Judge for the Second Circuit Court of Appeal.

### **Prior Appointments:**

- Nominated by Senior President Bush to the U.S. District Court for the Southern District of New York in 1991.
- Nominated by President Clinton to the Second Circuit in 1997.

### **Judicial Philosophy:**

- Stated that the “Court of Appeals is where policy is made”<sup>1</sup> during a panel discussion for Duke Law.
  - “But the Court of Appeals is where policy is made. And I know—I know this is on tape, and I should never say that because we don’t make law. I know, ok, I know. I’m not promoting it. I’m not advocating it. I’m—y’know”<sup>2</sup>
- Judge Sotomayor has had five decisions reviewed by the Supreme Court and three were reversed. She carried 11 of 44 possible votes during those cases.<sup>3</sup>
  - The Supreme Court upheld her decision in *Knight v. Commissioner of Internal Revenue*<sup>4</sup> but Chief Justice Roberts stated that her method of reading the statute in question, “flies in the face of the statutory language.”<sup>5</sup>
  - Sotomayor attempted to extend the liability of individual federal agents who violate constitutional rights to include private corporations in *Malesko v. Correctional Services Corporation*<sup>6</sup>
    - The Supreme Court reversed this decision in a 5-4 majority stating that caution and precedent do not foreclose such an extension.<sup>7</sup>
    - Basing her decision on the opinions of several circuit courts, Judge Sotomayor attempted to override Supreme Court precedent.
  - Sotomayor ruled that certain state-law securities claims were not preempted by federal law in *Dabit v. Merrill Lynch*<sup>8</sup> but she was unanimously reversed by the Supreme Court which demonstrated that it had rejected that interpretation after 1971.<sup>9</sup>
  - In *New York Times v. Tasini*<sup>10</sup> the Supreme Court rejected Sotomayor’s reading of copyright law.

### **Abortion:**

- Despite 17 years on the bench, Judge Sotomayor has never directly decided whether a law regulating abortion was constitutional.<sup>11</sup>
- Wrote the opinion and upheld the Mexico City Policy prohibiting federal funding of overseas abortions and that there is a rational basis for government to favor anti-abortion position with use of federal funds in *Center for Reproductive Law & Policy v. Bush*.<sup>12</sup>
  - Found that the pro-abortion organization’s due process claim of alleged harm did not fall within the categories protected by the Due Process Clause.
  - Decision was heavily based on past precedent set in *Planned Parenthood Federation of America Inc. v. Agency for International Development*<sup>13</sup> before he was on the bench.

### **Second Amendment:**

Denied the status of the Second Amendment as an individual right in *Maloney v. Cuomo* which held that the Second Amendment applied only to limitations imposed by the federal government,

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and was not a fundamental right. Therefore the second amendment did not protect the possession of nunchukas in New York; the New York penal statute was adjudicated under rational basis and upheld.<sup>14</sup>

### **Affirmative Action:**

- Supported affirmative action in city jobs in *Ricci v. DeStefano*<sup>15</sup> by upholding a District Court decision which approved changing procedure in filling a city position because the original procedure produced a racially disparate result.<sup>16</sup>

### **Establishment Clause and Free Exercise:**

- Held that a church may invite homeless persons to sleep on its premises according to the Free Exercise Clause in *Fifth Avenue Presbyterian v. NYC*<sup>17</sup>
- Held that a revocation of plaintiffs' permit to use the town hall annex for their worship services violated the First Amendment because the policy granted the town unfettered discretion to deny applications in *Amandola v. Town of Babylon*.<sup>18</sup> The opinion, however, stated that the town constitutionally could have had a policy that banned all religious uses. That same logic was later overturned by the US Supreme Court in *Good News Club v. Milford School District*.<sup>19</sup>
- Held that the interest of avoiding violations of the Establishment Clause "on some public properties . . . not closely associated with the seat of government" did not constitute a compelling justification for content-based restrictions on expressive conduct in *Flamer v. City of White Plains*<sup>20</sup>
- Wrote a dissent expressing no view on whether the Religious Freedom Restoration Act (RFRA) is constitutional in *Hankins v. Lyght*.<sup>21</sup>

### Sources:

<sup>1</sup> Tony Mauro, "What Old Sin Will Haunt the Next Supreme Court Nominee?" National Law Journal.com, May 18.

<sup>2</sup> Sonia Sotomayor, "Judicial Clerk Information Panel," Duke Law, Feb. 25, 2005.

<sup>3</sup> Ed Whelan, "Bench Memos," National Review Online, Oct. 3, 2008.

<sup>4</sup> *Knight v. Commissioner of Internal Revenue*, 467 F.3d 149 (2d Cir. 2006).

<sup>5</sup> *Knight v. Commissioner of Internal Revenue*, 128 U.S. 782, 787 (2008).

<sup>6</sup> *Malesko v. Correctional Services Corporation*, 229 F.3d 374 (2d Cir. 2000).

<sup>7</sup> *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001).

<sup>8</sup> *Dabit v. Merrill Lynch*, 395 F.3d 25 (2d Cir. 2005).

<sup>9</sup> *Merrill Lynch v. Dabit*, 547 U.S. 71 (2006).

<sup>10</sup> *New York Times v. Tasini*, 533 U.S. 483 (2001).

<sup>11</sup> *Americans United for Life, "In Defense of Life?" Potential U.S. Supreme Court Nominees,* AUL.org. May 22, 2009.

<sup>12</sup> *The Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002).

<sup>13</sup> *Planned Parenthood Federation of American, Inc. v. Agency for International Development*, 915 F.2d 59 (2d Cir. 1990).

<sup>14</sup> *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009).

<sup>15</sup> John Perazzo, "The Next Token Justice?" FrontPageMagazine.com, May 7, 2009.

<sup>16</sup> *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008).

<sup>17</sup> *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002).

<sup>18</sup> *Amandola v. Town of Babylon*, 251 F.3d 339 (2d Cir. 2001).

<sup>19</sup> *Good News Club v. Milford School Dist.*, 533 U.S. 98 (2001).

<sup>20</sup> *Flamer v. City of White Plains*, 841 F. Supp. 1365 (S.D.N.Y. 1993).

<sup>21</sup> *Hankins v. Lyght*. 441 F.3d 96, 112 n.4 (2d Cir. 2006) ("I express no view on whether RFRA is constitutional as applied to federal law because it is unnecessary for us to reach this question.")

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