Mr. Chairman, members of the Committee, I am Peter N. Kirsanow, a member of the U.S. Commission on Civil Rights and a partner in the labor and employment practice group of the Cleveland, Ohio law firm of Benesch Friedlander Coplan & Aronoff. I am appearing in my personal capacity.

The Commission on Civil Rights was established by the Civil Rights Act of 1957 to study and collect information relating to discrimination or denial of equal protection laws under the constitution because of color, race, religion, sex, age, disability or national origin; appraise the laws and policies of the federal government relating to discrimination or denials of equal protection and serve as a national clearinghouse of information relating to discrimination or denials of equal protection on the basis of protected classifications.

In furtherance of the clearinghouse function, and with the help of my assistants, I have examined civil rights opinions that Judge Sotomayor drafted as a circuit judge. Our examination indicates that Judge Sotomayor's approach to civil rights cases frequently is inconsistent with generally accepted textual interpretation of the relevant constitutional and statutory provisions as well as governing precedent. Rather than confining herself to the adjudication of the cases before her, in several significant cases Judge Sotomayor instead attempts to step outside the judicial role and employ policy preferences. No case better illustrates the problems with this approach than *Ricci v. de Stefano*, the New Haven firefighters case that has drawn much scrutiny from the media. I will focus my remarks today on why Judge Sotomayor's chosen approach raises troubling questions about how a Justice Sotomayor might address similar issues. I will also briefly address two of Judge Sotomayor's civil rights-related dissents, *Brown v. City of Oneonta* and *Hayden v. Pataki*, that also illustrate Sotomayor's tendency to legislate from the bench.

Like many cities, New Haven uses competitive examinations to identify the best qualified municipal employees for promotions. The city's charter establishes this merit system for promotion.[1] New Haven hired Industrial/Organization Solutions ("IOS") -- an Illinois firm that specializes in designing entry-level and promotional examinations for police and fire departments – to design a promotional test for its firefighters.[2] IOS conducted extensive job analyses to identify the tasks, knowledge, and skills necessary for effective performance in the captain and lieutenant roles.[3] IOS's representatives interviewed current New Haven captains, lieutenants, and their supervisors.[4] They rode along in the fire trucks with on-duty officers.[5] Most importantly, at every stage of their analysis, IOS deliberately oversampled minority firefighters to ensure that their exam questions would not give an unfair advantage to white candidates.[6]

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[1] Ricci, 557 U.S. – (2009)(slip opinion 1).
[2] Id. at 4. IOS has also designed examinations for fire departments in communities similar to New Haven, including Orange County, Florida; Lansing, Michigan; and San Jose, California. Slip opinion at 9.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*.

IOS also developed oral examinations, all of which were administered by firefighters senior in rank to those being tested. Again to avoid giving unfair advantages to white candidates, sixty-six percent of the assessors were racial minorities.[7] Each of the nine three member panels also contained two minority members.[8]

Many candidates spent months preparing for the test. Frank Ricci – the named plaintiff in this lawsuit, who is here to testify today – stated at a Civil Service Board meeting that the test questions were based on the Department's own rules and procedures and on nationally recognized materials that presented "accepted standards" for firefighting.[9] Ricci told the CSB that he has "severe learning disabilities," including dyslexia, and that he spent more than $1,000 to purchase study materials and pay his neighbor to read them on tape so that he could give the test his best shot.[10] Ricci spent eight to thirteen hours a day preparing for the exam.[11]

In spite of these extensive attempts to ensure the test's racial neutrality, no blacks or Hispanics performed well enough on the exams to receive an immediate promotion to lieutenant.[12] Nine candidates – seven whites and two Hispanics – were eligible for immediate promotions to captain.[13] A vociferous political debate broke out in the community over what to do with the test results.[14] Ultimately, New Haven sided with the protesters. The white and Hispanic firefighters who would have received promotions sued, claiming that the city had discriminated against them on the basis of race, in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment.[15] The District Court sided with the city, claiming that the city's actions had not been motivated by racial animus because "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted."[16] Of course, as one of Judge Sotomayor's Second Circuit colleagues pointed out, it is at the very least an open question whether discarding test results to allow candidates of certain racial backgrounds a second chance at the test constitutes racial discrimination.[17]

The plaintiffs appealed, and a Second Circuit panel – including Judge Sotomayor – heard the case. The parties submitted briefs of eighty-six pages each and a six-volume joint appendix of over 1,800 pages. Two *amici* briefs were filed and oral argument lasted over an hour, an atypically long time for the Second Circuit. Seemingly recognizing the importance of the case, Judge Sotomayor herself participated enthusiastically in oral

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[7] *Id.* at 5.
[8] *Id.*
[9] *Id.* at 7.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 5. Subsequent vacancies would have allowed at least three black candidates to be considered for promotion to lieutenant.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] 557 F. Supp. 2d. at 161.
[17] 530 F.3d at 98 (Cabranes, J., dissenting.)

argument.[18] Her two Second Circuit colleagues barely spoke for the first ten minutes of oral argument while Judge Sotomayor peppered plaintiffs' attorney Karen Torre with questions about the firefighters' 42 U.S.C. 1983 claim.[19] Twenty minutes later, after the attorney representing New Haven stood up to speak, Judge Sotomayor asked him about an Eleventh Circuit case that appeared damaging to the city's case.[20]

Despite all of these signs that Ricci was an important, precedent-setting case, Judge Sotomayor's panel affirmed the District Court's ruling in a one paragraph, unpublished summary order.[21] The federal appellate courts usually use such orders only to dispose of cases that raise no new issues of law. Adam Liptak of the New York Times described the Ricci panel's perfunctory opinion as "baffling."[22] Following the publication of this short opinion, the firefighters appealed to the entire Second Circuit for a rehearing *en banc*, which was denied. In a dissent from this denial of rehearing, Judge Cabranes, a Clinton appointee who is widely regarded as a political moderate, criticized Sotomayor's summary handling of the case: [23]

> This appeal raises important questions of first impression in our circuit – and indeed, in the nation – regarding the application of the Fourteenth Amendment's Equal Protection Clause and Title VII's prohibition on discriminatory employment practices… The use of *per curiam* opinions of this sort, adopting in full the reasoning of the district court without further elaboration, is normally reserved for cases that prevent straightforward questions that do not require explanation or elaboration by the Court of Appeals. The questions in this appeal cannot be classified as such, as they are indisputably complex and far from well-settled… I respectfully dissent from that decision, without expressing a view on the merits of the questions presented by this appeal, in the hope that the

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[18] *See* "Sotomayor Tape Reveals Views on Ricci v. de Stefano Discrimination Case," Wall Street Journal Law Blog, *available at* http://blogs.wsj.com/washwire/2009/05/29/sotomayor-tape-reveals-views-on-ricci-v-destefano-discrimination-case/ (last accessed July 12, 2009). Audio recording of oral argument available at http://online.wsj.com/public/resources/media/052909usca.mp3 (last accessed July 12, 2009).

[19] *Id*.
[20] *Id.*
[21] 530 F. 3d 88. The panel later withdrew that order and issued in its place a nearly identical, one paragraph *per curiam* opinion.
[22] Adam Liptak, "News Analysis: Nominee's Rulings Exhaustive But Often Narrow," The New York Times, May 26, 2009, available at http://www.nytimes.com/2009/05/27/us/politics/27judge.html?_r=1.

[23] See, e.g., Luisa Savage, "2nd Circuit's Jose Cabranes Offers Bipartisan Appeal," *The New York Sun*, June 10, 2005. See also Mary B.W. Tabor, "Opportunities Knocks Put Judge High On List," The New York Times, May 9, 1994 (*available at* http://www.nytimes.com/1994/05/09/nyregion/opportunities-knocks-put-judge-high-on-lists.html) (last accessed July 9, 2009).

> Supreme Court will resolve the issues of great significance raised by this case.[24]

Cabranes noted that the Judge Sotomayor panel's opinion contains "no reference whatsoever to the constitutional claims at the core of the case"[25] and further commented that "a casual reader of the opinion could be excused for wondering whether a learning disability played at least as much of a role in this case as the alleged racial discrimination."[26] He concluded that the Sotomayor panel's "perfunctory disposition" of Ricci's claim "rests uneasily with the weighty issues presented by this appeal."[27]

Just as Judge Cabranes hoped might happen, the Supreme Court agreed to hear the case. Notably, not a single current Supreme Court justice agreed with Sotomayor that summary judgment for the city was appropriate. Writing for the majority, Justice Kennedy concluded that race-based actions like New Haven's are impermissible under Title VII unless an employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under a disparate impact theory.[28] New Haven could not meet that threshold standard and thus violated Title VII by throwing out the tests.[29] Even the four justices who dissented thought that the case should be remanded back to the district court for trial. None thought, as Sotomayor did, that summary judgment for New Haven was appropriate.[30]

Indeed, Judge Sotomayor's chosen approach in *Ricci* would give employers license to adhere to strict racial quotas and engage in racial bean counting. As Justice Kennedy observed, New Haven decided not to promote white firefighters because of race; it rejected the test results solely because its highest scoring candidates were white.[31] The question was not whether that conduct was racially discriminatory – clearly it was – but whether New Haven had any lawful justification for this race-based action.[32] But, as the Supreme Court noted in earlier cases, allowing employers to take race-based action based on mere good faith fears of disparate impact litigation would encourage race-based action at the slightest hint of disparate impact.[33] Judge Sotomayor's approach could allow employers to reject the results of an employment examination whenever those results did not yield the desired racial balance – or, to put it another way, failed to satisfy a racial quota.[34] Judge Sotomayor's interpretation is thus fundamentally at odds with the purpose

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[24] *Ricci v. de Stefano*, 530 F.3d 88, 93 (2nd Cir. 2008).
[25] *Id.* at 96.
[26] *Id*.
[27] *Id.*
[28] *Id*. at 2.
[29] *Id.*, 2-3.
[30] Four justices – Breyer, Ginsburg, Souter, and Stevens – dissented from the majority opinion and joined in a dissent written by Justice Ginsburg. In footnote 10 of this dissent, Justice Ginsburg observes, "The lower courts focused on respondents' intent rather than on whether respondents in fact had good cause to act. [Citations omitted.] Ordinarily, a remand for fresh consideration would be in order." Dissent at 26.
[31] Slip opinion at 20.
[32] *Id.*
[33] *Id*. at 22, *citing Watson v. Fort Bank & Trust*, 487 U.S. 977, 983 (1988).
[34] See, e.g., Cabranes' dissent in *Ricci*, 530 F.3d at 98.

of Title VII, which is "to promote hiring on the basis of job qualifications, rather than on the basis of race or color."[35]

Other Second Circuit race-related decisions in which Judge Sotomayor participated indicate the same troubling tendency to reach a desired policy outcome. For example, Judge Sotomayor joined an opinion dissenting from the denial of rehearing en banc in *Brown v. Oneonta* that set forth what one of her Second Circuit colleagues called "novel equal protection theories that … would severely impact police protection."[36]

In *Brown*, a seventy-seven-year old woman, resident of the small upstate New York town of Oneonta, reported to the police that a young black man broke into her house and assaulted her with a knife.[37] The police used dogs to trace the attacker's scent to the nearby State University of Oneonta.[38] They obtained a list of black male students enrolled at the university and attempted to find and question them.[39] In the days following the assault, the police also conducted a sweep of Oneonta for the perpetrator, in which they stopped young black men on the street for questioning and looked at their hands for cuts.[40] Some of the young black men sued Oneonta, claiming that these questionings violated their Equal Protection rights because they were singled out for questioning based on their race.[41] A Second Circuit panel concluded that, because the young men were questioned on "the altogether legitimate basis of their resemblance of a physical resemblance given by the victim of a crime," the police had not violated their Equal Protection rights.[42] Judge Sotomayor disagreed with this holding and joined in a dissent authored by Judge Calabresi, which drew blistering criticism from Chief Judge Walker.[43] According to Walker, the dissenters had chosen to advance theories of the sort "common to the pages of an academic journal" that would, if actually put into practice, greatly hinder police investigations:

> The dissenters propose that when the police have been given a description of a criminal perpetrator by the victim that includes the perpetrator's race, their subsequent investigation to find that perpetrator may constitute a suspect racial classification under the equal protection clause. . . . Judge Calabresi believes that equal protection review arises . . . when the police ignore the non-racial components of the provided description and question persons who, except for the racial descriptor, do not fit the description provided.

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[35] Slip opinion at 22.
[36] 235 F.3d 769
[37] 221 F.3d 329.
[38] *Id*.
[39] *Id*.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] 235 F.3d 769

> The fact that no legal opinion, concurrence, dissent (or other judicial pronouncement) has ever intimated, much less proposed, any such rules of equal protection confirms a strong intuition of their non-viability. But, for the benefit of anyone who in the future may be undeterred by the inability of these theories to attract judicial recognition, their practical difficulties and analytical defects should be recognized.[44]

Judge Sotomayor employed equally troubling reasoning in her dissent in *Hayden v. Pataki,* in which the plaintiffs challenged the disenfranchisement of felons under the Voting Rights. Fellow Clinton appointee Judge Cabranes wrote a thirty-six page, carefully reasoned opinion that explained that felons had not been denied the right to vote because of invidious discrimination based on their race, but rather because they were in prison.[45] Cabranes looked at the relevant text of the Fourteenth Amendment, the history of the relevant statutory provisions, and at the long history of felon disenfranchisement in New York and in nearly every other American state.[46] He noted that felons have been unable to vote in New York since 1820, just as they are unable to vote today in all but two American states. [47]He also carefully analyzed relevant precedents from the Second and its sister circuits, including an Eleventh Circuit en banc opinion that also found that the Voting Rights Act does not prohibit felon disenfranchisement.[48] Finally, he noted that the case posed "a complex and difficult question that, absent Congressional clarification, will only be definitively resolved by the Supreme Court."[49]

Judge Sotomayor, on the other hand, did not find this case particularly complex or difficult. In a three paragraph dissent eerily reminiscent of her brief *per curiam* opinion in *Ricci*, Judge Sotomayor categorically stated, "I fear that the many pages of the majority opinion and concurrences — and the many pages of the dissent that are necessary to explain why they are wrong—may give the impression that this case is in some way complex. It is not."[50] Without further addressing Judge Cabranes's lengthy analysis, Judge Sotomayor concluded, "The majority's "wealth of persuasive evidence" that Congress intended felony disenfranchisement laws to be immune from scrutiny under § 2 of the Act, Maj. Op. at 322, includes not a single legislator actually saying so"[51]

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[44] *Id.*
[45] 449 F.3d 305.
[46] *Id.*
[47] *Id.* at 312.
[48] *Johnson v. Gov. of State of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc). *But see* *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), in which a panel of the Ninth Circuit. *See also* [cite], in which Judge Alex Kozinski and six other Ninth Circuit judges dissented vociferously from a request for en banc review by the Ninth Circuit.
[49] *Id.* at 305.
[50] *Id.* at 368.
[51] *Id.*

Another of Judge Sotomayor's Second Circuit colleagues, Judge Raggi, eloquently highlighted the problems with Sotomayor's proposed approach to the Voting Rights Act:

> Plaintiffs and supporting *amici* submit that New York's practice of prisoner disenfranchisement violates the VRA because there is a gross racial disparity in the state prison population. If permitted to pursue their claim, they seek to show that this disparity is a product of pervasive racism infecting every part of the New York criminal justice system, from stop and frisk determinations by police officers on the street, to charging decisions by prosecutors, to detention and sentencing rulings by state court judges. In short, plaintiffs propose to use the VRA to indict the New York criminal justice system for racism.
>
> So employed, the VRA would not only significantly intrude on, but also seriously disrupt, the orderly administration of criminal justice in New York, obviously a matter of legitimate state interest. Plaintiffs' suit would effectively impugn the constitutionality of countless state convictions without necessarily proving that any one prosecution or sentence was, in fact, discriminatory. Equally disturbing, the state's criminal justice system could be adjudged discriminatory without New York being required to release, retry, or resentence a single prisoner. New York would just have to give prisoners the vote. Such a result would undoubtedly undermine public confidence in all state criminal proceedings at the same time that it bred cynicism toward federal law for responding to such a serious problem with so ill-fitting a remedy.[52]

Other prominent commentators have attempted to study Judge Sotomayor's race cases and have come to different conclusions. Prominent lawyer Tom Goldstein, for example, has conducted a study that might seem to suggest that Judge Sotomayor's civil rights jurisprudence is unremarkable. But Goldstein's study ultimately raises more questions than it answers. By Goldstein's count, Judge Sotomayor decided 97 race-related while on the Second Circuit.[53] Goldstein has never explained how he defined race-related for purposes of the study, which in and of itself raises questions: perhaps using a slightly different definition of "race related" would have yielded different results. According to Goldstein's calculations, Judge Sotomayor rejected discrimination in 78 cases and agreed with the claim of discrimination 10 times.[54] (The other eight cases involved other kinds of claims or dispositions.) Goldstein thus asserts that Judge Sotomayor rejected discrimination related claims by a margin of 8 to 1. But this statistic provides no definitive information on whether Judge Sotomayor's approach is within the

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[52] *Id.* at 340.
[53] Tom Goldstein, "Judge Sotomayor and Race: Results from the Full Data Set," Supreme Court of the United States Blog, May 29, 2009, *available at* http://www.scotusblog.com/wp/judge-sotomayor-and-race-results-from-the-full-data-set/ Last accessed July 9, 2009.
[54] *Id.*

mainstream. As University of Minnesota law professor and Goldstein's fellow SCOTUSblog contributor, David Stras writes:

> The only way to know for sure [if Sotomayor's race-related decisions fall out of the judicial mainstream] is if we compare her dispositions to the disposition rates of other judges, both within and beyond her circuit. For instance, it is possible that claims of discrimination are upheld at a rate of only 5% by the average circuit judge in the federal judiciary, in which [sic] there could be an argument that Judge Sotomayor tends to uphold claims of discrimination, on average, twice as often as her colleagues. (By the way, I certainly do not expect Tom to conduct this type of inquiry as this is the type of paper that can take an academic a year or more to produce. What is more helpful is to actually read those opinions, as Tom suggests in another post.[55] (emphasis added)

Goldstein's review of Judge Sotomayor's cases appears to exclude *en banc* reviews and dissents.[56] Such omissions may be significant because Judge Sotomayor adopted equally troubling positions in both *en banc* reviews and dissents, including the dissents discussed above in *Hayden v. Pataki* and in *Brown v. Oneonta*.

President Obama has reported that one particular line in his 2004 speech at the Democratic National Convention – "There is not a black America and white America and Latino America and Asian America – there is the United States of America"[57] – especially resonated with the voters whom he later met on the campaign trail. In the President's words, this line helped voters:

> capture a vision of America finally freed from the past of Jim Crow and slavery, Japanese internment camps and Mexican braceros, workplace tensions and cultural conflict--an America that fulfills Dr. King's promise that we be judged not by the color of our skin but by the content of our character.[58]

The President himself embraces this vision of a post-racial America:

> I have no choice but to believe this vision. As the child of a

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[55] David Stras, "The Politics of the Sotomayor Nomination," *Supreme Court of the United States Blog*, May 31, 2009, *available at* http://www.scotusblog.com/wp/the-politics-of-the-sotomayor-nomination/) (last visited July 9, 2009).

[56] *See* Ed Whelan, "Goldstein on Judge Sotomayor and Race," Bench Memos, June 2, 2009, *available at* http://bench.nationalreview.com/post/?q=NGYzNmU1ZmQ2YzEzY2MxMTcxYzcyOTk4YzFhZjU4Yjc= (last accessed July 9, 2009).

[57] Barack Obama, THE AUDACITY OF HOPE, 231

[58] Id.

> black man and white woman, born in the melting pot of Hawaii, with a sister who is half-Indonesian, but who is usually mistaken for Mexican, and a brother-in-law and niece of Chinese descent, with some relatives who resemble Margaret Thatcher and others who could pass for Bernie Mac, I never had the option of restricting my loyalties on the basis of race or measuring my worth on the basis of tribe.[59]

Given that many Americans voted for the President hoping that he would usher in a new era of racial harmony, I respectfully submit that it is important for the Committee to consider whether a nominee to the Supreme Court shares this vision of a post-racial America. Judge Sotomayor's interpretive doctrine would allow cities to impose quotas and engage in racial bean counting. She is willing to strike down facially neutral, deeply rooted bans on felon voting. Judge Sotomayor would even adopt novel theories of equal protection that would make it more difficult for the police to keep ordinary citizens safe from violent crime.

It's respectfully submitted that a nominee's interpretive doctrine should be evaluated for whether it would be likely to produce results contrary to the color-blind ideal and result in a legal regime that 45 years after passage of the Civil Rights Act, would increasingly count by race.

Thank you for giving me the opportunity to testify today.

[59] *Id*.