July 10, 2009

The Honorable Patrick Leahy, Chairman
The Honorable Jeff Sessions, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of People for the Ameriean Way's hundreds of thousands of members nationwide, we are writing in strong support of the nomination of Judge Sonia Sotomayor to the position of Associate Justice of the United States Supreme Court. In her seventeen years on the federal bench, Judge Sotomayor has demonstrated her outstanding intellect, her deep respect for the rule of law, and her commitment to core constitutional values of equality and justice for all. As important, Judge Sotomayor's impressive life story has instilled in her a keen understanding of the impact of the law on the daily realities of people's lives.

Sotomayor was raised in a New York City housing project by parents who migrated from Puerto Rico. Her father died when she was nine years old and she was raised by her mother – a nurse - who instilled in her a deep respect for learning. She excelled in high school, graduating as valedictorian of her class and went from there to Princeton University, where she graduated *Summa Cum Laude* and then to Yale Law School, where she was an editor of the *Yale Law Journal.*

After law school, Judge Sotomayor spent five years as a criminal prosecutor in Manhattan. She then spent eight years as a corporate litigator with the firm of Pavia and Harcourt, where she gained expertise in a wide range of civil law areas, including contracts and intellectual property. In 1992, President George H.W. Bush appointed Judge Sotomayor to the position of District Court Judge on the United States District Court for the Southern District of New York. In 1998, she was nominated by President Bill Clinton and confirmed by the Senate to serve on the Second Circuit Court of Appeals. Judge Sotomayor has participated in over 3000 panel decisions and authored roughly 400 opinions, handling a range of complex legal and constitutional issues, including civil rights and voting rights, criminal justice, free speech, religious liberty, antitrust, bankruptcy, securities and banking, property rights, labor law, intellectual property, among others. When confirmed, Judge Sotomayor will have more experience on the federal bench than any other Supreme Court Justice in the last hundred years, and will be the only sitting Justice with experience as a trial court judge.

During her distinguished career, Judge Sotomayor has forged a stellar reputation that extends throughout the legal community and across the political spectrum. She has been honored on numerous occasions for her deep commitment to service for her community, including the 2009 New York State Women of Excellence Award Presented by Gov. David A. Paterson. Judge Sotomayor has also helped shape the minds of the nation's future lawyers, as a lecturer at

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Columbia University Law School and an adjunct professor at New York University School of Law.

Beyond a mastery of the law and a demonstrated ability to handle complex legal questions, which Judge Sotomayor has clearly shown, three other criteria guide People For the American Way's evaluation of judicial nominees: (1) their commitment to the rule of law, (2) their respect for the Constitution and commitment to core Constitutional values, and (3) their appreciation for how the law and the Constitution affect the daily lives of all Americans. As discussed briefly below, Judge Sotomayor's record is strong in all three respects.

Commitment to the Rule of Law

Three cases for which Judge Sotomayor has been criticized from some quarters for "judicial activism" in fact demonstrate her abiding respect for the rule of law and a clear understanding of the limits of her power and authority as a judge.

In *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006), Judge Sotomayor dissented from an *en banc* decision of the Second Circuit which rejected a claim that New York's law denying convicted felons the right to vote was a violation of the federal Voting Rights Act. The majority reasoned that Congress did not intend the Voting Rights Act to be applicable to state laws that disenfranchised felons nor did the Voting Rights Act contain a clear statement that it was intended to "alter the constitutional balance" between states and the federal government to warrant its extension to state felon disenfranchisement laws. Judge Sotomayor's pointed dissent challenged the majority for treating the issue as far more complicated than necessary. The plain reading of the Voting Rights Act, she opined, is that it applies to all "voting qualifications" and the state felon disenfranchisement law, by disqualifying people from voting, brings it squarely within the Voting Rights Act's coverage. As Judge Sotomayor said, "[t]he duty of a judge is to follow the law, not to question its plain terms. I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created.....even if Congress had doubts about the wisdom of subjecting felony disenfranchisement laws to the [Voting Rights Act] I trust that Congress would prefer to make any needed changes itself, rather than have the courts do so for it." 449 F.3d at 368 (Sotomayor, J., dissenting).

In *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009), Judge Sotomayor joined a unanimous decision rejecting a New York resident's claim that the state's ban on the possession of a nunchaku, a martial arts weapon, violated the Second Amendment because it infringed on his right to keep and bear arms. The panel on which Judge Sotomayor participated, noted that the Supreme Court had recently decided in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), that the Second Amendment protects an individual citizen's right to keep and bear arms, but had explicitly left open the question of whether the Second Amendment has been "incorporated" by the Fourteenth Amendment to apply to the States. As such, the panel reasoned that they were bound by the existing precedent in *Presser v. Illinois*, 116 U.S. 252 (1886), stating that the Second Amendment is a limitation only on the power of Congress and the federal government, not the states. As the panel said, "where, as here, a Supreme Court precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the

Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions." 554 F.3d at 59 (internal quotation omitted). Indeed, even Maloney, who brought the suit, later admitted that the Second Circuit was simply following the law. According to a June 1, 2009, article by Mike Pesca in NPR Legal Affairs, *High Court May Review Personal Weapons Ruling*, Maloney said "it was clear to me that they had a very solid basis for saying that the Second Amendment is not incorporated and that essentially they are powerless to do anything about it, they had a defensible position there."

Similarly, in *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), the Title VII discrimination case recently decided by the Supreme Court, Judge Sotomayor's panel followed Second Circuit precedent in the case of *Hayden v. City of Nassau*, 180 F.3d 42 (2d Cir. 1999), in unanimously affirming the District Court's rejection of the firefighters' claim of unlawful discrimination. In *Ricci*, a number of white firefighters and one Hispanic firefighter brought a Title VII challenge against the city's decision not to promote anyone, including the plaintiffs, because the test being used would have rendered virtually all of the minority exam takers ineligible for promotion. The Second Circuit panel, while indicating their sympathy for the plaintiffs' frustration, felt bound by the law. As the panel stated, "because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." 530 F.3d at 87. As the District Court in *Ricci* said, "The Court of Appeals [in *Hayden*] rejected the plaintiffs' contentions [that race-consciousness in configuring public employment tests violated Title VII] observing that '[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically suspect." (Citations omitted) 554 F.Supp. 2d 142, 157 (D. Conn. 2006). While the Supreme Court recently rejected this interpretation of Title VII, the Court admitted that it was "clarifying how Title VII applies," hardly a development that Judge Sotomayor's panel would have been expected to anticipate. Moreover as the New York Times recently editorialized: "[T]he ruling underscored the emptiness of the 'judicial activist' label [used] in debates over nominees to the federal courts, including Judge Sotomayor. In the firefighters' case, she actually refused to second-guess the city's decision – an act of judicial restraint. It was the court's conservatives, including Chief Justice John Roberts, who voted to overturn the decision of an elected government." *Firefighters and Race*, *N.Y. Times*, July 1, 2009.

Respect for the Constitution and Commitment to Core Constitutional Values

Several cases similarly demonstrate Judge Sotomayor's commitment to core Constitutional values.

In *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003), a Muslim prison inmate brought a suit against prison officials who refused to allow him to participate in a religious feast, alleging denial of his free exercise rights. The district court rejected the free exercise claim and granted summary judgment for the Department of Correctional Services, relying on testimony by the religious authorities working in the Department that the prisoner's beliefs did not comport with "Islam's actual requirements." Judge Sotomayor, writing for a unanimous panel, reversed the district court, concluding that "the opinions of the [Department's] religious authorities cannot trump the

plaintiff's sincere and religious belief." *Id.* at 590. Relying on Second Circuit and Supreme Court precedent, Judge Sotomayor reasoned that attempting to assess the objective reasonableness of a prisoner's beliefs would require courts to resolve questions beyond their competence, saying "District courts have no aptitude to pass upon questions of whether particular religious beliefs are wrong or right." *Id.* at 591 n.8.

Judge Sotomayor's dissent in the difficult case of *Pappas v. Giuliani*, 290 F.3d 143 (2d Cir. 2002), similarly demonstrates her commitment to core First Amendment values. The case involved an employee of the New York City Police Department who was terminated from his desk job for responding to mailings requesting contributions with racially inflammatory and anti-Semitic writings. The statements were made anonymously, on the employee's own time and while not at the office. The majority held that the police department had not violated the employee's right to free speech. Judge Sotomayor in dissent, while acknowledging that the speech was "patently offensive, hateful, and insulting," cautioned the majority against "gloss[ing] 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." *Id.* at 154 (Sotomayor, J., dissenting).

Judge Sotomayor's concern for fundamental due process protections is also notable. As the Alliance for Justice has noted in its *Report on Judge Sotomayor's Civil Rights and Constitutional Protections Record*, Sotomayor "consistently protects individuals' rights to have a meaningful opportunity to be heard and participate in the legal process before their life, liberty, or property is taken away." Relevant cases include: *Southerland v. Giuliani*, 4 F. App'x 33 (2d Cir. 2001) (Sotomayor panel allowed plaintiff to proceed with case against New York's child welfare organization that took his children away without a hearing); *Neilson v. Colgate-Palmolive Co,* 199 F.3d 642 (2d Cir. 1999) (Sotomayor dissent argued for due process rights of mentally disabled woman in employment suit); *Anderson v. Recore,* 446 F.3d 324 (2d Cir. 2006) (Sotomayor wrote for unanimous panel that affirmed prisoner's right to notice and opportunity to be heard before being removed from temporary release program); *Mills v. Fenger,* 216 F. App'x 7 (2d Cir. 2006) (Sotomayor panel unanimously held detainee's due process rights were violated when denied medical care for ruptured tendon).

Also instructive is the case of *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005), a takings case in which Judge Sotomayor's panel concluded that notice to property owners by publication (as opposed to individual notice by mail) that a public use determination for their property had been made as well as the village's failure to notify property owners of the thirty-day period for challenging the determination violated the property owner's rights to due process.

Impact of the Law and the Constitution on the Lives of All Americans

Judge Sotomayor brings to the bench, not just an outstanding intellect, but a deep understanding, forged from the richness and diversity of her own life experiences, of the impact of the law on the daily lives of individual Americans. Several cases stand out in this regard.

In *Gant v. Wallingford Board of Education,* 195 F.3d 134 (2d Cir. 1999), Judge Sotomayor dissented from the majority's conclusion that there was no racial discrimination when a six-year

old student, who was the only African American in his first grade class, was subjected to racial name-calling by other children and parents, including being called a "nigger" and was forced to repeat kindergarten. In concluding that the transfer was discriminatory because the African American student received different treatment than other students having academic difficulty who received transitional assistance, Judge Sotomayor described the child's treatment "during his brief time in Cook Hill's first grade to have been not merely 'arguably unusual' or 'indisputably discretionary,' but unprecedented and contrary to the school's established policies." *Id.* at 151 (Sotomayor, J., dissenting).

In *N.G. V. Connecticut*, 382 F.3d 225 (2d Cir. 2004), Judge Sotomayor dissented from a majority decision upholding the strip search of two teenage girls (age thirteen and fourteen) who were brought to a juvenile detention facility for running away and for truancy. In an opinion that aligned with the Supreme Court's recent decision in *Safford Unified School District v. April Redding*, 2009 WL 1789472 (U.S.) (U.S. 2009), Sotomayor found that while the juvenile detention facilities may conduct a strip search if there is a reasonable basis to believe the juveniles were concealing contraband, initial entry into a juvenile detention facility for running away or for truancy did not constitute such a reasonable basis. In balancing the interests involved, Judge Sotomayor focused on the invasive and degrading nature of a strip search and the fact that many of the young people subjected to these searches had suffered from sexual abuse that may enhance the potential psychological harm of a strip search. As Sotomayor explained, "We should be especially wary of strip searches of children, since youth is a time and condition of life when a person may be most susceptible to influence and to psychological damage." 382 F.3d at 239 (Sotomayor, J., dissenting) (citation omitted).

In *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094 (S.D.N.Y. 1997), while serving on the District Court, Judge Sotomayor, in an exhaustive decision following 21 days of testimony, held that a dyslexic Vermont Law School graduate was a disabled individual within the meaning of the Americans with Disabilities Act and, therefore, entitled to reasonable accommodations, including extra time, for taking the New York bar exam. As Judge Sotomayor explained, Bartlett was entitled not to assurances that she pass the bar examination, only that she receive an accommodation "so that she might be able to compete on a level playing field with other applicants taking the bar examination." 970 F. Supp. at 1121. Without such a fair chance to compete for admission to the bar "a law school graduate is effectively excluded from performing 'a class of jobs,' most specifically, lawyering, including providing legal advice or performing all of the functions that comprise the essence of being a lawyer." *Id.* On appeal the Second Circuit affirmed in part and vacated in part, agreeing, however with Judge Sotomayor's finding that the plaintiff was entitled to reasonable accommodation in taking the bar exam. The Supreme Court then vacated and remanded the Second Circuit's decision, in light of recent 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. On remand, after a four-day trial, Judge Sotomayor again found that the law school graduate was disabled and entitled to accommodations.

In sum, Judge Sotomayor's impressive intellect, her deep respect for the rule of law, her commitment to core constitutional values of equality and justice for all and her appreciation for

the impact of the law on the lives of average Americans commend her nomination as an Associate Justice of the Supreme Court. We urge her prompt confirmation.

Sincerely,

Michael B. Keegan
President

Marge Baker
Executive Vice President for Policy
and Program Planning