I expected the judges who heard my case along the way to make the right decisions, the ones required by the rule of law. Of all that has been written about our case, it was Justice Alito who best captured our own feelings. We did not ask for sympathy or empathy, we asked only for even-handed enforcement of the law, and prior to the majority Justice opinion in our case, we were denied just that.

Thank you.

Senator CARDIN. Thank you for your testimony.

We'll now hear from Peter Kirsanow. Peter Kirsanow serves on the U.S. Commission on Civil Rights. He's a member of the National Labor Relations Board, where he received a recess appointment from President George W. Bush. Previously, he was a partner with the Cleveland law firm of Benesch, Friedlander, Coplan & Aronoff. Mr. Kirsanow received his law degree from Cleveland State University.

STATEMENT OF PETER KIRSANOW, COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS

Mr. KIRSANOW. Thank you, Mr. Chairman, Senator Sessions, members of the Committee. I am Peter Kirsanow, member of the U.S. Commission on Civil Rights. I am currently back at Benesch, Friedlander in the Labor Employment Practice Group. I'm here in my personal capacity.

The U.S. Commission on Civil Rights was established by the——

Senator SESSIONS. Is that microphone on?

Mr. KIRSANOW. The U.S. Commission on Civil Rights was established by the 1957 Civil Rights Act to, among other things, act as a national clearinghouse for information related to denials of equal protection and discrimination.

In furtherance of the clearinghouse process, my assistant and I reviewed the opinions in civil rights cases in which Judge Sotomayor participated while on the Second Circuit in the context of prevailing civil rights jurisprudence, and with particular attention to the case of *Ricci* v. *DeStefano*. Our review revealed at least three significant concerns with respect to the manner in which the three-judge panel that included Judge Sotomayor handled the case.

The first concern was, as you've heard, the summary disposition of this particular case. The *Ricci* case contained constitutional issues of extraordinary importance and impact. For example, the issues of—that are very controversial and volatile—racial quotas and racial discrimination. This was a case of first impression, no Second Circuit or Supreme Court precedent on point. Indeed, to the extent there were any cases that could provide guidance, such as *Wygant*, *Crowson*, *Adderand*, even private sector cases such as *Johnson Transportation*, *Frank* v. *Xerox*, *Rubber* v. *Steelworkers*, would dictate or suggest a result opposite of that reached by the Sotomayor panel.

The case contained a host of critical issues for review, yet the three-judge panel summarily disposed of the case, as you've heard, in an unpublished, one-paragraph pro curium opinion that's usually reserved for cases that are relatively simple, straightforward, and inconsequential.

The second concern is that the Sotomayor panel's order would inevitably result in proliferation of de facto racial and ethnic quotas. The standard endorsed by the Sotomayor panel was lower than that adopted by the Supreme Court's test of strong basis in evidence. Essentially, any race-based—decision evoked to avoid a disparate impact lawsuit would provide immunity from Title 7 review. Under this standard, employees who fear the prospect or expense of litigation, regardless of the merits of the case, would have a green light to resort to racial quotas.

But even more invidious is the use of quotas due to racial politics, and as Judge Alito's concurrence showed, there was glaringly abundant evidence of racial politics in the *Ricci* case. Had the Sotomayor panel decision prevailed, employees would have license to use racial preferences and quotas on an expansive scale. Evidence introduced before the Civil Rights Commission shows that when courts open the door to preferences just a crack, preferences expand exponentially.

For example, evidence adduced before hearings of the Civil Rights Commission in 2005 and 2006 show that despite the fact that Adderand was passed more than—or decided more than 10 years ago, Federal agencies persist in using race-conscious programs in Federal contracting, governmental contracting as opposed to race-neutral alternatives. Moreover, even though the Supreme Court had struck down the use of raw numerical rating in college admissions in *Gratz* v. *Bollinger*, thereby requiring that race be only a mere plus factor, a thumb on the scale in the admissions process, powerful preferences show no signs of abating.

A study by the Center for Equal Opportunity showed that at a major university, preferences were so great that the odds that a minority applicant would be admitted over a similarly situated white comparative were 250:1, at another major university, 1,115:1. That's not a thumb on the scale, that's an anvil. And had the reasoning of the *Ricci* case in the lower court prevailed, what happened to Firefighter Ricci and Lieutenant Vargas would happen to innumerably more Americans of every race throughout the country.

The third concern is that the lower court's decision that would permit racial engineering by employers would actually harm minorities who are purported beneficiaries of that particular decision. Evidence adduced at a 2006 Civil Rights Commission hearing shows that there's increasing data that preferenced—preferences create mismatch effects that actually increase the probabilities that minorities will fail if they receive beneficial treatment or preferential treatment.

For example, black law students who are admitted under preferences are 2.5 times more likely not to graduate than a similarly situated white or Asian comparative, 4 times as likely not to pass the bar exam on the first try, and 6 times as likely never to pass the bar exam, despite multiple attempts.

Mr. Chairman, it is respectfully submitted that if a nominee's interpretive doctrine permits an employer to treat one group preferentially today, there's nothing that prevents them from treating another group or shifting the preferences to another group tomorrow, and that's contrary to the colorblind ideal contemplated by the

1964 Civil Rights Act, Title 7, which was the issue decided in the *Ricci* case.

Thank you, Mr. Chairman.

Senator CARDIN. And thank you for your testimony.

We'll now hear from Linda Chavez, who is chairman of the Center for Equal Opportunity and a political analyst for Fox News Channel. She's held a number of appointed positions, among them White House Director of Public Liaison, and Staff Director of U.S. Commission on Civil Rights.

STATEMENT OF LINDA CHAVEZ, PRESIDENT, CENTER FOR EQUAL OPPORTUNITY

Ms. CHAVEZ. Thank you, Mr. Chairman and members of the Committee. I testify today not as a wise Latina woman, but as an American who believes that skin color and national origin should not determine who gets a job, a promotion, or a public contract, or who gets into colleges or receives a fellowship.

My message today is straightforward: Mr. Chairman, do not vote to confirm this nominee. I say this with some regret, because I believe Judge Sotomayor's personal story is an inspiring one, which proves that this is truly a land of opportunity where circumstances of birth and class do not determine whether you can succeed. Unfortunately, based on her statements both on and off the bench, I do not believe Judge Sotomayor shares that view.

It is clear from her record that she has drunk deep from the well of identity politics. I know a lot about that well, and I can tell you that it is dark and poisonous. It is, in my view, impossible to be a fair judge and also believe that one's race, ethnicity and sex should determine how someone will rule as a judge. Despite her assurances to this Committee over the last few days that her "wise Latina" woman statement was simply a "rhetorical flourish that fell flat", nothing could be further from the truth. All of us in public life have at one time or another misspoken, but Judge Sotomayor's words weren't uttered off the cuff. They were carefully crafted, repeated not just once or twice, but at least seven times over several years.

As others have pointed out, if Judge Sotomayor were a white man who suggested that whites or males made better judges, again, to use Judge Sotomayor's words, "whether born from experience or inherent physiological or cultural differences", we would not be having this discussion because the nominee would have been forced to withdraw once those words became public.

But of course, Judge Sotomayor's offensive words are just a reflection of her much greater body of work as an ethnic activist and judge. Identity politics is at the core of who this woman is. And let me be clear here. I'm not talking about the understandable pride in one's ancestry or ethnic groups, which is both common and natural in a country as diverse and pluralistic as ours. Identity politics involves a sense of grievance against the majority, a feeling that racism permeates American society and its institutions, and the belief that members of one's own group are victims in a perpetual power struggle with the majority.

From her earliest days at Princeton University and later Yale Law School, to her 12-year involvement with the Puerto Rican