Testimony of Arkansas Attorney General Dustin McDaniel

Before the Senate Judiciary Committee
United States Senate

Hearing on "The Nomination of Sonia Sotomayor to be Associate Justice to the United States Supreme Court"

Thank you Chairman Leahy, Ranking Member Sessions and members of the Committee for giving me the opportunity to be here today. My name is Dustin McDaniel, and I am the Attorney General for the State of Arkansas.

I am here today to speak in support of the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States. We have heard all week about her compelling life story and impressive accomplishments. I have the highest respect and admiration for Judge Sotomayor, and I am proud to testify on behalf of this person who was first appointed to the United States District Court by President George H. W. Bush and then to the Second Circuit Court of Appeals by my most famous predecessor in the Arkansas Attorney General's Office, President Bill Clinton. More specifically, I am here to rebut any assertion that Judge Sotomayor's participation in the United States Court of Appeals for the Second Circuit's ruling in the matter of Ricci v. DeStefano in any way negatively reflects on her qualifications or ability to serve as a justice on the United States Supreme Court.

When the United States Supreme Court granted certiorari in the Ricci case, I, on behalf of the State of Arkansas, joined with five other attorneys general in support of the Second Circuit. Before I address the brief and the relevance, or lack thereof, of that case to this

confirmation hearing, let me address the firefighters who were involved, and how I have both a personal and professional interest in the issues confronted by each court which has considered this matter.

I entered the world of public service long before I became an elected official. After college, I turned down admission into law school and became a police officer in my hometown of Jonesboro, Arkansas. As a police officer, I saw first hand the heroism and dedication of the men and women who protect and serve our communities every day. Firefighters like Frank Ricci run into homes and buildings when everyone else is running out. I have the highest respect and gratitude for all who serve our communities, states and nation.

My personal experience with civil service exams was favorable, but not all are so lucky. I understand the frustration of Mr. Ricci and his colleagues with the process. I also understand the city's fear of litigation and its desire to avoid unfair results. I am for a process that is fair. All of us are. But ensuring fairness in such a process can be extremely difficult, as reflected by the lengthy litigation that unfolded in the Ricci case.

As Attorney General, I represent hundreds of state agencies, boards and commissions. I provide general advice and litigation defense in matters of employment law, including issues surrounding Title VII of the Civil Rights Act of 1964. Like all attorneys, my job is to allow my clients to go about their appointed duties with confidence that they are in compliance with all applicable law and without fear that they will be subject to costly

litigation. City attorneys are no different. I joined the amicus brief in Ricci because the Second Circuit's ruling was based on precedent relied upon by thousands of agencies for some level of certainty. The law had, until recently, allowed the flexibility necessary for public employers to develop and administer their personnel systems so as to avoid unfair outcomes and to avoid litigation. The Supreme Court's ruling in Ricci decreased certainty, continuity and flexibility. The decision will likely increase litigation. Litigation is expensive, and the taxpayers will ultimately pay the price.

Based on the Supreme Court's ruling, an employer is now subject to being sued no matter its course of action in a situation like that presented in Ricci. As a result, employment decisions in this context will be based upon an evaluation of which lawsuit an employer and its counsel believe they are most likely to win. That will not produce a fair result and it is not a consideration an employer should have to make in administering the work place.

In the end, I believe Judge Sotomayor and her colleagues on the Second Circuit reached a decision that was based on the law. All who have commented on the nomination process in recent years have been critical of those who have been labeled an "activist judge." It is quite important to note that Judge Sotomayor's ruling in Ricci was not judicial activism at work. To the contrary, she followed existing law.

In Ricci, Judge Sotomayor and the panel issued a *per curiam* order adopting the lengthy analysis of the district court, an opinion the panel described as "thorough, thoughtful and

well reasoned."[1] The district court opinion adopted by the *per curiam* cited two prior cases issued by the Second Circuit that stand for the proposition that a public employer faced with a potential claim of racial discrimination does not then violate the law by taking neutral remedial action, although based on considerations of race, to avoid liability. (Hayden v. County of Nassau, 180 F.3d 42 (2nd Cir. 1999); Bushey v. N.Y. State Civil Serv. Comm'n, 733 F.2d 220 (2nd Cir. 1985). Based on the facts and the application of the controlling precedent, the panel affirmed the district court's ruling.

That ruling was consistent with the law and the doctrine of *stare decisis*. Had Judge Sotomayor acted otherwise, she would have been in the minority among the judges considering the case at that time and would have been disregarding 28 years of precedent. Granted, the Supreme Court, in a closely divided opinion, ruled differently, but in doing so it set *new* precedent.

It is also important to note that Judge Sotomayor's ruling in Ricci was supported by many prestigious groups, including the following:

- The Equal Employment Opportunity Commission
- The United States Department of Justice[2]
- The National League of Cities
- The National Association of Counties

---

[1] The practice of adopting district court opinions in a per curiam opinion dates back to 1841 and it is a practice used by the 2nd Circuit frequently. See Ricci v. DeStefano, 530 F.3d 88, 91 – 92 (2nd Cir. 2008). The Supreme Court reviews thousands of such orders every year.

[2] Contrary to some assertions, the Department of Justice did not take a position contrary to the Second Circuit opinion. It agreed with the fundamental legal holding but also suggested the case be remanded for the development of additional fact.

- International Municipal Lawyers Association
- The Attorneys General of Alaska, Arkansas, Iowa, Maryland, Nevada and Utah.

There is a large body of research available on Judge Sotomayor's record. No allegation that this judge rules based on anything other than the law can stand when cast in the light of her actual record. She knows that Congress makes the law and, like all good judges, she does not try to legislate from the bench. The Congressional Research Service is non-partisan and recently conducted an exhaustive analysis of her judicial record. It concluded as follows:

> Perhaps the most consistent characteristic of Judge Sotomayor's approach as an appellate judge could be described as an adherence to the doctrine of *stare decisis*, i.e., the upholding of past judicial precedents. This characteristic would be in line with the judicial philosophy of Justice Souter, who often displayed special respect for upholding past precedent.[3]

Finally, I believe Judge Sotomayor's judicial philosophy at work is best demonstrated in a dissent she authored in 2006, long before she was slated to seek confirmation from this body. In Hayden v. Pataki, 449 F.3d 305 (2nd Cir. 2006), a Voting Rights Act case, Judge Sotomayor dissented from the majority based primarily on her belief that the majority failed to simply follow and apply the law as it was written. She bluntly stated that "it is the duty of a judge to follow the law, not question its plain terms."[4] She then concluded by stating: "Congress would prefer to make any needed changes itself, rather than have courts do so for it."[5]

---

[3] Congressional Research Service, "Judge Sonia Sotomayor: Analysis of Selected Opinions", June 19, 2009.
[4] Hayden, 449 F.3d at 368.
[5] Hayden, 449 F.3d at 368.

In my opinion, Judge Sotomayor is abundantly qualified and an excellent nominee. Her experience as a prosecutor, trial judge and appellate judge provide her with valuable and unique experience that will be well placed on the United States Supreme Court. Most importantly, her history reflects an overriding support for the rule of law and contains nothing to support a legitimate concern that she will be an "activist judge." I believe the people of the United States will be well served by her presence on the Supreme Court.

Thank you.