

2015

# Justice Sonia Sotomayor

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## Recommended Citation

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## I. BIOGRAPHY

Justice Sonia Sotomayor was born on June 25, 1954 in the Bronx.<sup>1</sup> Her mother, Celina, was previously enlisted in the Women’s Army Corps as non-combat personnel, a position that brought her from Puerto Rico to the United States mainland.<sup>2</sup> At the time of Justice Sotomayor’s birth, her mother had recently completed the General Education Development (GED) test and was working as a telephone operator at Prospect Hospital in the South Bronx.<sup>3</sup>

Justice Sotomayor’s father, Juan, was also a Puerto Rican who migrated to the mainland during the war.<sup>4</sup> He worked in a tool-and-die factory, did not speak English, and only had a third-grade education.<sup>5</sup>

Shortly after Justice Sotomayor’s birth, her mother began studying to be a licensed practical nurse (LPN), and her parents made plans to move out of their tenement apartment into a public housing project in the Bronx.<sup>6</sup> At age 3, Justice Sotomayor and her parents moved into the Bronxdale Houses, a housing project in the Soundview section of the South Bronx.<sup>7</sup> Justice Sotomayor recalls the newly constructed housing project as the cleanest apartment she had ever seen, and she was overwhelmed that it would be her new home.<sup>8</sup> At the time, housing projects like the one that Justice Sotomayor had just moved into were respectable working-class homes that were well-kept, affordable, spacious, and family friendly.<sup>9</sup>

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<sup>1</sup> ANTONIA FELIX, SONIA SOTOMAYOR THE TRUE AMERICAN DREAM (The Berkley Publishing Group 2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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At around the same time Justice Sotomayor's family moved into this housing project, her younger brother, Juan Luis Jr. was born.<sup>10</sup> At this time, her mother was now working as an LPN at Prospect hospital.<sup>11</sup> Justice Sotomayor described her mother as strongly self-motivated, and she taught Justice Sotomayor and her brother that education could allow you to accomplish any dreams.<sup>12</sup>

Justice Sotomayor's parents did not want to send their children to public school, so both Justice Sotomayor and Juan Jr. went to Blessed Sacrament, an excellent private school near their home.<sup>13</sup> In order to afford this, Celina worked extra hours at the hospital.<sup>14</sup>

During the weekends, Justice Sotomayor spent a lot of time with her extended family.<sup>15</sup> Her cousins, aunts and uncles would often meet in the home of her paternal grandmother to enjoy Puerto Rican dishes, play games, and dance. Justice Sotomayor recalls that her "Latina soul was nourished."<sup>16</sup> Her family would also picnic on the Long Island Sound and attend Yankee games.<sup>17</sup>

At age 8, Justice Sotomayor was diagnosed with type 1 diabetes.<sup>18</sup> Prior to her diagnosis, diabetes often made Justice Sotomayor tired, quiet and uninterested in school.<sup>19</sup> Once diagnosed, the treatment improved her lifestyle and changed her behavior greatly, allowing her to feel like a child.<sup>20</sup> However, at that time, diabetes was thought to

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 18.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

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lower life expectancy and lead to other health problems.<sup>21</sup> This discouraged Justice Sotomayor and deeply impacted her approach to her goals as a young adult.<sup>22</sup>

A year after Justice Sotomayor's diabetes diagnosis, her father, at age forty-two, died from a heart attack.<sup>23</sup> After Juan's death, Celina moved the family into a smaller apartment in the same housing project.<sup>24</sup> Her mother was stricter with the children and would not allow Justice Sotomayor to play with friends until after her homework and chores were done.<sup>25</sup> Justice Sotomayor enjoyed reading *Nancy Drew* books and wanted to become a detective.<sup>26</sup> However, she was told that this career would be too strenuous for someone with diabetes.<sup>27</sup> Even at age eight, Justice Sotomayor was disappointed and upset that she did not have an established career plan.<sup>28</sup> She began watching *Perry Mason*, and she became inspired to become a lawyer.<sup>29</sup> Justice Sotomayor has said, "I was going to college and I was going to become an attorney, and I knew that when I was ten."<sup>30</sup> While watching *Perry Mason*, Justice Sotomayor was especially impressed with the Judge's role, and she liked how the judge had the power to dismiss a case and how the lawyers had to ask to judge for permission to do anything.<sup>31</sup>

Sometimes, Justice Sotomayor would spend her days in a sweatshop with her aunt.<sup>32</sup> Her aunt was a seamstress, and Justice Sotomayor would go to work with her

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<sup>21</sup> SONIA SOTOMAYOR, MY BELOVED WORLD (Alfred A. Knopf 2013).

<sup>22</sup> Felix, *supra* 1, at 19.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 22.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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when no one else was available to baby sit.<sup>33</sup> She said that she would be confined in a room with blacked out windows and little ventilation, and her aunt would chase her away from the windows because, unaware to her at time, the undocumented seamstresses were hiding from the police.<sup>34</sup>

During the 1960's, the South Bronx grew into a more dangerous place.<sup>35</sup> Justice Sotomayor would often have to protect her younger brother from bullies, muggers and bike thieves.<sup>36</sup> Her brother recalls her as watching over her, being very strong willed and confident and "tough as nails."<sup>37</sup> Around this time, Justice Sotomayor began working her first part time job at Zaro's Bakery, which was about 10 blocks from her home.<sup>38</sup> At age fifteen, she began working at a large retail store called United Bargains.<sup>39</sup> Commuting around the Bronx became more dangerous with armed gangs and drug dealers.<sup>40</sup> By the end of the 1960's, the Bronxdale Houses became an unsafe place to live, and Celina began looking for a new place to move her family.<sup>41</sup>

Justice Sotomayor finished the eighth grade with the highest grades in her class. She took the Catholic High School entrance exam and enrolled at Cardinal Spellman High School in 1968.<sup>42</sup> It was one of the top high schools in the city and was located about five miles north of the Bronxdale houses.<sup>43</sup> At this time, the school was

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 25.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

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approximately 90% white.<sup>44</sup> Justice Sotomayor earned a reputation as one of the top scholars at the school.<sup>45</sup>

In the end of 1970, the worsening condition of the South Bronx reached a peak.<sup>46</sup> Gang violence and drugs were out of control, and landlords were burning down tenements and apartment buildings in order to collect insurance money.<sup>47</sup> Celina moved her family to Co-op City, a new project in the northeast section of the Bronx, which had opened two years earlier.<sup>48</sup> This was considered a middle class section of New York, and Celina bought a two bedroom apartment.<sup>49</sup> From her new home, Justice Sotomayor had a fifteen minute bus ride to Cardinal Spellman High School<sup>50</sup>

While Justice Sotomayor was a junior in high school and her brother was a freshmen, Celina decided she needed to become a registered nurse in order to support herself in the future.<sup>51</sup> She enrolled in the RN program at Hostos Community College in the South Bronx.<sup>52</sup> As a result of Celina's enrollment in school, she could not work as many hours at the hospital.<sup>53</sup> In order to make up for the lost income, Justice Sotomayor and Juan spent more hours working on weekends and during summer vacations, and Justice Sotomayor also began working at the hospital.<sup>54</sup> Celina also spent more time working on the weekends, but still had to take out loans and depend on the part time jobs

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

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of her children for help.<sup>55</sup> Justice Sotomayor said that it was no sacrifice for her at all to take on extra work in order to help her mother go back to school.<sup>56</sup>

While working at the hospital, Justice Sotomayor was exposed to the extremely poor population that the hospital catered to.<sup>57</sup> It taught her about the suffering that went on in the city and how hard her mother had to work to move the family from the South Bronx.<sup>58</sup>

During Justice Sotomayor's senior year of high school, she participated in school government and the debate team.<sup>59</sup> She also met Kevin Noonan, another student who was known for being very smart and having a bright future.<sup>60</sup> Although Justice Sotomayor now had a boyfriend, she did not let this distract her from her classes, debate meets or work with the Latino organization ASPIRA.<sup>61</sup>

In 1972, Justice Sotomayor graduated high school and delivered the valedictory address after winning a speech competition, as opposed to holding the highest grade in the class.<sup>62</sup> Justice Sotomayor left the Bronx to attend Princeton University but she explains that the media is "woefully misleading" when it describes her as coming from "humble beginnings."<sup>63</sup> She explains "that despite economic hardship, it was not hard [...] to succeed because [she] had the example and guidance of a truly remarkable woman, [her] mother."<sup>64</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 34.

<sup>64</sup> *Id.* at 34.

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Justice Sotomayor acknowledges that she was accepted into Princeton University based on affirmative action, but her entering class of only 1,127 included only 22 Latino, 15 Chicano, and 113 black students.<sup>65</sup>

Justice Sotomayor recalls secluding herself in the dorm room during her early weeks at Princeton and being both overwhelmed and confused by her new surroundings.<sup>66</sup> Justice Sotomayor also struggled with academics at first.<sup>67</sup> During her first semester, she received a C on a midterm paper, and she realized her writing was not good.<sup>68</sup> Justice Sotomayor recalls that although she always excelled in her academic work prior to Princeton, her education did not compare to her colleagues, and she felt a huge divide between herself and her WASP counterparts.<sup>69</sup> Justice Sotomayor worked closely with all of her professors to close that gap, and improve her writing and grammar skills and reading comprehension.<sup>70</sup> Eventually, her motivation produced great results, and she began writing better and gaining confidence in herself.<sup>71</sup>

Eventually, she joined the Puerto Rican student organization, Acción Puertorriqueña, and an activity center for minority groups called Third World Center.<sup>72</sup> Justice Sotomayor says that these groups helped her to remain grounded in the unfamiliar environment.<sup>73</sup>

Justice Sotomayor became cochair of Acción Puertorriqueña, and in 1974, she decided to file a complaint with the Department of Health, Education and Welfare

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

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(HEW) charging Princeton with a lack of commitment to hiring Puerto Rican and Chicano administrators and faculty and recruiting Puerto Rican and Chicano students.<sup>74</sup> The complaint said that Princeton's affirmative action plan did not specify goals which were provided for other minority groups, that their attempts to recruit qualified Latinos consisted of contacts with only one foundation and one Chicano student, that Princeton did not even try to contact Latino organizations, and that no Princeton course focused on Puerto Rican or Chicano culture.<sup>75</sup> Originally, Justice Sotomayor felt that Princeton was "following a policy of benign neutrality."<sup>76</sup> However, a month later, Justice Sotomayor followed up with a letter to the *Daily Princetonian*, and alleged that Princeton had an institutional pattern of racism.<sup>77</sup>

Following the complaint, Princeton authorized a new class on Puerto Rican history and politics and made more efforts to recruit Latino faculty.<sup>78</sup> While at Princeton, Justice Sotomayor also started a program for students to volunteer as translators at the Trenton Psychiatric Hospital so that Spanish-speaking patients could communicate with doctors and staff.<sup>79</sup>

During her senior year, Justice Sotomayor wrote her senior thesis on Luis Muñoz Marín, former leader of the Popular Democratic Party in the Puerto Rican senate and the first elected governor of Puerto Rico, and the consideration of Puerto Rican independency.<sup>80</sup> Her thesis received an honorable mention from the History

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 46.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

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Department.<sup>81</sup> She was also awarded the M. Taylor Pyne Prize, which is given to one or two seniors each year who show excellence in academics, leadership and being a responsible citizen.<sup>82</sup>

During the summer of 1976 after her graduation from Princeton, Justice Sotomayor married her high school boyfriend, Kevin Noonan.<sup>83</sup> That fall, he began working on a Ph.D. in molecular biology at Princeton, and she headed to Yale Law School.<sup>84</sup> They ultimately divorced.<sup>85</sup>

At Yale Law School, Justice Sotomayor cochaired a club called the Latin, Asian, and Native American Students Association (LANA).<sup>86</sup> Justice Sotomayor was part of a diverse group of friends, and she recalls that, “We worked hard, we studied hard, we partied very hard.”<sup>87</sup>

During her second year at Yale, Justice Sotomayor worked as a salesperson at the Graduate-Professional Student Center on campus.<sup>88</sup> Thereafter, she was a summer associate at Paul, Weiss, Rifkind, Wharton & Garrison.<sup>89</sup> During her third year, she worked in the law school’s mimeo room.<sup>90</sup>

Also during her third year, Justice Sotomayor attended a recruiting dinner held by the Washington law firm, Shaw, Pittman, Potts & Trowbridge.<sup>91</sup> During the dinner, a partner from the firm asked her a series of questions about minorities and their credentials

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 60.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

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to work in firms and affirmative action.<sup>92</sup> Justice Sotomayor found these questions to be discriminatory, and she filed a complaint against the firm and urged Yale to terminate the firm from their recruiting program.<sup>93</sup> Ultimately, the firm wrote an apology letter to Yale Law School because word had spread to other law schools and began to mar the firm's reputation.<sup>94</sup>

After graduating from Yale Law School in 1979, Justice Sotomayor worked as an Assistant District Attorney in New York City until 1984.<sup>95</sup> As a prosecutor, Justice Sotomayor said that she would not prosecute a case she didn't believe in, and she always had an impulse to keep both sides in mind.<sup>96</sup> She thereafter worked as an associate and partner at Pavia and Harcourt in Manhattan until 1992.<sup>97</sup> During her first few days on the job, Justice Sotomayor overheard another litigation associate refer to her as "one tough bitch."<sup>98</sup>

In 1991, President George H.W. Bush nominated her to the U.S. District Court for the Southern District of New York, where she served from 1992 until 1998.<sup>99</sup> She was the first Hispanic person to be appointed to the federal bench in New York.<sup>100</sup> President Bill Clinton nominated her to the United States of Appeals for the Second Circuit, where she served from 1998 until 2009.<sup>101</sup> On May 26, 2009, President Barack Obama nominated

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES (November 26, 2014), <http://www.supremecourt.gov/about/biographies.aspx>.

<sup>96</sup> Sotomayor, *supra* at 21

<sup>97</sup> *Biographies of Current Justices of the Supreme Court*, *supra* at 95.

<sup>98</sup> Sotomayor, *supra* at 21, at 261.

<sup>99</sup> *Biographies of Current Justices of the Supreme Court*, *supra* at 95.

<sup>100</sup> CNN Library, *Sonia Sotomayor Fast Facts*, CNN (June 19, 2014), <http://www.cnn.com/2013/03/08/us/sonia-sotomayor-fast-facts/>

<sup>101</sup> Peter Hamby, Ed Henry, Suzanne Malveaux and Bill Mears, *Obama nominates Sonia Sotomayor to Supreme Court*, CNN (8:26 p.m. May 26, 2009),

<http://www.cnn.com/2009/POLITICS/05/26/supreme.court/>

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her as an Associate Justice of the Supreme Court.<sup>102</sup> Democrats unanimously supported her confirmation;<sup>103</sup> however, she particularly faced criticism from Republicans for a comment she made in 2001 at a lecture at the University of California, Berkeley where she said “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”<sup>104</sup> Nonetheless, on August 6, 2009 she was confirmed as a Justice of the Supreme Court by a 68-31 vote.<sup>105</sup> She was sworn in August 8, 2009, and she became the first Hispanic and the third woman to serve on the Supreme Court.<sup>106</sup>

## **II. JUSTICE SOTOMAYOR’S JURISPRUDENCE: CANDID, FACT-SPECIFIC, NARROW, FAIR AND FORWARD LOOKING**

Justice Sotomayor’s personal experiences and legal career prior to becoming a Justice have both influenced her opinion writing and decision-making. Justice Sotomayor recognizes the effects that a Justice’s personal experiences may have on his or her viewpoints. In reference to her fellow Justices, she has pondered, “What’s the human experience that they’ve had that has led them to some of the choices that they made in our jurisprudence?”<sup>107</sup> Specifically, in reference her and Justice Scalia’s differing opinions, she has pointed out that,

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<sup>102</sup> *Biographies of Current Justices of the Supreme Court*, *supra* at 95

<sup>103</sup> *Id.*

<sup>104</sup> Charlie Savage, *A Judge’s View of Judging Is on the Record*, THE NEW YORK TIMES (May 14, 2009), [http://www.nytimes.com/2009/05/15/us/15judge.html?\\_r=0](http://www.nytimes.com/2009/05/15/us/15judge.html?_r=0)

<sup>105</sup> Lisa Desjardins, Kristi Keck and Bill Mears, *Senate confirms Sonia Sotomayor for Supreme Court*, CNN (6:40 p.m. August 6, 2009), <http://www.cnn.com/2009/POLITICS/08/06/sonia.sotomayor/index.html?iref=topnews>.

<sup>106</sup> Charlie Savage, *Sotomayor Sworn In as Supreme Court Justice*, THE NEW YORK TIMES (August 8, 2009) <http://www.nytimes.com/2009/08/09/us/politics/09sotomayor.html>.

<sup>107</sup> Interview by Linda Greenhouse with Justice Sonia Sotomayor, James A. Thomas Lecture at Yale Law School (February 3, 2014).

[i]t's a simple fact that he advertises repeatedly: Justice Scalia in high school used to carry his rifle on the train to go do his rifle club things. Sorry, target shooting and stuff. He and I both come from a city, but his views of the Second Amendment have been very different than mine. Our experiences on the same issue were very different, and knowing that fact about him has given me an insight into where his well of passion springs from. And it's not useful on outcomes, necessarily. It is useful in knowing what cases to take or not take for cert, and how to vote, when you're reviewing cases. And thinking about what the possible outcomes are.<sup>108</sup>

Furthermore, Justice Sotomayor finds importance in sharing these personal experiences.<sup>109</sup> "I hope my candor about myself as a person would permit others to be more introspective about themselves and more hopeful about themselves."<sup>110</sup> She also urges involvement from society, "participate, find your nook. You don't have to be a lawyer, but you have to be an involved person. You have to care enough about things to do something about them... What you cannot do is ignore things."<sup>111</sup> Justice Sotomayor's desire for everyone to have a fair chance, a voice, and her focus on facts is evident in her opinion writing.

Her experience as a prosecutor also taught her to form rules of law and decide cases on a very fact specific basis.<sup>112</sup> "[B]road absolute rules don't really suit me," she has stated, because while prosecuting criminals, she learned to be very sensitive to facts in order to preserve the record so that that her prosecutorial victories would not be

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

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reversed.<sup>113</sup> Additionally, Justice Sotomayor likes to make fact specific rulings because she is always looking to the future and weary of how a holding may impact future cases.<sup>114</sup>

She also focuses on fairness when deciding a case. She has pointed out that “[she] can’t control the outcomes of cases,” but she “can live with that if [she] perceives the process to be fair.”<sup>115</sup>

### **A. Majority Opinions**

Justice Sotomayor authored the majority opinion in *J.D.B. v. North Carolina*.<sup>116</sup> In that case, the Court had to decide whether police should consider a suspect’s age in determining whether their questioning warrants the Miranda warning, which is required only during a custodial interrogation.<sup>117</sup> Whether a suspect is in custody in an objective inquiry and requires an examination of the circumstances surrounding the interrogation and whether a reasonable person would feel free to end the interrogation and leave.<sup>118</sup>

The petitioner, J.D.B. was a 13-year-old seventh grader who was removed from his classroom by a uniformed police officer, taken to a closed-door conference room, and questioned by the police for 30 to 45 minutes.<sup>119</sup> The school’s assistant principal and administrative intern were also present.<sup>120</sup> This was the second time that the student was being questioned within the span of a week in connection with two home break-ins because he was seen behind one of the homes where the crimes occurred, and police found one of the stolen items, a digital camera, in the school, and it had been seen in

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> 131 S. Ct. 2394 (2011).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (citing *Thompson v. Keohane*, 115 S. Ct. 457 (1995)).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

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J.D.B.'s possession.<sup>121</sup> Before his questioning in the school, neither the police nor the school administrators contacted J.D.B.'s guardian, his grandmother.<sup>122</sup> He was not given a *Miranda* warning or the opportunity to speak with his grandmother.<sup>123</sup>

The police officer confronted J.D.B. about the stolen camera, and the assistant principal urged him to "do the right thing."<sup>124</sup> The officer told J.D.B. that he could be sent to juvenile detention, and he confessed to the break-ins.<sup>125</sup> Thereafter, the officer informed J.D.B. that he could refuse to answer questions and that he was free to leave.<sup>126</sup> However, J.D.B. continued to provide further information about the crime.<sup>127</sup>

After J.D.B. was charged with two juvenile petitions alleging breaking and entering and larceny, his public defender moved to suppress his statements because he was "interrogated by police in a custodial setting without being afforded *Miranda* warning[s]."<sup>128</sup> At the suppression hearing, the trial court denied the motion, and the North Carolina Court of Appeals and the North Carolina Supreme Court both affirmed, holding that J.D.B. was not in custody when he confessed.<sup>129</sup> These courts did not find that age should be a factor when considering whether or not a suspect is in custody.<sup>130</sup>

The Supreme Court disagreed and remanded the case for the state courts to determine whether J.D.B. was in custody, this time considering his age at the time.<sup>131</sup> In her majority opinion, Justice Sotomayor recognized the inherent pressures of custodial

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 2399.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 2400.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

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interrogation, but emphasized the issue when it came to juveniles. “A reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.”<sup>132</sup> She argued that this commonsense conclusion should be “self evident to anyone who was a child once himself, including any police officer or judge.”<sup>133</sup> She pointed out that the law takes age into consideration in many different areas and explained, “that children cannot be viewed simply as miniature adults.”<sup>134</sup> The Court held that “so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.”<sup>135</sup>

In her opinion, Justice Sotomayor faced the question head on and rejected the idea that taking a child’s age into consideration would taint the objectivity of the custody test used for administering a *Miranda* warning. Much of her opinion is focused on the idea that children, far more so than adults, are subject to the psychological and physical pressures of a custodial isolation. Justice Sotomayor’s personal experiences shine through in the opinion because she, as a young person, often felt isolated. After she was first diagnosed with diabetes, Justice Sotomayor recalls being withdrawn and quiet.<sup>136</sup> Additionally, she remembers being confined in a sweatshop while her seamstress aunt babysat her, and she was too naïve to realize that she was disallowed from going near the windows because the undocumented workers were hiding from the police.<sup>137</sup> Similarly,

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<sup>132</sup> *Id.* at 2403.

<sup>133</sup> *Id.* at 2403.

<sup>134</sup> *Id.* at 2404.

<sup>135</sup> *Id.* at 2406.

<sup>136</sup> Felix, *supra* at 1.

<sup>137</sup> *Id.*

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although she was a young adult at the time, Justice Sotomayor felt very isolated when she first entered Princeton University.<sup>138</sup> It is clear that, as Justice Sotomayor mentioned in her opinion, these memories from her childhood and younger years influenced her decision that children do not have the confidence or maturity to protect themselves when an adult normally would. This is in line with Justice Sotomayor's introspective and candid judicial approach.

Justice Sotomayor also wrote the majority opinion in *Matrixx Initiatives, Inc. v. Siracusano*.<sup>139</sup> In that case, the Court had to decide whether a plaintiff can bring a claim for securities fraud under § 10(b) of the Securities Exchange Act of 1934 and Securities Exchange Commission Rule 10b-5 when a pharmaceutical company failed to disclose reports of adverse events associated with a product when the reports did not find a statistically significant number of adverse events.<sup>140</sup>

Investors in Matrixx Initiatives, Inc. brought a class action suit against the company alleging that Matrixx, in violation of § 10(b) of the Securities Exchange Act and SEC rule 10-b(5), did not disclose that Zicam, a cold remedy medication that earns the corporation 70% of its profit, may cause a patient to lose her sense of smell.<sup>141</sup> There were reports from three medical professionals and researchers about more than 10 patients who lost their sense of smell after using Zicam and one patient who experienced severe burning in his nose followed immediately by loss of sense of smell.<sup>142</sup> Furthermore, two consumers had already sued Zicam for that same reason.<sup>143</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> 131 S. Ct. 1309 (2011).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

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Nonetheless, Martixx issued statements that Zicam was “poised for growth in the upcoming cold season” and that the company “had very strong momentum.”<sup>144</sup> They also predicted that revenues would be up in excess of 50% and that earnings per share would be about 25 to 30 cents.<sup>145</sup>

After Dow Jones Newswires reports that the Food and Drug Administration was looking into complaints about cold medicine manufactured by Matrixx, the stock fell from \$13.55 to \$11.97 per share.<sup>146</sup> However, three days later, Matrixx issued a press release stating that Zicam is manufactured and marketed according to FDA guidelines and that there has been no clinical trial with a single report of Zicam causing a loss of smell.<sup>147</sup> The stock thereafter increased to \$13.40 a share.<sup>148</sup> However, three days later, Good Morning America reported on a study where more than one dozen patients lost their sense of smell after using Zicam.<sup>149</sup> The price for Matrixx fell to \$9.94 per share.<sup>150</sup>

In order to prove their allegations, the investors had the burden to show that there was a material misrepresentation or omission by the corporation, that there was scienter, that there was a connection between the misrepresentation or omission and the purchase of the security, that there was reliance on the misrepresentation or omission, that there was economic loss and that there was loss causation.<sup>151</sup> Matrixx argued that the investors failed to prove both that there was any material misrepresentation or omission and that there was scienter.<sup>152</sup> Matrixx argued for bright-line rule that would find that their

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<sup>144</sup> *Id.* at 1316.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

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omission was not material because the number of patients who lost their sense of smell was not statistically significant.<sup>153</sup>

The District Court ruled in favor of Matrixx and found that the plaintiffs failed to plead the elements of a material misstatement or omission and scienter.<sup>154</sup> They found that the plaintiffs did not allege a “statistically significant correlation between the use of Zicam and anosmia so as to make failure to public[ly] disclose complaints and the ... study a material omission.”<sup>155</sup> Similarly, they found that plaintiffs did not state with particularity facts that proved scienter. The Court of Appeals reversed.<sup>156</sup>

In affirming the Court of Appeals in a unanimous decision for the Court, Justice Sotomayor held that the plaintiffs adequately pleaded the element of a material misrepresentation or omission and found that there was scienter.<sup>157</sup> She rejected Matrixx’s bright line rule that a study must be statistically significant for it to be a material omission.<sup>158</sup> Instead, she found that “assessing the materiality of adverse events reports is a fact specific inquiry.”<sup>159</sup> She pointed out that “statistically significant data are not always available” because sometimes an adverse event is “subtle or rare” or ethical considerations prevent some studies that may find statistically significant data.<sup>160</sup> Furthermore, Justice Sotomayor found that there was scienter and rejected the inference that the Matrixx did not report the information because they did not know it was significant.<sup>161</sup> Instead, she pointed out that Matrixx likely did not report the information

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1317.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1321.

<sup>160</sup> *Id.* at 1319.

<sup>161</sup> *Id.*

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because they knew it would have a negative impact on their stock prices.<sup>162</sup> She explained that they must have known of the harmful effects of Zicam because they hired a consultant to review the product, asked a medical researcher to participate in animal studies, convened a panel of doctors and scientists in response to a presentation and study that Zicam was harmful and asked the presenter to refrain from using the corporations and product name in his presentation.<sup>163</sup>

First, this opinion is in line with Justice Sotomayor's style of opinion writing because she rejected a bright line rule that would use the statistically significant test in deciding whether or not an omission was material. Justice Sotomayor prefers a specific finding that looks at facts of the case instead. This is inline with the approach that she learned during her time in the District Attorney's office. Additionally, in her reasoning, Justice Sotomayor pointed out reasons why a bright line statistically significant test would not work.<sup>164</sup> In pointing out that such data is not always available to shareholders, she showed her appreciation for fairness and recognized that it would not be fair to require shareholders to allege statistically significant data when such data is not always possible.<sup>165</sup>

Justice Sotomayor also authored the majority opinion in *Mohawk Industries, Inc. v. Carpenter*.<sup>166</sup> In that case, the Court had to decide, "whether disclosure orders adverse to the attorney client privilege qualify for immediate appeal under the collateral order doctrine."<sup>167</sup> The collateral order doctrine gives federal courts of appeals jurisdiction to

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> 130 S. Ct. 599 (2009).

<sup>167</sup> *Id.* at 603.

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review prejudgment orders that are collateral to the merits of an action and too important to denied immediate review.<sup>168</sup>

In *Carpenter*, Norman Carpenter, a shift supervisor at Mohawk manufacturing facility, notified human resources that the company was employing undocumented immigrants.<sup>169</sup> The company directed him to meet with the company's counsel that they had retained for a pending class-action suit for conspiring to drive down the wages of its legal employees by hiring undocumented workers in violation of federal and state racketeering laws.<sup>170</sup> At the time, Carpenter was unaware of the pending class action suit.<sup>171</sup> After meeting with the counsel, Carpenter claimed that they tried to convince him to recant his statements, and after he refused, he was fired.<sup>172</sup>

During discovery in his lawsuit against Mohawk, Carpenter filed a motion to compel Mohawk to produce information about his meeting with their attorneys and the reasons for his termination.<sup>173</sup> Mowhawk refused, claiming that the requested information was protected by the attorney-client privilege.<sup>174</sup>

The District Court agreed that the information was privileged, but compelled its disclosure, finding that Mohawk waived the privilege through its representations in the pending class-action suit.<sup>175</sup> The court denied certification for an interlocutory appeal, but stayed its ruling so that Mohawk could explore other ways to appeal.<sup>176</sup> Thereafter, Mohawk filed a notice of appeal and a petition for a writ of mandamus to the Eleventh

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

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Circuit.<sup>177</sup> They dismissed for lack of jurisdiction, finding that the District Court's order did not qualify for immediate appeal under the collateral order doctrine.<sup>178</sup>

On appeal, the Supreme Court affirmed. In her majority opinion, Justice Sotomayor looked to the precedent *Cohen v. Beneficial Industrial Loan Corp.*<sup>179</sup> to explain that “an order is appealable if it (1) conclusively determines the disputed question; (2) resolves; and (3) is effectively unreviewable on appeal from final judgment.”<sup>180</sup> Justice Sotomayor pointed out that collateral appeals have an adverse effect on trial court efficiency and the administration of justice.<sup>181</sup> She found that the types of appeals permitted under the collateral order doctrine must remain narrow and selective, and that adverse attorney client privilege rulings did not fall into this category.<sup>182</sup>

This opinion is typical of Justice Sotomayor because it shows her preference for narrow rules since she did not want to expand the class of rulings that are eligible for a collateral appeal. This was also Justice Sotomayor's first opinion, and although this is not a major case for the Court, Justice Sotomayor used this opinion to her advantage because it is the first time that the Court used the term “undocumented immigrant” as opposed to “illegal immigrant” which appeared in many other opinions.<sup>183</sup> Although this is not part of her decision, it shows Justice Sotomayor's preference for everyone to get involved and have a voice. In her first opinion as a Supreme Court Justice, she took the opportunity to change a term that she presumably finds harmful to undocumented residents of the United States.

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> 546 S. Ct. 1221 (1947).

<sup>180</sup> *Mohawk*, 130 S. Ct. at 599 (quoting *Cohen*, 546 S. Ct. 1221).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Adam Liptak, *Sotomayor Draws Retort From a Fellow Justice*, THE NEW YORK TIMES (December 8, 2009), <http://www.nytimes.com/2009/12/09/us/09sotomayor.html>.

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Justice Sotomayor also wrote the majority opinion in *Michigan v. Bryant*,<sup>184</sup> where the Court had to decide whether the Confrontation Clause barred the admission at trial of a shooting victim's statements to police.<sup>185</sup> Police were dispatched to a gas station in Detroit where they found Anthony Covington lying on the ground next to his car with a gunshot wound to his abdomen.<sup>186</sup> He was in great pain and barely able to speak.<sup>187</sup> When the police asked him what happened, who shot him and where the shooting occurred, he told police that "Rick" shot him about 25 minutes prior at Richard Bryant's house through the door of the home after they had a conversation.<sup>188</sup> Mr. Covington was transported to the hospital where he died within hours.<sup>189</sup> After arriving at Mr. Bryant's house, the police found blood and a bullet on the back porch and a bullet hole in the door.<sup>190</sup> Mr. Covington's wallet and identification were also outside the home.<sup>191</sup> At Mr. Bryant's trial, the officers testified about what Mr. Covington told them before he died, and the jury found Mr. Bryant guilty of second degree murder, being a felon in possession of a firearm and possession of a firearm during the commission of a felony.<sup>192</sup>

Mr. Bryant argued that the statements to the police were testimonial and therefore inadmissible and the State argued that they were excited utterances, admissible under the Michigan Rules of Evidence.<sup>193</sup>

The Michigan Court of Appeals affirmed his conviction, and the Supreme Court of Michigan remanded the case back to the Court of Appeals, which again affirmed,

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<sup>184</sup> 131 S. Ct. 1143 (2011).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

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holding that the statements were not testimonial.<sup>194</sup> After Mr. Bryant appealed to the Supreme Court of Michigan again, they reversed his conviction.<sup>195</sup>

In Justice Sotomayor's majority opinion, the Court found that the statements were not testimonial because they had the primary purpose of assisting the police with an ongoing emergency.<sup>196</sup> Justice Sotomayor found that "objectively ascertaining the primary purpose of the interrogation by examining the statements and actions of all participants is ... most consistent with ... past holdings."<sup>197</sup> In order to reach the conclusion that the investigation's primary purpose was to assist with an ongoing emergency, she considered the fact that the police knew nothing about the shooting when they arrived at the scene, a gun was involved, the police were unsure if there was a greater threat to the general public and the informality of the interrogation.<sup>198</sup> This approach is consistent with Justice Sotomayor's preference for fairness and fact-specific holdings. She wanted to consider all the circumstances, presumably so that she could reach a fair result that was limited and relied only on the facts presented. Even though Justice Scalia dissented, he still found fairness in Justice Sotomayor's approach; "The only virtue of the Court's approach (if it can be misnamed a virtue) is that it leaves judges free to reach the "fairest" result under the totality of the circumstances."<sup>199</sup>

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1148.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 1170.

## B. Concurring Opinions

Justice Sotomayor wrote a concurring opinion in *U.S. v. Jones*.<sup>200</sup> In that case, the Court has to decide whether the attachment of a Global-Positioning-System (GPS) tracking device to a person's vehicle and the use of the device to track the vehicle's movement on public streets constituted a search or seizure under the Fourth Amendment.<sup>201</sup> The Government installed the GPS on the undercarriage of a car registered to Antoine Jones' wife while it was parked in a public lot.<sup>202</sup> The United States District Court for the District of Columbia issued a warrant that authorized the installation within 10 days because Jones was suspected of trafficking narcotics.<sup>203</sup> The Government tracked the car's movements for 28 days, and Jones was ultimately charged with conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base.<sup>204</sup>

Jones filed a motion to suppress, and the District Court granted the motion in part, suppressing only the data obtained while his vehicle was parked in the garage next to his residence.<sup>205</sup> They held that the data obtained at other locations was admissible because a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."<sup>206</sup> A jury found him guilty, and he was sentenced to life imprisonment.<sup>207</sup> The United States Court of Appeals for the District of Columbia Circuit reversed the conviction, finding that "the admission of the

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<sup>200</sup> 132 S. Ct. 945 (2012).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> 451 F.Supp.2d 71, 88 (2006) (quoting *U.S. v. Knotts*, 103 S.Ct. 1081 (1983)).

<sup>207</sup> *Jones*, 132 S. Ct. at 949.

evidence obtained by warrantless use of the GPS... violated the Fourth Amendment.”<sup>208</sup>

In a majority opinion written by Justice Scalia, the Supreme Court held that the Government’s installation of the device and the use of the device to track the car’s movements did constitute a “search.”<sup>209</sup> As opposed to focusing on a person’s reasonable expectation of privacy under the Fourth Amendment, Justice Scalia’s opinion focused on how the “Government trespassorily inserted the information gathering device.”<sup>210</sup> The physical trespass test for a search had not been used by the Court in recent years, but Justice Scalia found that the test was never eliminated either.<sup>211</sup> The “reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test.”<sup>212</sup> Furthermore, Justice Scalia found that the reasonable-expectation-of-privacy test could not be used in this case to affirm the Circuit Court’s reversal of the conviction because the Supreme Court already held in *U.S. v. Knotts*<sup>213</sup> that a person does not have a reasonable expectation of privacy when traveling on public roads.<sup>214</sup>

In her concurrence, Justice Sotomayor recognized that the Government’s physical intrusion on Jones’ Jeep constituted a search.<sup>215</sup> However, she found that “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”<sup>216</sup>

This concurrence is typical of Justice Sotomayor’s desire for fairness and her habit of looking into the future to assess how a current holding may have later impact.

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<sup>208</sup> *Id.* at 949.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 952.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 952.

<sup>213</sup> 103 S. Ct. 1081 (1983).

<sup>214</sup> *Jones*, 132 S. Ct. at 953.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 957

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Justice Sotomayor noted that the physical trespass test is not suited for today's technological advances because, for example, smartphones are now equipped with GPS devices that are installed either by the factory or by the owner, but may be used by police to track personal whereabouts.<sup>217</sup> She pointed out that this type of monitoring could expose a person's familial, political, professional, religious and sexual associations.<sup>218</sup> Despite established law that public movements are not subject to a reasonable expectation of privacy, Justice Sotomayor believes that this principle requires reconsideration because of fairness. In a discussion at Yale Law School, Justice Sotomayor stated that:

there are moments when you understand that the consequence of *stare decisis* so burdens another side, so unfairly deprives them of something that is really critical to the system that you're examining, that you have to decide to change existing precedent or else continue what you view as an injustice.<sup>219</sup>

Thus, although Justice Sotomayor respects current law, her goal to achieve fairness and her ability to foresee future problems with current Supreme Court holdings could outweigh even the doctrine of *stare decises*.

Justice Sotomayor also authored a concurring opinion in *Bullcoming v. New Mexico*, where the Court had to decide whether the introduction of a forensic laboratory report through the testimony of a scientist who did not perform or observe the test was a violation of the Confrontation Clause.<sup>220</sup>

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Sotomayor & Greenhouse, *supra* at 107.

<sup>220</sup> 131 S. Ct. 2705 (2011).

Donald Bullcoming was arrested for driving while intoxicated after he rear-ended another vehicle in Farmington, New Mexico.<sup>221</sup> He refused to take a Breathalyzer test, and the police thereafter obtained a search warrant for a blood alcohol analysis and sent the blood sample for analysis.<sup>222</sup> At trial, the prosecution called an analyst who was familiar with the laboratory's test procedures, but who did not participate or observe the testing on Bullcoming's sample.<sup>223</sup> The lab report also contained a testimonial certification, and the scientist who appeared in court with the forensic laboratory report was not the same scientist who signed the certification.<sup>224</sup> They could not call the analyst who actually performed the test because she was on unpaid leave for an unexplained reason.<sup>225</sup>

The New Mexico Supreme Court found that although the blood alcohol analysis was testimonial, it was not a constitutional violation because the testimony of the other analyst was enough to satisfy the requirements of the Confrontation Clause.<sup>226</sup> In a majority opinion written by Justice Ginsburg, the Supreme Court reversed.<sup>227</sup> They found that a testimonial out of court statement cannot be introduced at trial unless the witness who made the statement is unavailable and the accused was previously able to confront the witness.<sup>228</sup> The Court held that the forensic report was testimonial and that, in order to satisfy the Confrontation Clause, the prosecution would have to call the scientist who actually performed the test.<sup>229</sup>

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

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Justice Sotomayor wrote a concurrence where she agreed that the statements were testimonial and that their introduction violated the Confrontation Clause.<sup>230</sup> However, she wrote separately to emphasize the limited reach of the Court's opinion.<sup>231</sup> She emphasized what the case was not about.<sup>232</sup> She wanted to point out that this case was not about a situation in which, and the holding would not apply to a situation in which, the State suggested an alternate purpose for the forensic report, the person testifying was a supervisor, reviewer or someone else with even some connection to the forensic report, or an expert witness who was asked for an independent opinion about underlying testimonial report that were not themselves admitted into evidence.<sup>233</sup>

This concurrence keeps inline with Justice Sotomayor's preference for narrow and fact specific opinions. Although she agreed with the Court, she wanted to make sure that the limited reach of the opinion was clear. Additionally, it shows how Justice Sotomayor has an ability to look into the future and be weary of how a current holding may be read into future cases. She predicted that the three mentioned situations may be litigated using *Bullcoming* is precedent, and she wanted to make it clear that the holding did not apply.

### C. Dissenting Opinions

Justice Sotomayor authored a dissent in *Schuette v. Coalition to Defend Affirmative Action, et al.*<sup>234</sup> In that case, the Court had to decide whether an amendment to Michigan's constitution, which prohibited state universities from considering race in the admissions process, was invalid under the Equal Protection Clause of the Fourteenth

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> 134 S. Ct. 1623 (2014).

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Amendment to the United States Constitution.<sup>235</sup> This amendment was approved and enacted by Michigan voters.<sup>236</sup> The Coalition to Defend Affirmative Action, Integration and Immigrant Rights, Fight for Equality By Any Means Necessary (BAMN), and students, faculty, and prospective applicants to Michigan public universities challenged the amendment.<sup>237</sup> The District Court granted summary judgment to Michigan, and the Sixth Circuit Court of Appeals reversed the grant of summary judgment.<sup>238</sup>

In an opinion authored by Justice Kennedy, the Supreme Court reversed the Sixth Circuit and held that the Equal Protection Clause did not prohibit voters from enacting an amendment to the Michigan constitution that prohibited affirmative action in public education or employment.<sup>239</sup> The Court made sure to point out that they were in no way prohibiting affirmative action, but explained that voters in the States may opt out of using race as a consideration for admissions to public universities.<sup>240</sup> The Court distinguished this case from precedents that involved state laws that had the “serious risk, if not purpose, of causing specific injuries on account of race.”<sup>241</sup> The court found that, alternatively, this Michigan law just denied “the grant of favored status to persons in some racial categories and not other.”<sup>242</sup>

In a dissent joined by Justice Ginsburg, Justice Sotomayor emphasized the United State’s “long and lamentable record of stymieing the right of racial minorities to participate in the political process.”<sup>243</sup> She pointed out that, for example, states still tried

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 1632.

<sup>242</sup> *Id.* at 1638.

<sup>243</sup> *Id.* at 1651.

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to deny minorities the right to vote even after the Fifteenth Amendment was passed.<sup>244</sup> She argued that the Court always intervened in the past, when, for example, Texas tried to prevent racial minorities from participating in primaries<sup>245</sup> or when Oklahoma tried to require all voters to pass a literacy test.<sup>246</sup>

She also found that this holding took the power away from voters since the admissions policies of Michigan's public universities were previously decided by each institution's board which are nominated by political parties and elected by the citizens.<sup>247</sup> She argued that minorities fought long and hard to persuade these boards to adopt affirmative action, and this amendment undid their efforts.<sup>248</sup> She argued that for any other issues regarding admissions to a public university, supporters may lobby the elected board of the institution, but for supporters of affirmative action, they must now seek to amend Michigan's constitution.<sup>249</sup>

It is not surprising that Justice Sotomayor emphasized the importance of the political process doctrine and the necessity of letting the people have a voice. During both her undergraduate and law school studies, Justice Sotomayor spoke out against racism and discrimination by filing a complaint against Princeton for their lack of Latino and Chicano courses, faculty and students and by fighting for an apology from the law firm that questioned her abilities as a minority and product of affirmative action.<sup>250</sup> She experienced first hand the changes that can be made when minorities have a say.

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<sup>244</sup> *Id.*

<sup>245</sup> *Nixon v. Herndon*, 47 S. Ct. 446 (1927).

<sup>246</sup> *Guinn v. United States*, 35 S. Ct. 926 (1915).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Felix, *supra* at 1.

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Furthermore, Justice Sotomayor's strong stance against prohibiting affirmative action is likely a direct result of her experiences in education. She acknowledges that she was accepted into both Princeton and Yale Law School as a result of affirmative action, and she doesn't believe that affirmative action results in minorities that are less qualified being accepted into school.<sup>251</sup> She explained at a Practising Law Institute panel discussion,

I am a product of affirmative action. I am the perfect affirmative action baby. I am a Puerto Rican born and raised in the South Bronx from what is traditionally described as a socio-economically poor background. My test scores were not comparable to that of my colleagues at Princeton or Yale, but not so far off the mark that I wasn't able to succeed at those institutions. But if we had gone through the traditional numbers route of those institutions it would have been highly questionable whether I would have been accepted with my academic achievements in high school. I was accepted rather readily at Princeton and equally as fast at Yale. But my test scores were not comparable to that of my classmates and that's been shown by statistics there are reasons for that, there are cultural biases built into testing. And that was one of the motivations for the concept of affirmative action, to try to balance out those effects.<sup>252</sup>

This, it is clear how Justice Sotomayor's personal benefits from affirmative action played a part in this dissenting opinion, and she likely finds that her candor in sharing these experiences will inspire others.

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<sup>251</sup> Felix, *supra* at 1.

<sup>252</sup> *Id.*

Justice Sotomayor also dissented in *Berghuis v. Thompkins*,<sup>253</sup> where the Court had to decide whether a suspect waived his right to remain silent during a police interrogation.<sup>254</sup> In that case, Van Chester Thompkins was interrogated in a small room for three hours in relation to a shooting that happened about a year prior.<sup>255</sup> The detective gave Mr. Thompkins a *Miranda* warning and asked him to sign a form saying that he understood his rights.<sup>256</sup> Thompkins declined to sign the form, but the detective claimed that Thompkins verbally confirmed that he understood his rights, although Thompkins disputed this.<sup>257</sup> During the interrogation, Thompkins never said that he wanted to remain silent, that he did not want to speak with the police or that he wanted an attorney.<sup>258</sup> However, he remained mostly silent during the entire three hours, giving a few limited verbal responses such as “yeah,” “no,” and “I don’t know” and nodding his head.<sup>259</sup> He also declined an offer to have a peppermint and commented that the chair he was sitting in was hard.<sup>260</sup> Eventually, the detective began asking Thompkins if he believed in God and prayed to God.<sup>261</sup> After Thompkins answered, “yes,” the detective said, “Do you pray to God to forgive you for shooting that boy down?”<sup>262</sup> Thompkins answered, “yes,” but refused to make a written confession, and the interrogation thereafter ended.<sup>263</sup> He was charged with first-degree murder, assault with intent to commit murder and other

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<sup>253</sup> 130 S.Ct. 2250 (2010).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 376.

<sup>263</sup> *Id.* at 376.

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offenses related to firearms.<sup>264</sup> He moved to suppress the statements, arguing that, at interrogation, he invoked his Fifth Amendment right to remain silent, and the police should have stopped the interrogation immediately, that he didn't waive his right, and that the statements were involuntary.<sup>265</sup> The trial court denied the motion to suppress, and the jury convicted him of all charges, sentencing him to life in prison without parole. On appeal, the Michigan Court of Appeals found that Thompkins did not invoke his right to remain silent.<sup>266</sup> He filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan, but that court also rejected his claim that he invoked his right to remain silent.<sup>267</sup> The United States Court of Appeals for the Sixth Circuit reversed, explaining that a waiver of the right to remain silent does not need to be expressed, but can be inferred from the actions and words of the suspect, and that he invoked this right by remaining silent for the first two hours and 45 minutes of the interrogation.<sup>268</sup>

The Supreme Court reversed, holding that since Thompkins answered the detective's questions about believing in God, he waived his right to remain silent despite the fact that he remained silent for almost three hours prior to that.<sup>269</sup>

In her dissent, Justice Sotomayor argued that Thompkins invoked his right to remain silent by sitting tacit for nearly three hours except for a few one-word responses and that the government did not carry its burden of showing that he waived this right.<sup>270</sup> She recognized the force behind a *Miranda* warning and its significance in protecting a

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

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suspect's right against self-incrimination and pointed out the heavy burden that rests on the government to prove that a suspect waived his rights.<sup>271</sup> She found that the majority opinion ignores the important interests behind *Miranda* and that requiring a suspect to unambiguously invoke this right counter intuitively requires the suspect to speak.<sup>272</sup> This opinion is line with Justice Sotomayor's judicial approach because she focused on procedural fairness in explaining the government's heavy burden and taking the right to remain silent very seriously.

Justice Sotomayor also dissented in *Chamber of Commerce of U.S. v. Whiting*.<sup>273</sup> In that case, the court had to decide whether the federal Immigration Reform and Control Act (IRCA), which preempts "any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ ... unauthorized aliens"<sup>274</sup> preempted the Legal Arizona Workers Act, an Arizona statute that provides that the licenses of state employers that knowingly or intentionally employ authorized aliens may be, and in certain circumstances must be, suspended or revoked.<sup>275</sup> The Arizona law also requires that every employer use the E-Verify system to verify the employment eligibility of the employee.<sup>276</sup> The E-Verify was created by Congress and allows employers to verify the work authorization status of employees via the internet.<sup>277</sup>

Under the Arizona law, the state attorney general or county attorney should respond to complaints about an employer hiring unauthorized workers by verifying the

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<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> 131 S. Ct. 1968 (2011).

<sup>274</sup> 8 U.S.C. § 1324a(h)(2).

<sup>275</sup> *Whiting*, 131 S. Ct. at 1972.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

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employee's work authorization status with the Federal Government, notifying the Federal Government and then bring an action against an employer.<sup>278</sup>

The Chamber of Commerce of the United States and business and civil rights organizations filed suit against Arizona, arguing that the Arizona law's provisions which allow suspension and revocation of business licenses are expressly and impliedly preempted by the federal law, and that mandatory use of the E-Verify system was impliedly pre-empted.<sup>279</sup>

The District Court ruled in favor of Arizona because they found that the plain language of the pre-emption clause in the IRCA allows states to impose licensing conditions on businesses within that state.<sup>280</sup> They also found that, although use of the E-Verify system is optional at the federal level, Congress did not express any intent to prevent states from making use of the system mandatory.<sup>281</sup> The Court of Appeals affirmed.<sup>282</sup>

In the majority opinion written by Justice Roberts, the Supreme Court held that IRCA did not pre-empt the Arizona law because, based on the plain language of the Federal Statute, Arizona's law falls squarely within the licensing exception within IRCA.<sup>283</sup> Furthermore, the Court found nothing in IRCA that prohibited a state from requiring use of the E-Verify system.<sup>284</sup>

In her dissenting opinion, Justice Sotomayor argued that the Arizona law does not fall within the licensing exception of IRCA because the exception should be read to allow

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

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a state to impose licensing sanctions only after the Federal Government finds that an employer knowingly hired an unauthorized worker.<sup>285</sup> She also found that Arizona’s law requiring mandatory use of the E-Verify system is pre-empted because the state effectively made a decision for Congress, ignoring Congress’s policy objective in making the E-Verify system optional.<sup>286</sup>

In her reasoning, Justice Sotomayor explained that licensing sanctions exist in other laws in many different forms.<sup>287</sup> “Some permit authorities to take action with respect to licenses upon finding that a licensee has engaged in prohibited conduct...Other, more narrowly, permit authorities to take such action following a pre-existing determination by another authorized body that the licensee has violated another provision of law.”<sup>288</sup> Justice Sotomayor found that the narrower form was necessary in this situation so that the Federal Government can be the one to make the determination if a worker is unauthorized and enforce the provisions of the IRCA against the employer.<sup>289</sup> She explained that under the IRCA, the Attorney General designates a specialized federal agency unit whose primary duty is to prosecute violations of the IRCA.<sup>290</sup> Thereafter, the Attorney General must provide the employer with notice and an opportunity to be heard by a federal administrative law judge.<sup>291</sup> Justice Sotomayor pointed out that under the Arizona law and majority holding, state courts will be adjudicating questions about work authorization.<sup>292</sup> “[S]tate decisions – made by prosecutors and courts with no or little

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<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 1999.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

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experience in federal immigration law – will rest on less-than-complete or inaccurate information.”<sup>293</sup>

In this dissent, Justice Sotomayor again shows her preference for narrow holdings. When faced with deciding between the broad or narrow form of license sanctioning laws, she chose the narrower version. In this way, she again showed her preference for fairness because she was concerned that those accused of violating IRCA would not have a fair process in court because they can be sanctioned based on a decision made by a state court and argued by a state prosecutor, neither of which is experienced in hearing or arguing cases about immigration law.

Justice Sotomayor also wrote a dissenting opinion in *Perry v. New Hampshire*.<sup>294</sup> In that case, the Court had to decide “whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of an eyewitness identification made under suggestive circumstances that were not arranged by the police.”<sup>295</sup> This type of assessment is ordinarily required in cases where an identification is made under improper police influence.<sup>296</sup>

In *Perry*, officer responded to an apartment building parking lot after receiving a call that an African American male was breaking into cars.<sup>297</sup> After her arrival, Officer Nicole Clay heard what she described as a metal bat hitting the ground and found Perry standing between two cars, holding two car-stereo amplifiers.<sup>298</sup> Soon after, Alex Clavijo approached the officer and told her that his neighbor woke him up to tell him that she saw

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<sup>293</sup> *Id.* at 2003.

<sup>294</sup> 132 S. Ct. 716 (2012).

<sup>295</sup> *Id.* at 723.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

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someone break into his car.<sup>299</sup> Upon inspection of his car, Mr. Clavijo found his rear windshield shattered and the speakers and amplifiers of his car stereo were missing.<sup>300</sup>

While Perry stayed in the lot with a second officer, Officer Clay went inside the apartment building to speak with the neighbor who called the police.<sup>301</sup> When the officer asked for a description of the man she saw breaking into cars, she responded that he was a tall, African-American man roaming the parking lot and looking into cars.<sup>302</sup> When the officer asked for a more specific description, the neighbor “pointed to her kitchen window and said the person she saw breaking to Clavijo’s car was standing in the parking lot, next to the police officer.”<sup>303</sup> Upon this identification, Perry was arrested.<sup>304</sup>

After being charged with theft and criminal mischief, Perry moved to suppress the identification based on due process, arguing that, even though the police did not arrange the suggestive circumstances of the identification, a reliability assessment must be made anytime an identification is made under suggestive circumstances.<sup>305</sup> The trial judge denied his motion, and the jury convicted him of theft.<sup>306</sup>

The Supreme Court, in an opinion written by Justice Ginsburg, held that “the Due Process Clause does not require a preliminary judicial inquiry when the identification was not procured under unnecessarily suggestive circumstances arranged by law

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<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 721.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

enforcement.”<sup>307</sup> The Court found that due process is triggered only by police use of unnecessarily suggestive procedures, whether or not the suggestion is intentional.<sup>308</sup>

In her dissent, Justice Sotomayor pointed out that the “Court has long recognized that eyewitness identifications’ unique confluence of features – their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process – can undermine the fairness of the trial.”<sup>309</sup> She found it improper to only consider these concerns when police arrange the suggestive circumstances.<sup>310</sup> She pointed out that the policy behind these assessments is based on the inherent reliability problems with witness identifications, and she found no reason for distinction between intentional and unintentional suggestion.<sup>311</sup> “At trial, an eyewitness’ artificially inflated confidence in an identifications accuracy complicates the jury’s task of assessing witness credibility and reliability. It also impairs the defendant’s ability to attack the eyewitness’ credibility.”<sup>312</sup> “Whether the police have created the suggestive circumstances intentionally or inadvertently, the resulting identification raises the same due process concerns. It is no more or less likely to misidentify the perpetrator. It is no more or less powerful to the jury. And the defendant is no more or less equipped to challenge the identification through cross examination or prejudiced at trial. The arrangement-focused inquiry thus untethers our doctrine from the very evidentiary interest it was designed to protect, inviting arbitrary results.”<sup>313</sup>

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<sup>307</sup> *Id.* at 730.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* 730–731.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 732.

<sup>313</sup> *Id.* at 735.

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This opinion is consistent with Justice Sotomayor's focus on fairness because she sought to look past the majority's inquiry into police involvement or police intention, and instead focused on the effects that the majority holding will have on defendants. She focused on the inherent reliability issues in witness identifications and found that a defendant still suffers from the same severe prejudice caused by witness identification, whether or not the police created the suggestive circumstances surrounding it.

### **III. CONCLUSION**

In conclusion, Justice Sotomayor's life experience and time spent as a prosecutor taught her to rule in a narrow and fact-specific way. She also has a strong focus on fairness, likes to be candid about her personal experiences and predict how a current holding may impact future situations. This judicial approach is apparent in Justice Sotomayor's opinions.