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STATEMENT OF
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HEARING ON
"THE NOMINATION OF SONIA SOTOMAYOR TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES"

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

JULY 16, 2009

Chairman Leahy, Ranking Member Sessions, and members of the Committee: I am Wade Henderson, President and CEO of the Leadership Conference on Civil Rights (LCCR). I am also honored to serve as the Joseph L. Rauh, Jr. Professor of Public Interest Law at the University of the District of Columbia David A. Clarke School of Law. Thank you for the opportunity to present the views of the Leadership Conference on the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States.

LCCR is the nation's oldest and most diverse coalition of civil and human rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, the Leadership Conference seeks to further the goal of equality under law through legislative advocacy and public education. LCCR consists of more than 200 national organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. I am privileged to represent the civil and human rights community in submitting testimony for the record to the Committee.

The nomination of Judge Sonia Sotomayor to be an Associate Justice on the United States Supreme Court occurs in the context of several significant milestones in the history of our great nation. Her nomination to be the first Hispanic American on the Supreme Court, and only the third woman to sit on the Court, comes but months after the election of the first African-American President of the United States, Barack Obama, who nominated her to the Court. It also comes shortly after the most successful presidential campaign ever by a woman candidate. While enormous challenges remain in our nation's quest for equal opportunity, these recent events point to a growing consensus in our nation that favors inclusivity in our most vaunted institutions, and speak volumes about the health and vitality of American democracy. The nomination of Judge Sotomayor is thus something that all Americans – regardless of their political ideology – can celebrate with the knowledge that we are continuing to make progress toward becoming a more perfect union.

The selection of a Supreme Court justice demands the utmost attention from the civil rights community. The Supreme Court has been responsible for both some of the greatest triumphs and

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some of the greatest setbacks regarding the principle of equality under the law. In courageous decisions like *Brown v. Board of Education*, the Supreme Court stayed true to the Constitution in spite of entrenched public sentiment favoring institutional segregation, and ordered the integration of our nation's schools. But the courage and fidelity to our Constitution that impelled the *Brown* Court's stand against segregation have often been lacking in the high court. In *Dred Scott v. Sandford*, the Supreme Court ruled that African Americans were not entitled to American citizenship; in *Plessy v. Ferguson*, the Supreme Court upheld the doctrine of separate-but-equal, thereby validating a pernicious caste system that would dominate the American South until the *Brown* decision more than a half-century later. For these reasons, civil rights leaders must consider whether a prospective justice is a person who will follow our laws and Constitution bravely and faithfully. Judge Sotomayor's countless qualifications for the Supreme Court, including her long record of careful adherence to our nation's laws, have convinced me that she is highly suited – indeed I can think of no one better-suited – to be the next associate justice of the Supreme Court.

And so LCCR is proud to support this truly historic nomination. In her seventeen years of service to date as a federal trial and appellate judge, and throughout the course of her entire career, Judge Sotomayor has strongly distinguished herself through her outstanding intellectual credentials, her deep respect for the rule of law, and her steadfast dedication to fairness. Her record makes it overwhelmingly clear that she will be an impartial, thoughtful, and highly-respected addition to our nation's highest court. I further believe that Judge Sotomayor's unique life experiences that she will bring to the Court are highly relevant – she was raised in a working-class Puerto Rican family and overcame difficult circumstances, including economic disadvantage as well as diabetes, to become one of the most accomplished jurists in the nation. I believe that her background has made her a more just, fair, and even-handed judge, committed to equal justice for all, and will profoundly enhance the deliberations of the Supreme Court as it continues to tackle our most pressing legal issues in years to come. Moreover, she is the embodiment of the American Dream. Her background and her defiance of the odds will be both a tremendous asset to her and her colleagues on the Supreme Court, as well as a compelling inspiration to others who dream of someday following in her footsteps.

At this point in the nomination process, I could easily skip over many of Judge Sotomayor's qualifications to serve on the Supreme Court, as they are already a matter of public record. But I think they bear repeating. After graduating with top honors from Princeton University, Judge Sotomayor again distinguished herself at Yale Law School, where she was an editor for the prestigious Yale Law Journal. She then spent five years as a criminal prosecutor in Manhattan working for District Attorney Robert Morgenthau. Upon leaving the District Attorney's office, Judge Sotomayor worked for eight years as a corporate litigator with the firm of Pavia & Harcourt, where she gained expertise in a wide range of civil law areas such as contracts and intellectual property, and became a partner in the firm after four years. At the same time, she further diversified her wealth of experience by staying heavily involved in public service work, in both the governmental and nonprofit sectors, including as a board member of the Puerto Rican Legal Defense and Education Fund (now named LatinoJustice PRLDEF). In 1992, on the bipartisan recommendation of her home-state Senators, President George H.W. Bush appointed her as District Judge for the Southern District of New York. In recognition of her outstanding record as a trial judge, President Bill Clinton elevated her to the U.S. Court of Appeals for the

Second Circuit in 1998, where she has participated in thousands of cases and has authored hundreds of opinions.

In all this time, Judge Sotomayor has demonstrated a thorough understanding of a wide range of highly complicated legal issues, and she has earned an overwhelmingly positive reputation for deciding cases based on the careful application of the law to the facts of cases. And she has garnered broad support across partisan and ideological lines, earning glowing praise from colleagues in the judiciary, law enforcement community, academia, public interest sector, and legal profession who know her best.

Since President Obama nominated Judge Sotomayor to the Supreme Court in late May, a number of LCCR member organizations have undertaken extensive reviews of her record on civil rights issues of importance to the communities that we represent. The findings have not surprised us, as they are consistent with her well-established reputation for approaching cases with an open mind, remaining open to persuasion by all sides, painstakingly analyzing the relevant facts and laws, and rendering fair and thoughtful decisions that are firmly grounded in precedent – even when the outcomes are not always those that civil rights plaintiffs would prefer.

Our colleagues at the American Civil Liberties Union (ACLU), for example, found that 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."[1] The ACLU also found that "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," and that "she has agreed with the ACLU position in some cases and disagreed in others."[2]

Similarly, our colleagues at the NAACP Legal Defense and Educational Fund, Inc. (LDF) found that Judge Sotomayor "has taken a careful, fact-sensitive approach to reviewing individual claims of employment discrimination. She has also shown appropriate respect for the jury's role in resolving factual disputes. Taken as a whole, her decisions are extremely balanced and show no tendency to favor either side in discrimination cases."[3] As evidence of her impartiality, LDF outlined a number of employment discrimination cases in which "Judge Sotomayor has found that the law, as applied to the facts of the case before her, doomed the plaintiff's case."[4]

I could discuss several more reports from our coalition that echo these findings,[5] but for now, I would like to point to just one more by our colleagues at the Brennan Center for Justice at New

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[1] American Civil Liberties Union, "Report of the American Civil Liberties Union on the Nomination of Judge Sonia Sotomayor to be Associate Justice of the United States Supreme Court," June 8, 2009, at 2, available at http://www.aclu.org/pdfs/scotus/sotomayor_report.pdf.
[2] Id. at 3.
[3] NAACP Legal Defense and Educational Fund, Inc., "The Nomination of Judge Sonia Sotomayor to the Supreme Court of the United States," July 10, 2009, at 8-9.
[4] Id. at 10.
[5] See, e.g., Lawyers Committee for Civil Rights Under Law, "Report on the Civil Rights Record of Supreme Court Nominee Judge Sonia Sotomayor," July 9, 2009, available at

York University School of Law. The Brennan Center, taking an innovative approach to analyzing Judge Sotomayor's record, examined 1,194 constitutional cases that were heard by the Second Circuit, and found that Judge Sotomayor has been squarely within the mainstream on the court. Specifically, the Brennan Center's report found that 94 percent of Judge Sotomayor's decisions in constitutional law cases have been unanimous, and that she was in the majority in 98.2 percent of such cases. In nearly 90 percent of cases in which she voted to hold a government action unconstitutional, and in 94 percent of the cases in which she overruled a lower court or government agency, she had the support of at least one Republican-appointed colleague when they were on the same panel.[6]

In short, despite the best efforts of some ideological extremists to tarnish Judge Sotomayor's record through distorted interpretations of a few cherry-picked cases or other elements of her record, the evidence of her impartiality and her mainstream judicial results is overwhelming and cannot be seriously disputed. I should note that those outside of the LCCR coalition have reached similar findings to our own. The *Wall Street Journal*, for example, undertook an analysis that found her to be slightly to the right of Justice Souter on criminal justice cases, which the authors speculated was due to her experience as a prosecutor.[7] The staff of Senator Schumer looked at her immigration rulings and found that in asylum appeals, she sided with the asylee 17 percent of the time, a record that is comparable to other judges on the circuit.[8] And *The Washington Post* found that in discrimination cases, Judge Sotomayor ruled for victims in some cases and against them in others, without any easily discernible pattern[9] – which is a good sign that she handles such appeals on a case-by-case basis, as one should expect in a judge.

We know that Judge Sotomayor may not side with us on every case involving civil or human rights matters. We do not expect that out of her. All we expect, as all Americans should expect, is that she will approach cases with an open mind, and that she gives litigants – on all sides of a case – a fair day in court.

There is no doubt in my mind that our nation is ready for this historic moment, and that Judge Sotomayor is the right person to be the face of it. Having said that, I must note, with dismay, that some individuals appear determined to prevent this moment from arriving at any cost.

Given the lifetime nature of Supreme Court appointments, and the tremendous impact that the Court has on our lives, it is perfectly legitimate for Americans to have strong feelings about individual nominees. Indeed, it is even understandable that some Americans would oppose the confirmation of otherwise-qualified nominees who take a dramatically different approach to the

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http://www.lawyerscommittee.org/admin/site/documents/files/0058.pdf (concluding that Judge Sotomayor "interprets civil rights laws in a manner that provides meaningful protection from discrimination, while being mindful of the need to grant early relief to defendants when the facts and law justify a summary ruling," at 3).

[6] Brennan Center for Justice, "Judge Sotomayor's Record in Constitutional Cases," July 9, 2009, at 10-12,

[7] Jess Bravin and Nathan Koppel, "Nominee's Criminal Rulings Tilt to the Right of Souter," *Wall Street Journal*, June 5, 2009, available at http://online.wsj.com/article/SB124415867263187033.html.

[8] Senator Charles E. Schumer, Press Release: "Schumer Unveils New Analysis Showing Sotomayor's Moderate Record On Immigration Cases; Review of Close to 850 Cases Shows She Ruled Against Asylum Claims 83 Percent of Time," June 9, 2009, available at http://schumer.senate.gov/new_website/record.cfm?id=314152.

[9] Jerry Markon, "Judge's Votes Show No Single Ideology," *The Washington Post*, June 7, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/06/06/AR2009060601966.html.

law than they themselves take. LCCR itself has opposed a small number of judicial nominees in the past, on the basis of their legal ideology, and I accept that some people may not ultimately support the confirmation of Judge Sotomayor.

Having said that, I believe that opposition to any judicial nominee must be principled, intellectually honest, and based upon concerns that can fairly be inferred from the record. Sadly, the hyperbole and histrionics surrounding the Sotomayor nomination are not simply an unseemly display of the partisan rancor that we all must occasionally tolerate in our political system. In this instance, they are also a profound disservice to our nation, given the importance of the debate.

I could spend hours responding to the baseless and dishonest attacks that have been launched against Judge Sotomayor. Some, such as those accusing Judge Sotomayor of racism or questioning her intellectual capability, do not even deserve to be dignified with a lengthy response – but I would simply ask critics such as Rush Limbaugh, Tom Tancredo, Karl Rove, and Newt Gingrich, "Have you no shame; have you no decency?"

There are, however, several attacks that have been made on Judge Sotomayor that I do feel the need to address. One attack that I find particularly beyond the pale, as a civil rights lawyer and advocate myself, targets her past membership on the board of one of LCCR's member organizations, the Puerto Rican Legal Defense and Education Fund (now named LatinoJustice PRLDEF) -- which opponents have falsely characterized as a "radical" organization that has taken "extreme positions" in its legal activities.

Nothing could be further from the truth. LatinoJustice PRLDEF itself is one of the most mainstream and most important defenders of the legal rights of Latino Americans. LatinoJustice PRLDEF is recognized under our tax code as a charitable organization. Like a number of LCCR members that focus primarily on civil rights litigation, it was modeled after and remains allied to this very day with the NAACP Legal Defense and Educational Fund, Inc. (LDF). LDF, of course, was founded by none other than future Supreme Court Justice Thurgood Marshall – and like LDF, LatinoJustice PRLDEF and our other legal defense funds have played an essential role in our coalition's pursuit of equality by acting as private enforcers of civil rights laws, particularly when government bodies have been unable or unwilling to enforce those laws themselves. LatinoJustice PRLDEF is an advocacy organization, and like advocacy groups of all ideological stripes, it presses the legal system to consider new arguments and different approaches to the law in order to advance the cause of many individuals who would otherwise have no voice in our courts. Of course, people are free to disagree with the merits of a position that LatinoJustice PRLDEF or one of our other legal organizations might take in a given case – but it is unfair to suggest that they are taken in bad faith or that they are any different than the strategies of many other advocacy groups. Indeed, those who would slander the organization are ultimately revealing more about themselves, and often their own troubling records on civil rights issues, than they are revealing about their target.

I also want to say a few words about the case of *Ricci v. DeStefano*, which has also been raised by Judge Sotomayor's critics in an utterly dishonest fashion. *Ricci* was undoubtedly a difficult and understandably controversial case. But let's review a few very basic facts. Judge

Sotomayor hardly acted alone, or for that matter, outside of the well-established law on the Second Circuit at the time. Instead, she was on a three-judge panel that ruled unanimously against the plaintiffs – one of whom, incidentally, was Hispanic like Judge Sotomayor. When the Second Circuit was asked to review the case *en banc*, it declined to do so by a seven-to-six margin, again with Judge Sotomayor in the majority – along with a Bush appointee, Judge Barrington D. Parker, whose concurring opinion had far more to say than Judge Sotomayor about why the case should not have been revisited. Indeed, the Supreme Court in its *Ricci* decision frankly acknowledged that it was setting forth a new standard for that type of case, thus making clear that the lower court was simply ruling based on then-existing existing case law, and that the Second Circuit could not have applied the standard the Supreme Court newly set forth in its opinion.

Sotomayor's critics can certainly say, in good faith, that they would have come down on the other side of the case – as LCCR itself has said following the Supreme Court's recent decision to overturn the Second Circuit. But to use a case in which Judge Sotomayor was twice a part of her court's majority, which arrived at its conclusion based on then-existing law, as evidence that she operates out of the judicial mainstream – or as evidence that she is a "judicial activist" or even a racist – simply does not pass the giggle test.

Finally, I would like to address the debate – also an utterly preposterous one – that has been taking place over the concept of empathy. The debate has left me wondering how many of Sotomayor's critics have actually bothered to look up the term in a dictionary, because it appears they have come up with creative new definitions that range from pity to outright prejudice. The Cambridge Dictionary, on the other hand, one of several sources in which I would place far more trust, defines it as "the ability to share someone else's feelings or experiences, by imagining what it would be like to be in their situation."

In other words, it simply means being able to put yourself into someone else's shoes. It is one of the most important traits that human beings should possess if they are to deal with other human beings, including in a court of law. And contrary to what many of Judge Sotomayor's opponents are now claiming, empathy in no way causes one to favor "particular parties or groups over others."[10] Instead, an empathetic judge is one who can identify with an employer as well as an employee, with a consumer as well as a corporate head, and with the victim of a crime as well as the accused.

I am honestly baffled by the manufactured outrage over President Obama's desire to appoint judges who are capable of empathy. His critics certainly did not sound concerned during Justice Samuel Alito's 2006 confirmation hearing, for example, when he explained that "when 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."[11] Similarly, they voiced no dismay when Justice Clarence

[10] Alex Isenstadt, "McConnell: No 'Empathetic' Court Pick," *Politico.com*, May 11, 2009, available at http://www.politico.com/news/stories/0509/22305.html
[11] Senate Committee on the Judiciary, Hearing: Nomination of Judge Samuel A. Alito to the U.S. Supreme Court, 109th Cong. (Jan. 11, 2006).

Thomas proudly described his ability to "walk in the shoes of the people who are affected by what the Court does."[12] To me, the inconsistency is very revealing.

Insofar as Judge Sotomayor is concerned, her record demonstrates what empathy truly means in a judicial setting. Time and time again, she has shown that she is able to recognize that both parties to a dispute can have legitimate points of view, which helps her to fully appreciate the complexities of difficult cases, and to deliver thoughtful decisions that allow litigants to feel, regardless of the outcome, that they received a fair day in court.

In one immigration case, for example, she wrote that she found an immigrant's arguments against deportation were "persuasive" but she ruled that the court had no power to second-guess the Attorney General.[13] In another, in which a New York City police officer was fired for circulating racist flyers, she described his conduct as "patently offensive, hateful, and insulting" – but argued in a dissenting opinion that he was still protected by the First Amendment.[14] And in the much-ballyhooed *Ricci* case, the opinion that she joined noted the plaintiff's "frustration" and his "intensive efforts" to succeed in spite of his disability, even though the panel was forced to conclude that the law wasn't on his side. I would find it hard to say, with a straight face, that these are the opinions of someone who puts ideology or personal feelings above the law.

In closing, Judge Sotomayor has an incredibly compelling personal story and a deep and abiding respect for the Constitution and the rule of law. I look forward to her confirmation to the U.S. Supreme Court, and I hope that it is by a very wide margin. Thank you for having me here today. I look forward to any questions you may have.

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[12] Senate Committee on the Judiciary, Hearing: Nomination of Judge Clarence Thomas to the U.S. Supreme Court, 102d Cong. (Sept. 12, 1991).
[13] Mendez v. Mukasey, 525 F.3d 216 (2d Cir. 2008), at 221.
[14] Pappas v. Giuliani, 290 F.3d 143 (2d Cir. 2002) at 154.