

A church-state evaluation of the latest nominee to the U.S. Supreme Court



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{ Judge Sonia Sotomayor }

With the Senate Judiciary Committee confirmation hearings for Associate Justice nominee Sonia Sotomayor set to begin July 13, the Baptist Joint Committee for Religious Liberty has been examining her church-state record.¹ The U.S. Supreme Court is often closely divided on issues that affect religious liberty, and each new justice has the opportunity to make a significant mark on church-state law. Sotomayor is nominated to replace retiring Justice David Souter, author of many important decisions in favor of religious liberty. From the BJC's perspective, it is important that Souter's replacement is equally capable and likely to uphold principles of "no establishment" and "free exercise" in ways that provide broad religious freedom protection.

Over the past decade, the Court has issued splintered opinions in cases applying the Establishment Clause to allow more government involvement in religion. This includes upholding both government funding of religious institutions through a voucher program and a permanent religious display on government property. In addition, the Court limited the ability of taxpayers to challenge some governmental expenditures that violate the First Amendment. While the Court has properly interpreted federal statutes that protect the free exercise of religion, concerns remain about the strength of statutory and constitutional protections for religious practices.

Sotomayor, if confirmed, would join the Court with considerable experience. In addition to working as a prosecutor and in private practice, Sotomayor has an extensive record as a federal judge, serving more than a decade on the U.S. Court of Appeals for the Second Circuit² after six years as a trial judge for the U.S. District Court for the Southern District of New York. According to the White House, she served as a judge in more than 3,400 cases during her tenure on the federal bench.³ Among the cases over which she presided, there are several that implicate religious liberty protections. While not exhaustive, this report is intended to give an overview of Judge Sotomayor's most significant church-state opinions, evaluating them through the lens of the BJC's support for religious freedom. It is difficult to predict with any certainty how a judge will perform as a justice on the Supreme Court, but we review these cases to highlight the importance of courts in upholding religious liberty, to look for clues about how Sotomayor may approach cases that could come before her if she is confirmed, and to identify areas that deserve attention during the confirmation hearings. We urge the Senate to exercise due diligence to ensure that the nominee is well-suited to uphold the Constitution, including its protection of religious liberty.

Summary

Based on our review of cases in which she authored opinions on religious freedom claims, Sotomayor's record, taken as a whole, is commendable. She has written opinions suggesting a strong willingness to protect free exercise – even in difficult settings such as prisons and in cases where the religious practices of plaintiffs are unfamiliar. She has participated in fewer Establishment Clause cases, but her opinions in that area generally fit within the mainstream of Supreme Court decisions. Moreover, in a couple of cases where the governing case law was not settled, she accurately predicted the Supreme Court's eventual resolution.



Free Exercise Cases

The First Amendment's guarantee of the free exercise of religion means generally that government should not interfere with religious practice. The Free Exercise Clause, however, does not protect religious practice in all instances. The BJC believes that government should avoid substantially burdening a person's sincerely held religious beliefs absent an important governmental interest that could not be pursued in a less restrictive manner, and the government should make efforts to accommodate specific religious needs when it is feasible to do so. Until 1990, Supreme Court precedent generally reflected this interpretation of the Free Exercise Clause, requiring the government to pass "strict scrutiny" when it imposed a substantial burden on religious practice. In other words, the government had to show that the burden on religion was justified by a compelling governmental interest that could not otherwise be met.

In 1990, however, the Supreme Court held by a narrow majority in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), that the Free Exercise Clause protects much less, and does not require exceptions to laws that incidentally burden religion.¹ While the Court carved out some situations that were still entitled to a higher level of protection, generally the Court made it more difficult for religious claimants to prevail under the Free Exercise Clause, leaving the law of religious accommodations mainly to the legislative branches. Now, free exercise protection largely depends on the application of the Religious Freedom Restoration Act of 1993 ("RFRA"), the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), and similar statutes at the state level.²

Sotomayor has heard several free exercise cases involving constitutional and statutory claims. Although the precise parameters of her free exercise jurisprudence cannot be fully determined from these cases, her opinions largely are in keeping with the BJC's support for robust interpretation of free exercise rights.

In *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003),³ the Second Circuit considered a case brought by a Muslim prisoner claiming a violation of his rights under the Free Exercise Clause. His claim was based on the denial of a meal, known as the Eid ul Fitr feast, which occurs once a year to celebrate

the completion of Ramadan. The prison had scheduled the meal after the period prescribed by Muslim law and tradition to coincide with the prisoner's weekend family visitation.

The district court agreed with prison officials who argued that the prisoner's claim lacked objective religious significance and was too insignificant to warrant protection. The Second Circuit, in an opinion by Sotomayor, vacated that ruling.

Importantly, her opinion demonstrates that proper analysis of a free exercise claim begins with identification of a sincerely held religious belief, not with whether an asserted belief comports with a faith's "actual requirements." Controlling Supreme Court and Second Circuit cases had rejected "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."⁴ The question is not whether the belief is objectively reasonable, which would require courts to resolve issues that are beyond their competence, but only "whether a claimant sincerely holds a particular religious belief and whether the belief is religious in nature."⁵ Sotomayor wrote, "District courts have no aptitude to pass upon the question of whether particular religious beliefs are wrong or right."⁶ Likewise, she rejected the lower court's holding that the denial was a trivial burden on religious exercise because that conclusion rested heavily on Muslim clerics who said the observance of the requested meal was not mandated by the prisoner's religion.⁷ Instead, as Sotomayor explained, the inquiry should have been whether participation in the Eid ul Fitr feast was considered important to the claimant's practice of Islam.

Similar concerns appear in a case involving prisoners that Sotomayor decided as a district court judge. In *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994), Sotomayor stopped enforcement of new prison directive that prevented prisoners from wearing beads associated with their practice of the Santeria religion, described by the court as a fusion of native African religions and Catholicism.⁸

The case was brought by two New York inmates who had practiced the Santeria religion for many years without interference or incident. At the outset, Sotomayor noted, "This case raises significant constitutional and statutory issues about the protections accorded fundamental First Amendment rights of freedom of religious expres-

sion in a prison setting. It underscores the complex nature and difficulty of accommodating various religious belief systems and tenets within a prison system, wherein violence is a real and daily threat.¹² She recognized explicitly that the plaintiffs' beliefs, even if unfamiliar, deserve First Amendment protection from overly broad rules that burden the practice of non-mainstream religion.

The plaintiffs challenged a new directive prohibiting prisoners from wearing certain religious articles, including religious beads worn for devotional purposes, unless approved under a lengthy and invasive administrative process not required for other religious requests. Prison officials defended the directive as a protection against gang identification and violence. They said it did not significantly burden the prisoners' free exercise of religion because the new rule still allowed them to possess the beads. According to prison officials, the tenets of Santeria are satisfied by the mere possession of the beads without wearing them.

Again, this case illustrates that the proper initial step is evaluating the sincerity of the religious belief – in this case, the devotional nature of wearing beads. Sotomayor rejected the defendants' challenge to the sincerity of the prisoners' beliefs since it was solely based on the fact that the prisoners had identified their religion as "Catholic" and "Christian," respectively. Citing *Church of Lukumi Babalu Aye* 508 U.S. 520 (1993), in which Santeria was described as including Catholic symbols and participating in Catholic sacraments, and noting the lack of any additional information to suggest the prisoners were not adherents of Santeria, Sotomayor accepted that they were sincere in their religious beliefs.¹³

While recognizing that security and safety in prisons constitute compelling governmental interests, Sotomayor warned that "defendants cannot merely brandish the words 'security' and 'safety' and expect that their actions will automatically be deemed constitutionally permissible conduct."¹⁴ She credited prison administrators' assertion that beads are gang identifiers, but held that the testimony on this point was insufficient to justify the entire scope of the directive. In addition, the prison officials' refusal to consider the prisoners' compromise that they be allowed to wear the beads under clothing showed that the directive did not further the state's interest in the least restrictive manner.¹⁵ Sotomayor noted that any enforcement problem would be the same regardless of what religious

symbol was worn under an inmate's shirt, so that no rational distinction could be made between the beads, which were prohibited, and crucifixes, which were not. Given the defendants' failure to cite any attempted or actual illicit use of Santeria beads by prison gang members, Sotomayor granted the prisoners' motion to enjoin enforcement of the directive.

Also noteworthy is *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002), a case in which the BJC and others filed a friend-of-the-court brief in support of a church that provided its property as a place to sleep for "service-resistant" homeless persons. Though not its author, Sotomayor joined the court's opinion upholding the church's free exercise rights. The church was notified by the City of New York that it could no longer allow homeless persons to sleep on the steps, landing area, and adjoining sidewalk of the church's property. The city said that the homeless persons were subject to arrest for non-compliance. The church sued, claiming violation of its rights under the Free Exercise Clause, RLUIPA, and state law, and asked the court to prevent the city from dispersing homeless individuals sleeping on church property. The district court granted the church's request as to the church steps and landing but not on the public sidewalks beside the church. The city appealed, and the Second Circuit affirmed the district court's ruling.

The decision, which includes reasoning similar to that put forth in the BJC brief, explains that the city failed to demonstrate that its interest in preventing the homeless from sleeping on the church's property was sufficiently compelling to trump the church's free exercise rights, and that it did so in a way that was narrowly tailored. The panel found the city's purported interest, enforcing minimum standards for homeless shelters (raised for the first time on appeal), to be insufficient.

Another Sotomayor opinion that demonstrates strong support for free exercise is her dissent in *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2007). In *Hankins*, a minister sued his denomination, claiming that his compulsory retirement at age 70 violated the federal Age Discrimination in Employment Act. The trial court granted summary judgment for the defendant based on the "ministerial exemption," a rule grounded in free exercise concerns that prevents courts from interfering with a church's employment relationships with its ministers. In a 2-1 panel decision, the Second Circuit reversed the lower court, holding that it should

have applied RFRA to determine whether the Church was exempt from the application of the age discrimination law. The case was remanded to the lower court for further consideration.

A significant point in Sotomayor's dissent was her rejection of the majority's reliance on RFRA. She rebuffed RFRA's application for several reasons, including the fact that the denomination had not invoked it as part of its defense. She also explained the First Amendment basis for keeping the federal government out of disputes between religious organizations and the individuals they choose to hire or dismiss as spiritual leaders, drawing on cases that have prevented state interference with matters of church governance and doctrine.

Establishment Clause Cases

Some of the most contentious and closely-divided Supreme Court cases arise under the Establishment Clause. In these cases, the justices use various tests to determine whether a governmental action unconstitutionally advances religion. For the BJC, Establishment Clause cases raise theological issues as important as the constitutional questions since we believe individuals and communities should not rely on government to promote religion. Even where constitutionally permissible, government promotion inevitably harms religion, encouraging watered-down religious messages, rather than leaving religion to the voluntary efforts of individuals and houses of worship.

Justice Souter was a significant defender of the separation of church and state and wrote several important opinions defending a strong interpretation of the Establishment Clause.¹⁶ Sotomayor's judicial record includes very little in this area, and it appears she has never presided over a case dealing directly with government funding of religious institutions. In two cases, however, she addressed claims related to religious displays on government property, both times upholding the displays over Establishment Clause objections. The BJC does not disagree with the outcome in these cases, which are fact-specific and, unfortunately, reveal little about her overarching view of Establishment Clause jurisprudence. This leaves questions as to the criteria she would employ when deciding different variations of Establishment Clause claims.

As a district court judge, she decided *Flamer v. City of White Plains*, 841 F. Supp. 1365 (S.D.N.Y.

1993), a case that stopped the enforcement of a city resolution barring fixed outdoor displays of religious or political symbols in its city parks. The case was brought by a rabbi whose request to place a menorah in a city park during Hanukkah was denied because of the resolution. The rabbi claimed that the resolution was unconstitutional as a content-based regulation of speech since the park had historically been used for all manner of public demonstrations. His lawsuit asked that the resolution be declared unconstitutional and that he be allowed to display the menorah.

Sotomayor found the parks at issue were traditional public forums and, consequently, any regulation of speech or expressive activity must survive strict scrutiny. She rejected the City's claimed "compelling interest" (a desire to not violate the Establishment Clause) because the U.S. Supreme Court had upheld a similar menorah display in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). She noted further that even if it had been a compelling interest, the resolution was too broad, as it proscribed both religious and political displays, the latter of which are not implicated by the Establishment Clause.

In a later case, Sotomayor wrote the district court opinion in *Mehdi v. United States Postal Service*, 988 F. Supp. 721 (S.D.N.Y. 1997), rejecting the claims of Muslim plaintiffs who challenged the U.S. Postal Service's refusal to display the Star and Crescent alongside Christmas and Hanukkah symbols or to remove any "sectarian symbols from its holiday displays." The plaintiffs acted *pro se* (without counsel) and pursued various overlapping theories of free speech, no establishment, and equal protection. The case illustrates the highly fact-specific analysis that is often required in religious display cases, as well as the complicated doctrine of "forum analysis" in free speech cases.

Sotomayor granted the defendant's motion to dismiss the case. While avoiding a conclusion about all similar facilities, she rejected the plaintiffs' claim because the post office is a nonpublic forum, and the agency's prohibition of seasonal displays by the public was a "reasonable restriction designed to further its business." In many ways Sotomayor's opinion in this case anticipated the Supreme Court's recent ruling in *Pleasant Grove City, Utah, et. al., v. Summum*, 555 U.S. ____ (2009) which unanimously rejected a free speech claim to place a religious monument in a city park where a privately donated monument of the Ten

Commandments stood. Sotomayor explained, "If the government's speech on its own property by itself turned that property into a public forum, virtually all government facilities would become public fora open for a wide range of expressive activity. The First Amendment does not require this."¹⁷ Instead, she held the government is speaking on its own behalf – essentially in a commercial enterprise – and could restrict public displays.

Conclusion

While Sotomayor's written record raises no red flags, it also fails to provide complete assurance to those who are most concerned about our fragile religious freedom rights. In the free exercise cases, she displays careful attention to protecting religious rights, including in prisons where courts generally give deference to government officials. Likewise, these cases demonstrate an emphasis on the importance of assessing the individual's specific religious claim. This approach illustrates an

expansive view of religious freedom that does not depend on the approval of the majority. Her religious display cases demonstrate the fact-sensitive nature of such disputes, but tell us little about where she would draw the line between permissible acknowledgements of religion and unconstitutional displays that send a message of endorsement of religion by the government. Beyond those cases, her record gives little indication of her views of the Supreme Court's various Establishment Clause standards or how she is likely to decide such cases.

Sotomayor's writings include few if any statements articulating how the First Amendment protects religious liberty, promotes the voluntary nature of religion, prevents governmental interference in religion and tends to reduce conflict among religions. Still, her record offers positive signs that she will be a thoughtful, fair-minded jurist in protecting religious freedom.

Endnotes

¹ Although the BJC does not endorse or oppose candidates for office (elected or appointed), we do examine and critique their church-state records.

² The Second Circuit has jurisdiction over Connecticut, New York, and Vermont.

³ This information was in the White House announcement of Sotomayor's nomination on May 26, 2009. Full text is available at http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sotomayor.

⁴ Applying a new, narrow interpretation of the Free Exercise Clause, *Smith* held that the Oregon law disqualifying the plaintiffs from unemployment compensation was a neutral law of general applicability and, thus, constitutional. The plaintiffs had been terminated for ingesting peyote, a sacramental act of their Native American religious tradition.

⁵ The Baptist Joint Committee chaired a group of more than 50 religious and civil liberty organizations, known collectively as the Coalition for the Free Exercise of Religion, which worked to pass both RFRA and RLUIPA.

⁶ In response to the Senate Judiciary Committee's questionnaire, Sotomayor identified this case as one of the ten most significant cases over which she has presided.

⁷ *Ford*, 352 F.2d at 589, quoting *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834 (1989).

⁸ *Id.* at 590.

⁹ *Id.* at 591 n.8.

¹⁰ *Id.* at 586-87.

¹¹ As Sotomayor noted in her opinion, the practice of Santeria was the subject of a Supreme Court case striking down a city ordinance that targeted Santeria's practice of animal sacrifice. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

¹² *Campar*, 854 F. Supp. at 197.

¹³ Sotomayor's opinion recalled the Supreme Court's admonition to legislators regarding the Free Exercise Clause: "Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.* at 202-203 n.1.

¹⁴ *Id.* at 207.

¹⁵ The opinion rejects "distinctions between 'traditional' and 'nontraditional' religions." *Id.* at 208.

¹⁶ For example, in *Lee v. Weisman*, 505 U.S. 577 (1992), Justice Souter wrote separately to make clear his understanding that the Establishment Clause bars favoring religion over irreligion, not just promoting one particular religion over others. Similarly, he opined that actual coercion of religious practice was not a necessary element of an Establishment Clause violation, and that a general endorsement of religion by government would be sufficient. In his dissenting opinion in *Mitchell v. Helms*, Justice Souter explained the Establishment Clause's prohibition on funding religion:

"The establishment prohibition of government religious funding serves more than one end. It is meant to guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes." 530 U.S. 793, 868 (2000) (Souter, J., dissenting).

¹⁷ *Mehdi*, 988 F. Supp. at 726.