

Judging A Supreme Court Nominee: Americans United Report On Sonia Sotomayor

On Monday, July 13, the Senate Judiciary Committee will begin hearings on the confirmation of Sonia Sotomayor. Nominated by President Barack Obama to the U.S. Supreme Court, Sotomayor currently serves on the 2nd U.S. Circuit Court of Appeals, a position she has held since 1998. Prior to that, Sotomayor served as a federal judge for the Southern District of New York for eight years.

Sotomayor's views on a number of issues have come under intense scrutiny. Americans United for Separation of Church and State has researched her record on issues relating to church-state separation and religious freedom. A summary of her relevant rulings is below.

If confirmed, Sotomayor will replace Justice David Souter, a strong proponent of church-state separation. Because Souter was such a powerful advocate for the church-state wall, Americans United believes it is imperative that his replacement hold similar views. Sotomayor's record on church-state relations, however, is not lengthy. There are many church-state issues she has never had the opportunity to address.

In light of this, Americans United has taken no position on her confirmation. AU has asked members of the Judiciary Committee to question Sotomayor closely and give her ample opportunity to fully explain her views on both the Establishment and Free Exercise Clauses of the First Amendment.

Second Circuit Court of Appeals Cases

Stoianoff v. Comm'r of Dep't of Motor Vehicles, 12 Fed. Appx. 33 (2d Cir. 2001) (joined by Sotomayor):

The plaintiff challenged a statute that required driver's license applicants to provide their Social Security Numbers. He argued, among other things, that the requirement violated his Free Exercise rights. The district court dismissed the lawsuit, and a three-judge panel of the U.S. Court of Appeals for the Second Circuit unanimously affirmed that decision. The panel held that "Stoianoff's claim that [the statute] violates his right under the Free Exercise Clause of the First Amendment fails because [the statute] is facially neutral and does not evidence an antagonism by the legislature toward religion in general or a particular religious belief."

Rosario v. Does, 36 Fed. Appx. 25 (2d Cir. 2002) (joined by Sotomayor):

After a public school announced that one of its students had died, substitute teacher Mildred Rosario spoke to her 6th grade students about her religious views, including telling the students that "Jesus was the son of God" and that "one must come through Jesus to get to God." *Id.* at 26. She also placed her hands on the foreheads of the students and asked God to protect them and their families. After she was terminated for

this behavior, Rosario sued the school district on several grounds, including Free Speech and Free Exercise violations. *Id.* At the trial, however, Rosario withdrew her Free Exercise claim. The district court then dismissed her complaint.

The Second Circuit panel unanimously affirmed the district court's decision. Although the panel did not rule on the free exercise claim, the court nonetheless weighed in on a religious freedom issue: The court explained that "[a]s to Rosario's free speech claim . . . the School Board's 'strong, perhaps compelling interest in avoiding Establishment Clause violations' justified its actions in terminating Rosario." *Id.* at 27 (internal citations omitted).

Fifth Ave. Presbyterian Church v. New York, 293 F. 2d 570 (2d Cir. 2002) & 177 Fed. Appx. 198 (2d Cir. 2006) (joined by Sotomayor):

In order to create a "sanctuary for the service-resistant homeless who prefer not to sleep in shelters," a Presbyterian church designated two outdoor areas on its property where the homeless could sleep. 293 F.3d at 572. The city began dispersing the homeless from the property, however, and threatening them with arrest if they did not leave the area. The church sued the city, alleging, in part, that "its outdoor sanctuary forms an integral part of its religious mission," and, thus, dispersing the homeless violates its Free Exercise rights.

The panel unanimously granted the church's request for a preliminary injunction. It reasoned:

We agree with the District Court that on the present record, the Church has demonstrated a likelihood of success in establishing that its provision of outdoor sleeping space for the homeless effectuates a sincerely held religious belief and therefore is protected under the Free Exercise Clause. Further, we assume, without deciding, that the City's actions in dispersing the homeless substantially burden the Church's protected religious activity, a proposition with which the City has not argued. Accordingly, absent a demonstration that a neutral law of general applicability justifies the City's actions, the City must assert a compelling interest in preventing the homeless from sleeping on Church property that would suffice to overcome the Church's free exercise rights, and that the means it has adopted to fulfill that interest are narrowly tailored.

Id. at 575 (internal citations omitted).

Ultimately, the panel concluded that "at the present time, the City has not sufficiently shown the existence of a relevant law or policy that is neutral and of general applicability, and that would therefore justify its actions in dispersing the homeless from the Church's landings and steps." *Id.* at 576.

Later, in the course of litigation, the district court granted summary judgment for the church. On appeal, the Second Circuit unanimously upheld that decision. 177 Fed. Appx. 198 (2d Cir. 2006).

Ford v. McGinnis, 352 F.3d 582 (2d Cir. 2003) (Sotomayor, writing for the panel):

The plaintiff-prisoner claimed a Free Exercise violation after the prison refused to serve him an Eid ul Fitr meal. Though the Eid ul Fitr feast is traditionally served on the completion of Ramadan, the prison served the meal a week late at the request of Muslim prisoners. The plaintiff missed the meal, however, because he was being transferred at the time and the prison refused to serve the inmate the meal upon his return. The prison claimed that by serving the meal a week late, it “had lost all objective religious significance . . . and, therefore, did not warrant free exercise protection.” In the alternative, the prison argued that “denial of one religious meal is, in any event, a *de minimis* burden on Ford’s religious exercise.” *Id.* at 584.

The panel first examined whether the plaintiff’s religious beliefs were sincerely held, “as scrutiny of the prisoner’s sincerity is often essential in ‘differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud.’” *Id.* at 588 (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir.1984)). The court held that it should apply a subjective rather than an objective test when determining whether a prisoner’s beliefs are sincerely held. Whether a person’s beliefs are sincerely held does not turn on whether he is a member of an organized religion, whether the belief is found in any “tenet or dogma of an established religious sect,” or whether there is “any perceived lack of objective validity” to the beliefs. *Id.* at 590-91. Instead, the relevant question is what the plaintiff actually believes. Here, the court accepted the findings of the lower court that the plaintiff sincerely believed that having the feast, even if provided after the day proscribed, “is critical to his observance as a practicing Muslim.”

The plaintiff filed his case after RFRA was invalidated as to the states, but before the Religious Land Use and Institutionalized Persons Act (RLUIPA) was passed by Congress. Therefore, the court determined that it would rely solely on the First Amendment to adjudicate the Free Exercise claims. The court held that the *O’Lone /Turner* standard—the burden on the prisoner’s religious practice is permissible if it is reasonably related to a legitimate penological interest—set out the proper standard for prisoner cases, but that it was unclear whether a prisoner must demonstrate a substantial burden under this standard. Because the plaintiff did not argue that he did not need to demonstrate a substantial burden, the panel assumed that the plaintiff was obligated to demonstrate such a burden. In determining whether a substantial burden existed, the court said that it should not ask whether the meal is “mandated” by the plaintiffs’ religion, but whether the feast “is considered central or important to [the prisoner’s own] practice of Islam.” *Id.* at 593-94. The panel ultimately held that denial of the meal would constitute a substantial burden and remanded the case to district court to decide additional relevant facts and to weigh the *Turner* factors to determine whether the prison’s refusal to serve the feast to the plaintiff was justified by legitimate penological interests.

Okwedy v. Molinari, 333 F.3d 339 (2d Cir. 2003) & 69 Fed. Appx. 482 (2d Cir. 2003) (joined by Sotomayor):

A church contracted with a company “to post billboards that quoted four different translations of Leviticus 18:22 denouncing homosexuality as an abomination,

loathsome, detestable, and an enormous sin.” 333 F. 3d at 340. Shortly after the billboards went on display, Guy Molinari, the President of the Borough of Staten Island, wrote to the billboard company, objecting to—but not requesting removal of—the signs. The billboard company removed the signs.

The church and its pastor sued, alleging “that Molinari violated their rights under the Free Exercise Clause by criticizing the billboards’ message as unnecessarily confrontational and offensive, and by creating an atmosphere of intolerance.” 69 Fed. Appx. at 484. Molinari countered that he “acted pursuant to the general policy against ‘intolerance’ and ‘bigotry’ expressed in New York law and the New York City Administrative Code § 8-101.” *Id.*

The court rejected the church’s Free Exercise claim:

In order to prevail on a Free Exercise Clause claim, a plaintiff generally must establish that “the object of [the challenged] law is to infringe upon or restrict practices because of their religious motivation,” or that its “purpose . . . is the suppression of religion or religious conduct.” It is not a violation of the Free Exercise Clause to enforce a generally applicable rule, policy or statute that burdens a religious practice as long as the government can “demonstrate a rational basis for [the] enforcement” of the rule, policy or statute, and the burden is only an incidental effect, rather than the object, of the law. Plaintiffs have alleged no facts that suggest that Molinari’s purpose or the purpose of the New York law was to single out plaintiffs’ religious expression. In fact, plaintiffs acknowledge that Molinari acted pursuant to the general policy against “intolerance” and “bigotry” expressed in New York law and the New York City Administrative Code § 8-101. Therefore, because plaintiffs have not shown that Molinari lacked a rational basis for enforcing that policy, the district court correctly dismissed the Free Exercise Clause claim.

Id. (internal citations omitted).

The church also argued that Molinari’s letter violated the Establishment Clause both because it “demonstrate[d] the City’s ‘official position of hostility toward the biblical viewpoint of homosexual practice and [the plaintiffs’] religious beliefs’” and because it “violated the principle of ‘absolute equality before the law[] of all religious opinions and sects.’” *Id.* at 484. The court also rejected this claim, finding that the letter “did not ‘differentiate among sects,’ nor did it make “explicit and deliberate distinctions between different religious organizations.” *Id.* Furthermore, the panel, without discussion, concluded that the letter comported with the *Lemon* Test, which “we apply in situations where a facially-neutral policy is challenged on Establishment Clause grounds.” *Id.* at 485.

Friedman v. Clarkstown Cent. Sch. Dist., 75 Fed. Appx. 815 (2d. Cir.2003) (joined by Sotomayor):

A New York regulation required that schoolchildren obtain certain immunizations but also provided a religious exemption for parents with sincerely held religious objections. A parent who was denied the religious exemption sued, claiming that, among other

things, the denial violated the Free Exercise and Establishment Clauses. The district court dismissed her claims and the Second Circuit panel unanimously affirmed that decision.

As to the Establishment Clause challenge, the panel held that the school district “did not violate the Constitution by asking plaintiff to submit documentation describing the basis for her objections to immunizations.” *Id.* at 820. Concerning the Free Exercise claim, the panel concluded that the religious exemption cannot be “said to burden the free exercise of religion, inasmuch as it contains an express exemption for sincerely held religious objections to immunization.” *Id.*

The panel also affirmed the district court’s conclusion that the parent had not qualified for the exemption because she did not sufficiently establish that her objection to the immunization was driven by her religion. The court explained:

[W]e agree with the district court’s conclusion that plaintiff’s objection to immunization has not been proven to be based on her religious beliefs. We note particularly, as did the district court, evidence that plaintiff never described her religious beliefs as the basis for her refusal to immunize to her son’s pediatricians, her lack of forthrightness in answering the questions of the superintendent and the district court about the basis for her objections, and the changing nature of her objections over the course of this litigation. While we recognize that religious beliefs may develop over time and that people may transgress religious beliefs that are nonetheless sincerely held, the record in this case suggests to us that plaintiff does not in fact hold religious objections to immunization, and we find no basis to disturb the district court’s findings on this question. We further hold that this analysis does not run afoul of the fine line between the constitutionally permissible inquiry into the sincerity of beliefs and the unconstitutional assessment of the objective truthfulness of those professed beliefs.

Id. at 819 (internal citations omitted).

Shakur v. Selsky, 391 F.3d 106 (2d Cir. 2004) (joined by Sotomayor):

The plaintiff-prisoner was denied the opportunity to attend the religious Eid ul Fitr feast and claimed that the denial violated both the Free Exercise Clause and RLUIPA. The district court had “held that ‘[p]laintiff’s missing of a single religious feast simply does not amount to a ‘substantial burden’ on his religious exercise.’” *Id.* at 120. The appellate panel reversed, relying on its recent decision in *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003). In *Ford*, the court “explained that Eid ul Fitr ‘is one of two major religious observances in Islam.’ [It] then stated that [it] ‘would be inclined to hold ... that Ford has established a substantial burden as a matter of law.’” 391 F. 3d at 120. Accordingly, the panel found that the plaintiff had stated a Free Exercise and RLUIPA claim and overturned the district court’s decision to dismiss the plaintiff’s case.

Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006) (Sotomayor, dissenting):

In this case, a former clergy member who was forced into retirement at age 70 brought an age-discrimination case under the Age Discrimination in Employment Act (ADEA). The district court dismissed the case based on the “ministerial exemption,” holding that the Free Exercise Clause of the U.S. Constitution bars civil rights laws from governing “church employment relationships with ministers.” *Id.* at 100. On appeal, the majority held there was no need to decide the “ministerial exemption” question, because the issue could be resolved by applying the Religious Freedom Restoration Act (RFRA). It thus remanded the case to the district court for determination whether application of the ADEA in this case violates RFRA.

Judge Sotomayor concluded that RFRA was irrelevant to the dispute. First, she concluded that the defendants had waived a RFRA defense. Second, she reasoned that “RFRA by its own terms does not apply to suits between private parties” because “[t]wo provisions of the statute implicitly limit its application to disputes in which the government is a party.” *Id.* at 114. She concluded that the court should have simply upheld the lower court’s opinion because “courts may not adjudicate employment discrimination lawsuits brought by clergy members challenging a religious body’s refusal to select or retain them as spiritual leaders.” *Id.* at 118 n.13. She argued, however, that this conclusion was not based upon finding a “ministerial exemption” grounded in the Constitution that bars adjudication of ministerial employment disputes. *Id.* Instead, she applied “principles of statutory construction so as to avoid making definitive pronouncements on the constitutional question.” *Id.* She interpreted the ADEA as not applying to ministerial decisions because the ADEA would otherwise violate the Establishment Clause’s prohibition against excessive entanglement between secular and religious authorities. *Id.* at 116–18.

U.S. District Court for the Southern District of New York Cases

Flamer v. City of White Plains, 841 F. Supp. 1365 (S.D.N.Y. 1993):

Rabbi Reuven Flamer sought to display a temporary, free-standing menorah in a city park during the eight days of Hanukkah. The city park, which is not adjacent to any government buildings, had been used for “a wide array of expressive” activities over the years, including demonstrations, rallies and vigils. *Id.* at 1368. In addition, a United Way sign was placed in the park for months at a time, and some fixed-but-temporary signs were up for days as part of festivals. Furthermore, Christmas trees had been donated and placed in the park during the holiday season. When Rabbi Flamer requested a permit to display his menorah, however, his request was rejected. Shortly after, the city council passed a resolution prohibiting the “fixed outdoor display of religious or political symbols in the City’s parks.” *Id.* at 1371.

Judge Sotomayor held that the park was a traditional public forum under the Free Speech Clause. Because the ban on religious and political fixed outdoor displays was a content-based restriction, the ban could survive only if it were justified by a compelling state interest. She rejected the city’s argument that the ban “was necessary to serve the compelling state interest of avoiding violations of the Establishment Clause of the First Amendment.” *Id.* at 1376. She conceded that “[i]solated religious displays on some public properties may indeed send a message of government endorsement of

religion, and I am, therefore, sympathetic to the City's concerns." *Id.* But she found that:

while the Establishment Clause concerns may warrant bans on religious displays on some public properties, such considerations do not provide a compelling justification for the City's Resolution because it applies to public parks not closely associated with the seat of government, and traditionally open to diverse public expressive activity, including private free-standing non-religious displays.

Id. at 1376. She held that the reasonable observer would understand that the messages sent by private religious fixed displays in the park are attributable to the private speaker and not the government. Thus, in this instance, no Establishment Clause violation would occur. In rare instances, however, "a public park may, in the mind of the public, be so intimately associated with the seat of government that it is viewed as a mere extension of the government. Thus, it is conceivable that private fixed religious displays in such parks could convey a mistaken impression of government sponsorship." *Id.* at 1381.

Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994):

The plaintiff-inmates were adherents of the Santeria religion who sought to wear Santeria beads for devotional purposes. The prison allowed the prisoners to possess the beads but prohibited the wearing of the beads, arguing that colored beads were widely used in the prison as a means of gang identification. The plaintiffs challenged the ban under the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause. Judge Sotomayor held that RFRA "plainly applies to inmate claims challenging prison rules which substantially burden their free exercise of religion, and requires that any such rule be in furtherance of a compelling interest and be the least restrictive means to secure the government objectives." *Id.* at 206. Under this test, she found that banning all Santeria beads was not the "least restrictive means" of achieving the compelling interest of prison safety because the inmates could easily wear the religious beads under their shirts so that their colors would not be revealed.

Judge Sotomayor then examined the plaintiffs' claim under the Free Exercise Clause. She held that "the Supreme Court's *Smith* decision would not have dictated the standard applicable to the regulation. Instead, the *O'Lone/Turner* standard . . . would have governed." *Id.* at 205 n.8. Under the *O'Lone/Turner* standard, "the appropriate gauge of constitutionality of prison rules as a burden on an inmate's religious freedom is whether the regulation is 'reasonably related to legitimate penological interests.'" *Id.* at 206 (internal citations omitted). Because the "Santeria beads under clothing will not eradicate or significantly minimize attempts at individual affiliation or gang violence," Judge Sotomayor held that the ban on the beads "is not a reasonable response to the concerns the defendants assert." *Id.* at 211.

Judge Sotomayor also rejected the Department of Corrections' claims that the prisoners lacked sincerely held religious beliefs that compelled them to wear the beads. She rejected the argument that the prisoners were not truly adherents of Santeria because they had originally identified themselves to the prison as "Christian" and "Catholic." And

she rejected the claim that the belief is not sincere because not all adherents of Santeria wear the beads. She explained:

The fact that plaintiffs may practice Santeria in a manner distinct from other practitioners is not, in and of itself, grounds for challenging the genuine character of their religious tenets. Whether the plaintiffs represent a minority of Santeria practitioners is of no concern for this Court may not discern the propriety of religious practices, but merely the sincerity of plaintiffs' religious beliefs.

Id. at 210 n.13.

Rodriguez v. Coughlin, 1994 WL 174298 (S.D.N.Y. May 4, 1994):

Decided the day after *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994), Judge Sotomayor held that two other plaintiff-prisoners could wear religious beads under their clothing. She based her decision on the reasoning set forth in *Campos*.

Moore v. Kennedy, 1996 WL 452279 (S.D.N.Y. Aug. 8, 1996):

The plaintiff-prisoner was disciplined for possessing contraband by being placed in "keeplock" for 26 days. After his release, the prisoner filed suit, claiming that the deprivation of a vegetarian diet while in keeplock violated the Constitution, including the Free Exercise Clause. Judge Sotomayor rejected this claim. She explained:

"[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Kahane v. Carlson*, 527 F.2d 492, 495 n.4 (2d Cir. 1975). In *Kahane*, the Second Circuit upheld the First Amendment right of an Orthodox Jewish prisoner to eat kosher meals. *Id.* at 495-96. This result, however, depended upon the "deep religious significance" of obedience to kosher dietary laws, which the Court described as "an important, integral part of the covenant between the Jewish people and the God of Israel." *Id.* at 495. Here, a religious purpose underlying Moore's vegetarianism cannot be inferred from the record, and Moore has failed to proffer evidence sufficient to sustain a constitutional dietary claim. See *Benjamin v. Coughlin*, 905 F.3d 571, 580 (2d Cir. 1990) (affirming dismissal of a religious dietary claim brought by Rastafarian prisoners who "failed to clearly define the claim or to make the [required] evidentiary showing.")

Id. at *2.

Mehdi v. United States Postal Service, 988 F. Supp. 721 (S.D.N.Y. 1997):

The plaintiffs were two Muslims who objected to the fact that some post offices displayed Christmas trees and Hanukkah menorahs in their winter holiday displays, but

did not include symbols to recognize the Muslim celebrations also taking place. In particular, the plaintiffs challenged a Postal Service policy that allowed the display of “an evergreen tree bearing nonreligious ornaments” and “menorahs (when displayed in conjunction with other seasonal matter).” *Id.* at 729. The plaintiffs sought an injunction that would have ordered the Postal Service to display the Muslim crescent and star along with the Christmas and Hanukkah symbols, or, in the alternative, to remove the Christmas and Hanukkah symbols from the holiday displays.

In addressing the Establishment Clause claim, Judge Sotomayor applied the endorsement test, stating that “the endorsement test is the law of this circuit, however tenuous its status might be at the Supreme Court level.” *Id.* at 728-29. Relying on *Allegheny v. ACLU*, 492 U.S. 573 (1989), she concluded that a policy that allowed decorated evergreen trees and menorahs with other seasonal displays was not, on its face, unconstitutional. She noted, however, that “whether the policy is constitutional in *all* cases is impossible to determine; one can certainly imagine a case in which the ‘other seasonal matter’ displayed with a menorah served to enhance the religious aspects of the menorah rather than diminish them.” *Mehdi*, 988 F. Supp. at 729.

A footnote in the *Mehdi* ruling raised the issue of standing – the right to sue. In footnote 6, Sotomayor wrote that the Muslim plaintiffs’ allegations that they were offended by the holiday displays was not enough to confer standing. The plaintiffs, she said, had no legal right to challenge what she called the “purely dignitary harm of the USPS’s alleged favoring of other religions over Islam.” 988 F. Supp. at 727 n.6. It is unclear from this footnote whether Judge Sotomayor reached this conclusion because she rejected the well-recognized standing doctrine that allows Establishment Clause plaintiffs to challenge displays with which they have come in contact or whether she did not consider this type of standing because the plaintiffs had not actually alleged viewing any of the challenged displays. Ultimately, she found that the plaintiffs did have standing, however, “as taxpayers to challenge government expenditures, made pursuant to Congress’s taxing and spending power.” *Id.*