

October 30, 2017

VIA EMAIL

Dear Senators,

On behalf of the National Women's Law Center (the Center), an organization that has fought to promote women's legal rights and protections for nearly 45 years, I write to urge you to oppose the nomination of Amy Coney Barrett to the United States Court of Appeals for the Seventh Circuit.

Ms. Barrett's writings raise serious questions about her ability to execute the core responsibilities of a judge if confirmed. She has expressed troubling views about the force and validity of precedent she deems controversial. Moreover, her record demonstrates hostility to key legal rights and protections of importance to women, which would give litigants coming before her reason to doubt that she could impartially and fairly decide cases, especially around women's health and reproductive rights. In addition, she failed at her hearing to dispel concerns raised by her participation in an event sponsored by a group that is extremely hostile to LGBTQ individuals -- raising further questions about her judgment, impartiality and lack of bias.

*Barrett's Record on Precedent and Stare Decisis*

Ms. Barrett's writings on precedent and stare decisis, cornerstone principles of our judicial system, raise serious concerns. Although she repeatedly stated at her hearing that she would follow Supreme Court and circuit precedent if confirmed, her testimony is difficult to square with a long and consistent written record.

For example, Ms. Barrett wrote approvingly in one article that the Supreme Court's willingness to revisit its precedents in constitutional cases "helps the Court navigate controversial areas by leaving space for reargument. . . ."<sup>1</sup> This is language that could encourage litigants to bring cases that challenge prior Supreme Court decisions. Indeed, Ms. Barrett suggested in the same article that the public's response to decisions by the Supreme Court bears on its precedential force. Specifically, she wrote, "The force of [superprecedents] derives from the people, who have taken their validity off the Court's agenda. Litigants do not challenge them."<sup>2</sup> In Ms. Barrett's view, it

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<sup>1</sup> Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1724 (2013), available at <http://www.texasrev.com/wp-content/uploads/2015/08/Barrett.pdf>.

<sup>2</sup> *Id.* at 1735. See also *id.* ("Indeed, *Planned Parenthood of Southeastern Pennsylvania v. Casey* shows that the Court is quite incapable of transforming precedent into superprecedent by ipse dixit."). Ms. Barrett similarly wrote in another article that erroneous precedents stand not because they were final court decisions, but "from the People's choice to accept them." Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. OF CONST. L. 1, 5–9 (2017), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1619&context=jcl>. The article concludes that "once a precedent is deeply rooted, challenges die out and the [Supreme] Court is no longer required to deal with the question of the precedent's correctness." Barrett & Nagle, *supra*, at 3.

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follows that the converse is also true: “If anything, the public response to controversial cases like *Roe v. Wade* reflects public rejection of the proposition that stare decisis can declare a permanent victor in a divisive constitutional struggle. . . .”<sup>3</sup>

She also downplayed the harm that such an approach may cause to the institutional legitimacy of the Supreme Court and to people’s reliance on earlier precedents.<sup>4</sup> In another article, she argued that that if “a litigant demonstrates that precedent demonstrably conflicts with the statutory or constitutional provision it purports to interpret,” (emphasis added) the reliance interest in maintaining the precedent should be given less weight.<sup>5</sup> Accordingly, these statements suggest an approach to judging that openly and routinely questions the validity of judicial precedents – while disregarding the disruption for those who have come to rely on the law.

Together, these statements raise serious questions about how Ms. Barrett, if confirmed as a circuit court judge, would interpret, apply, and follow precedent, including Supreme Court precedent. Her assertions at the hearing that she would follow binding Supreme Court and circuit precedent (including *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*) notwithstanding, her prior writings consistently suggest that she believes precedents like *Roe* and *Casey* should be considered weaker and are susceptible to challenge, both by judges with different interpretative approaches and by litigants and the broader “public.” Indeed, by defining the strength of precedents in terms of the willingness of litigants to challenge them, she signals her openness to considering repeated, ideological challenges to cases like *Roe v. Wade*.

#### *Barrett’s Record on Specific Legal Issues*

The concerns about Ms. Barrett’s approach to precedent are particularly acute given that her record shows hostility to key legal protections important to women. For example:

- In an essay, Ms. Barrett agreed that Chief Justice Roberts’ interpretation of the Affordable Care Act in *NFIB v. Sebelius* pushed the ACA beyond “its plausible meaning to save the statute,” characterizing his opinion as allowing deference to Congress to “supersede a judge’s duty to apply clear text,” and thereby indicating

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<sup>3</sup> Barrett, *supra* note 1, at 1727. In the article, Ms. Barrett maintains that despite its reaffirmation for the past 46 years, “[s]cholars . . . do not put *Roe* on the superprecedent list because the public controversy about *Roe* has never abated.” *Id.* at 1735.

<sup>4</sup> *Id.* at 1725.

<sup>5</sup> Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1062 (2003), available at [http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1421&context=law\\_faculty\\_scholarship](http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1421&context=law_faculty_scholarship). The premise of this article is that “stare decisis must be flexible in fact, not theory,” because the rigid application of precedent “unconstitutionally deprives a litigant of the right to a hearing on the merits of her claim.” *Id.* at 1013. The article specifically limits itself to “a court’s obligation to follow its own precedent, rather than its obligation to follow the precedent of a superior court.” *Id.* at 1015.

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that she views the ACA to be unconstitutional,<sup>6</sup> in contrast to a majority of the Supreme Court. If failed repeal efforts engender further challenges to the ACA, Barrett's record raises the concern that she would be unable to rule fairly and impartially if the issue came before her.

- Ms. Barrett's writings consistently indicate that she takes an originalist approach to the Constitution and a textualist approach to statutory interpretation. One of Barrett's articles identified judicial precedents that could be viewed as inconsistent with originalism, including those that established the administrative state, paper money, and *Brown v. Board of Education*.<sup>7</sup> The article also suggested that, under the "original public meaning" of the Constitution, the 14th Amendment may be illegitimate.<sup>8</sup> This presumably would include the right to privacy and numerous civil rights protections.

In addition, her legal record on women's health and reproductive rights raises particularly serious doubts that, if confirmed, she could fairly adjudicate cases in which these legal issues arise.

For example, Ms. Barrett was a member of University of Notre Dame's Faculty for Life group, a group that advocates for the legal recognition of human life from "its inception."<sup>9</sup> Specifically, the group was "organized to promote research, dialogue, and publication by faculty, administration, and staff who respect the sacred value of human life from its inception to natural death in the spirit embodied in *Evangelium Vitae* and *Caritas in Veritate* and are committed to the legal and societal recognition of the value of all human life." This approach – the endorsement of the legal recognition of human life from "inception" – is counter to one of the key holdings of *Roe v. Wade*.<sup>10</sup>

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<sup>6</sup> Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT, 61, 80 (2017), available at <https://conservancy.umn.edu/bitstream/handle/11299/183482/4%20-%20Barrett.pdf?sequence=1&isAllowed=y>.

<sup>7</sup> Barrett & Nagle, *supra* note 5, at 1.

<sup>8</sup> *Id.* at 24-25. The article focused on how legislators who consider themselves originalists ought to deal with superprecedents that were wrongly decided from an originalist perspective. While the article suggested that originalist legislators need not reopen every superprecedent, it did not preclude them from doing so, especially if they face political pressure to do so.

<sup>9</sup> ND UFL Constitution, University of Notre Dame, University Faculty for Life, <http://ufl.nd.edu/about-ufl/constitution/> (last visited July 18, 2017).

<sup>10</sup> Barrett also signed on to a letter to the Synod Fathers in Christ "giv[ing] witness" to "the Church's teachings – on the human person and the value of human life from conception to natural death." Letter from Catholic women, to Synod Fathers (Oct. 1, 2015), available at <https://eppc.org/synodletter/>.

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In addition, Ms. Barrett signed a letter written by the Becket Fund challenging the ACA birth control benefit.<sup>11</sup> **The benefit ensures that women have access to insurance coverage that includes birth control. The Obama Administration created an “accommodation” for certain employers with religious objections to birth control.** The Becket Fund letter Ms. Barrett signed deliberately mischaracterizes the accommodation – it claims that it “is compelling religious people and institutions who are employers to purchase a health insurance contract that provides abortion-inducing drugs, contraception, and sterilization,” when in fact it allows certain organizations with religious objections to *opt out* of providing coverage of birth control, while still ensuring that women obtain birth control coverage separately through their regular insurance plan. The letter calls the accommodation a “grave infringement on religious liberty.”<sup>12</sup> In subsequent litigation brought by objecting employers against the accommodation, eight of nine circuit courts rejected legal claims that the accommodation is a violation of the Religious Freedom Restoration Act.

If the legal position she endorsed by signing this letter wasn’t troubling enough, Ms. Barrett’s signature on this letter also raises serious concerns about her ability to rule impartially, if confirmed, on such matters. This is not just hypothetical –cases challenging the Trump Administration’s rollback of the birth control benefit are pending in courts across the country and new ones are being filed against the recent Trump Administration rules that allow any employer with religious or moral objections to refuse to provide birth control coverage. Her testimony at her Senate Judiciary Committee hearing, in which she stated that she could not think of a case or category of issues regarding which she would need to recuse herself on the basis of her conscience, if confirmed, only heightens this concern.

In addition to Ms. Barrett’s view on precedent and her substantive positions on key legal issues, Ms. Barrett’s participation in a training sponsored by the Alliance Defending Freedom (ADF) raises further questions about her fitness to serve as a federal judge. ADF is an organization that the Southern Poverty Law Center has identified as a hate group, which has taken extreme positions against LGBTQ individuals under the guise of defending “religious liberty.”<sup>13</sup> Ms.

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<sup>11</sup> Amy Coney Barrett, United States Senate Committee on the Judiciary, Questionnaire for Judicial Nominees (2017), *available at* [https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SIQ\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SIQ(PUBLIC).pdf).

<sup>12</sup> The Becket Fund, Unacceptable (Feb. 27, 2011), *available at* <https://www.scribd.com/document/83046828/Unacceptable-2-27-11am2>.

<sup>13</sup> Southern Poverty Law Center, *Alliance Defending Freedom*, *available at* <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>. “Founded by some 30 leaders of the Christian Right, the Alliance Defending Freedom is a legal advocacy and training group that has supported the recriminalization of homosexuality in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a ‘homosexual agenda’ will destroy Christianity and society. ADF also works to develop ‘religious liberty’ legislation and case law that will allow the denial of goods and services to LGBTQ people on the basis of religion.” *Id.*

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Barrett was paid by ADF to participate in a training for law students that it sponsored. At her Judiciary Committee hearing, Senator Franken asked her whether she was aware of ADF's anti-LGBTQ policies. Ms. Barrett variously said that she was not aware that the training was sponsored by ADF, that she was not aware of all of ADF's policies, that she had a favorable impression of her colleagues and the law students she knew who participated in the training, and that the SPLC's designation of ADF as a hate group was controversial. But she admitted that by the time she gave the training, she was aware that ADF funded the training, and she did not disavow ADF's policies at the hearing. This raises serious questions not only about her judgment, but also about whether litigants could reasonably expect fair treatment in her court.

Ms. Barrett's record demonstrates extremely troubling views on judicial precedent and stare decisis, as well as on a number of legal issues important to women. Her blanket assurances at her confirmation, when contrasted with a long and consistent record, can provide little comfort to those who would come before her on the Seventh Circuit seeking a fair and impartial hearing. For all of the reasons described above, the Center urges you to reject the nomination of Amy Coney Barrett to a lifetime position on the U.S. Court of Appeals for the Seventh Circuit. Please feel free to contact me, or Amy Matsui, Senior Counsel and Director of Government Relations at the Center, at (202) 588-5180, should you have any questions.

Sincerely,



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President and CEO  
National Women's Law Center

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