Professor Elizabeth M. Iglesias
Director, (305) 284-4050
Fax: (305) 284-1588

Senator Patrick Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Bldg
United States Senate
Washington, DC 20510

June 3, 2009

Re: Confirmation of Judge Sonia Sotomayor

Dear Senator Leahy

I am pleased to write in support of the confirmation of Judge Sonia Sotomayor to the Supreme Court of the United States of America. There is no doubt that President Obama has made a nomination that is both historically significant and profoundly wise. Judge Sotomayor's personal life story and professional accomplishments reflect the best this country has to offer, and her confirmation will go a long way to restoring confidence that appointments to high office will be made in this country on the basis of demonstrated merit, talent, hard work and ethical integrity.

Judge Sotomayor is not by any stretch an unknown figure in the legal academy or the profession. Former students, classmates, professors and her colleagues both old and new know her personal integrity, intellectual brilliance, compassion, energy and courage. Though she is a top graduate with honors from two of the most elite institutions of higher learning in this country, she has moved through this life as a humble, generous and vibrant force for justice and fairness. The outpouring of enthusiasm and support for her confirmation has been deep and broad across all segments of our profession and communities.

It is critically important that the confirmation process remain focused on the merits. Even a brief and cursory review of Judge Sotomayor's appellate opinions demonstrate a fair, balanced, indeed, rather mainstream approach to legal doctrine. Constitutional scholars may not agree with every opinion she has written on the Second Circuit, but Constitutional scholars never agree with each other on every point, and the record as a whole undeniably reflects a careful, thoughtful legal mind intent on faithful application of established precedent. Take, for example, her opinion in *U.S. v. Santa*, 180 F.3d 20 (1999). In that case, Judge Sotomayor upheld a lower court decision denying a motion to suppress evidence of crack cocaine discovered during a search incident to arrest. The arrest itself was based on an arrest warrant that had been previously vacated, but never removed from the New York State Police Information Network ("NYSPIN"), a statewide computer database that contains outstanding warrants.

To be sure the integrity and accuracy of law enforcement databases implicate compelling liberty and privacy interests. The question whether and when the exclusionary rule should be applied to remedy and/or deter violations of constitutional rights as a general matter as well as the more particular issue whether the rule should be applied to suppress evidence obtained in "good faith" reliance on erroneous computer data

P.O. Box 248087
Coral Gables, Florida 33124-8087

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO
VerDate Nov 24 2008 11:18 Jun 24, 2010 Jkt 056940 PO 00000 Frm 00975 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\56940.TXT SJUD1 PsN: CMORC
56940.562

are both issues that continue to vex the Supreme Court, as reflected in the dissenting opinions by Justices Ginsberg and Breyer in the more recent 5-4 decision of *Herring v. United States*, 129 S.Ct. 695 (2009). Although there is no way to predict how Judge Sotomayor would have ruled had she been on the Supreme Court when *Herring* was just recently decided, it is clear from the opinion in *U.S. v. Santa*, that as a Court of Appeals Judge, her decision in *Santa* was controlled by *Arizona v. Evans*, 514 U.S. 1 (1995). The string of errors that resulted in the Village Court's failure to remove the vacated arrest warrant from the police computer database in *Santa* were rightly troubling to the Judge, but *Evans* established a "categorical exception to the exclusionary rule for clerical errors of court employees." The errors made in *Santa* fit squarely within that pre-established framework, and the Judge's careful assessment and application of *Evans* in *Santa*, despite her troubled concerns, reflect a respect for controlling precedent and judicial restraint that are entirely appropriate for judges on our Courts of Appeal.

Indeed, it is precisely her respect for precedent that best reflects her judicial temperament and illustrates the important contribution she will make to restoring our Constitutional doctrine to a fair and balanced expression of the rule of law. Take for instance, her opinion in *Malesko v. Correction Services Corporation*, 229 F.3d 374 (2000). *Malesko* provides a valuable lens into the kind of judging we can expect from Judge Sotomayor after her confirmation to the Supreme Court. Unlike *Santa*, which was controlled by the four corners of *Evans* and therefore called for faithful application of established precedent by the lower appeals court, *Malesko* was a case of first impression in the Second Circuit. Cases of first impression require appellate judges to engage in a kind of analysis that is not directly determined by the "four corners" of a controlling precedent and thus reflect a judge's understanding of the competing interests, policy objectives and fundamental constitutional values that inform an entire area of law from which the judge must craft a new rule of decision for the particular case.

Malesko is an especially significant case because it involves interpretation of the scope of a *Bivens* claim. *Bivens*, 403 U.S. 388 is a 1971 Supreme Court opinion that recognized for the first time an implied private right of action for damages against federal officers alleged to have violated an individual's constitutional rights. It is a critically important vehicle for vindicating constitutional rights in the absence of a Congressionally established remedial scheme. The specific question in *Malesko* was whether an inmate of a privately run correctional facility could bring a *Bivens* action for violation of his constitutional rights against the private corporation running the prison under color of federal law. The inmate in question had a known heart condition, but was nevertheless forced to take the stairs rather than an elevator to his fifth floor room, causing him to sustain injuries when he suffered a heart attack and fell. In reversing the district court's dismissal of the inmate's complaint, Judge Sotomayor engaged in a careful analysis of the analytical inferences that can fairly be drawn from prior precedents on the scope of the *Bivens* claim. Unlike the district court, whose dismissal of the inmate's claim purported to apply the 1994 Supreme Court decision in *FDIC v. Meyer*, 510 U.S. 471, Sotomayor concluded that the *Meyer's* precedent barring *Bivens* claims against federal agencies did not proscribe *Bivens* claims against private corporations acting under color of federal law.

As a matter of precedent, prior to *Meyer*, no Court of Appeals, other than the one under review in *Meyer* itself, had ever implied a *Bivens* action against a federal agency. By contrast, prior to *Meyer* several circuit courts had recognized *Bivens* claims against private corporations engaged in federal action. Thus, in the body of law preceding the Supreme Court's decision in *Meyer*, federal agencies and private corporations had not been treated similarly, and there was therefore no reason to automatically conclude that a Supreme Court decision barring *Bivens* claims against federal agencies would likewise apply to bar such claims against private corporations. On the contrary, there were compelling reasons implicated in the policies and the constitutional values the *Bivens* action was originally established to vindicate from which a lower court could reasonably infer that the proscription barring *Bivens* actions against federal agencies did not apply to claims against private corporations. This is because "the primary goal of *Bivens* was to provide a remedy for victims of constitutional violations by federal agents where no other remedy exists, regardless of whether the official would be deterred in the future from engaging in such conduct." *Malesko*, quoting *Hammons* at 706. With citations to Justice Harlan's concurring opinion in *Bivens*, Sotomayor noted the fundamental unfairness of denying relief to an individual whose constitutional rights have been violated "simply because he cannot show that future lawless conduct will be thereby deterred." *Malesko* quoting *Bivens* at 406 (Harlan, J., concurring). She further noted that the *Meyer* Court's concern that allowing

VerDate Nov 24 2008 11:18 Jun 24, 2010 Jkt 056940 PO 00000 Frm 00976 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\56940.TXT SJUD1 PsN: CMORC

56940.563

Bivens actions against federal agencies might undermine the deterrence purpose of *Bivens* did not apply in cases involving actions against private corporations where one would reasonably expect an "employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees." *Malesko* at 380.

In so holding, Sotomayor's decision in *Malesko* maintained a pre-established symmetry between the liability of federal agents for constitutional torts under *Bivens* and the analogous liability of state agents for constitutional torts under Section 1983. In 1982, the Supreme Court made it clear that private corporations violating constitutional rights under color of state law may be sued under Section 1983. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Respect for *Biven's* overriding purpose of providing redress for violations of constitutional rights warranted no lesser liability for private corporations violating constitutional rights under color of federal law.

From this analysis, it is abundantly clear that Judge Sotomayor has the intellectual integrity, professional competence and judicial temperament to bring to the Supreme Court a keen understanding of the compelling interests at stake in providing remedies for violations of constitutional law. The notion that constitutional violations have constitutional remedies is a fundamental principle inherent in the very notion of government under the "rule of law." It harkens back to the foundational precedent of *Marbury v. Madison*, where the Supreme Court in 1803 clearly and wisely asserted that the "very essence of civil liberty" consists "in the right of every individual to claim the protection of the laws whenever he receives an injury... The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

To be sure, *Malesko* is one of the cases in which the Supreme Court has reversed Judge Sotomayor. *Malesko* was reversed in a 5-4 decision authored by then-Chief Justice Rehnquist over the dissenting opinion of Justices Stevens, Souter, Ginsberg and Breyer with a concurring opinion by Justice Scalia. However, a close review of this reasoning in the Supreme Court's opinion suggests that dissenters had the better argument. Against the backdrop of established precedents, and the more reasoned analysis of the dissenters, there is basis for Justice Stevens' objection that "the driving force behind the Court's decision is a disagreement with the holding in *Bivens* itself." *Malesko* at 527-28 (Stevens, J. dissenting). As between Sotomayor's careful analysis of the precedential history and underlying policies of the *Bivens* action and the unreasoned distinctions and bald assertions of disapproval through which Justices Rehnquist and Scalia led a 5-4 majority to curtail this important remedy, Sotomayor demonstrates the kind of judicial temperament that will restore credibility to a struggling Court much to the credit of our system of Constitutional government under the rule of law.

To be sure, there is some tension between Judge Sotomayor's decisions in *Santa* and *Malesko*. Clearly, one might conclude, as Justices Ginsberg, Stevens, Souter and Breyer did in *Herring*, that application of the exclusionary rule to suppress evidence obtained in good faith reliance on erroneous information contained in a law enforcement computer data base might encourage "policymakers and systems managers to monitor the performance of the systems they install and the personnel employed to operate those systems" *Herring* (Ginsberg, J. dissenting) -- in the same way Sotomayor concluded that *Bivens* liability might encourage private companies "to be motivated to prevent unlawful acts by its employees." *Malesko* at 380. Clearly, one might also conclude that an individual subject to unlawful arrest should not be denied a remedy "simply because he cannot show that future lawless conduct will be thereby deterred." *Bivens* (Harlan, J. concurring) quoted in *Malesko*. Nevertheless, a fair analysis of this tension must take into account the very different contexts in which the Judge decided *Santa*, a case subject to the controlling precedent of a superior court, and *Malesko*, a case of first impression. Viewed in this light, the tension between her decisions in these cases is the best evidence of a judicial temperament that is both humble in its respect for the authority of controlling precedent and wise in its assessment of policies and values that our Constitutional jurisprudence must be made to uphold going forward.

Based on the record of her opinions in these and other cases in Constitutional law, as well as her impressive record of professional accomplishments and personal achievement, I have no doubt that she will make a first rate Justice. I applaud her nomination and support her confirmation as not only the first Latina Justice

VerDate Nov 24 2008 11:18 Jun 24, 2010 Jkt 056940 PO 00000 Frm 00977 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\56940.TXT SJUD1 PsN: CMORC

56940.564

on this high court, but as living evidence that decisions regarding positions of high office in this country will be made on the merits under Obama Administration.

If I can be of any further assistance, do not hesitate to contact me.

Sincerely,

Elizabeth M. Iglesias
Professor of Law and Director

VerDate Nov 24 2008 11:18 Jun 24, 2010 Jkt 056940 PO 00000 Frm 00978 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\56940.TXT SJUD1 PsN: CMORC

56940.565