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THE  
RECORD OF  
**AMY CONEY  
BARRETT**  
ON GENDER  
JUSTICE

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## **I. The Illegitimate Nomination of Amy Coney Barrett**

President Donald Trump’s nomination of Judge Amy Coney Barrett to the United States Supreme Court is an extraordinary abuse of power. To begin with, it comes in the midst of a global pandemic and during an active outbreak of the COVID-19 virus, which has stricken the President, First Lady, numerous White House aides, and two Republican Senators on the Senate Judiciary Committee. Indeed, this current outbreak has been tied to the White House celebration of Barrett’s nomination. Those are only the ones reported – the conditions were made worse as several Senators have stated that they do not plan to follow testing and quarantine protocols. It is against this backdrop that the Committee is considering the nominee for a lifetime position on the Supreme Court. The pandemic and outbreak in the Senate are alone enough for the Senate to stop any consideration of this nomination.

The nomination also comes in the midst of a general election. Millions of votes have already been cast by citizens across the country – over 9 million even before the hearings began. The nomination stands in stark contrast to Senator Mitch McConnell’s refusal to schedule a hearing for Judge Merrick Garland, who was nominated to replace the late Justice Scalia 237 days before the 2016 presidential election.

And the nomination comes with unprecedented speed, even before the late Justice Ginsburg was laid to rest and without enough time for a meaningful review of her record. The President has named that this unusual speed is required because he expects the Court to help decide the results of the upcoming election. This statement comes on top of the President’s statements threatening the legitimacy of the election. He has repeatedly suggested that he intends to challenge the results of the election and refuses to state that he will participate in a peaceful transfer power in the event he loses.<sup>1</sup> At the same time, the President has persistently alleged voting irregularities unsubstantiated by evidence with the apparent intent of calling into question the integrity of the election. Further, he has sought to suppress the vote by encouraging his supporters (including white supremacist groups) to engage in voter intimidation at the polls.<sup>2</sup> Thus, this nomination is part of an overarching approach that threatens our democracy.

Justice Ginsburg’s “most fervent wish,” made only days before her death, was that the winner of the upcoming election should make this critical appointment.<sup>3</sup> That counsel was wise – the illegitimate approach to this nomination with the backdrop of President Trump’s statements, the millions who are already voting for the next President and Congress, and the unsafe conditions all stand to undermine core values of our democracy. Indeed, it has already diminished both the Supreme Court and the Senate in the eyes of the public.

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<sup>1</sup> See, e.g., *U.S. election: Trump won’t commit to peaceful transfer of power*, BBC NEWS (Sep. 24, 2020), <https://www.bbc.com/news/election-us-2020-54274115>.

<sup>2</sup> See, e.g., Pam Fessler, *Trump’s Call for Poll Watchers Raise Fears About Voter Intimidation*, NPR (Sep. 30, 2020), <https://www.npr.org/2020/09/30/918766323/trumps-calls-for-poll-watchers-raises-fears-about-voter-intimidation>.

<sup>3</sup> John Nichols, *Ruth Bader Ginsburg: ‘My Most Fervent Wish is That I Will Not Be Replaced Until a New President Is Installed’*, THE NATION (Sep. 18, 2020), <https://www.thenation.com/article/politics/ruth-bader-ginsburg-fervent/>.

Barrett's willingness to accept this nomination from this President under these circumstances calls into question her judgment and her commitment to the rule of law. However, this nomination is not only an illegitimate political power grab, but also a dire threat to gender justice.

## **II. Barrett's Addition to the Supreme Court Threatens the Rights of Women and Girls**

The illegitimate nomination of Judge Barrett to the Supreme Court will forever be a stain in our fight for equality. Her confirmation to the Supreme Court would decimate the progress made on gender justice over the last 50 years and given that Judge Barrett could remain on the Court for the next 40 years, the future for our rights is dark and bleak. The confirmation of Judge Barrett would create a 6-3 conservative majority on the Court that would annihilate women's core constitutional and statutory rights for generations to come. Barrett's addition to the court could mean the evisceration of health care access, reproductive freedom, workers' rights, educational equity, and protections for those facing discrimination.

If confirmed, Barrett could eliminate access for many to quality, affordable health care. The threat is not hypothetical. A week after the election, the Court will hear a case challenging the constitutionality of the Affordable Care Act (ACA). Access to health care for at least twenty million people in this country is on the line, alongside protections for people with pre-existing conditions – including the nearly seven million who have tested positive for COVID-19 in the U.S. – Medicaid expansion, preventive services, and protections against discrimination in health care. This lawsuit and the next Supreme Court justice will determine whether the ACA stands, or whether health care gets taken away from millions during the most devastating pandemic in modern history. It is no exaggeration to say that the health, lives, and economic security of women – and women of color in particular – are at stake.

Barrett's nomination also poses a grave threat to core constitutional rights that protect the decision whether to use birth control or have an abortion. More than a dozen cases on abortion are one step away from the Supreme Court, including some that are already pending with the Court. Cases upholding the right to abortion have been decided by one vote, with Justice Ginsburg in the majority, including as recently as June 2020. Replacing Justice Ginsburg with a justice hostile to abortion will have devastating consequences for women's health, dignity, and equality. The right to birth control has also been under increasing attack – the Supreme Court has taken four cases related to birth control in the last six years – and if a justice who has extreme views on birth control is confirmed to the Court, those attacks are likely to have dire consequences for women and families..

Additionally, Barrett could also decide cases critical to the future of working women and their families. This Supreme Court will have the opportunity to limit antidiscrimination protections for workers and make it more difficult to enforce these rights, while further enabling discrimination by employers in the name of religion. The Court may decide whether and when employers can pay a man more than a woman for equal work. The Court may take up cases deciding whether sexual harassment laws will be interpreted to protect employers rather than the victims of harassment. A hostile Court may further chip away at the ability for workers to challenge company-wide discrimination, making it harder to hold corporations accountable. And the Court

may have the opportunity to dismantle many efforts to ensure diverse, equitable, and inclusive workplaces under the theory that such efforts harm white men.

If confirmed, Barrett could also determine whether students will feel valued, respected, and safe in schools. While Trump’s Department of Education has weakened protections against sexual harassment in schools, the Supreme Court is likely to ultimately be called upon to determine whether schools can take meaningful action to address and prevent sexual harassment. Last term, the Supreme Court ruled that laws protecting against sex discrimination at work prohibit employers from discriminating on the basis of sexual orientation or gender identity. Yet, some continue to argue that the Supreme Court’s decision is limited to workplaces and that schools can nevertheless discriminate on the basis of sexual orientation or gender identity. The Supreme Court will also likely be asked to block colleges and universities from taking steps to advance racial diversity.

Barrett has been nominated to the seat of the late Justice Ruth Bader Ginsburg, a fearless champion who spent her career advocating for gender equity. The fundamental legal protections and constitutional principles that Justice Ginsburg worked to secure allow women to live in safety and dignity, provide for themselves and their families, and strive for a brighter future. Barrett’s record to date demonstrates her willingness to undermine these core legal rights, and with them, the progress that has been made towards equality. With so much at stake for gender justice, we cannot afford for Barrett to be confirmed.

### **III. Barrett’s Record Demonstrates Extreme Hostility to Reproductive Rights**

Barrett’s record – both before her time on the Seventh Circuit and as a circuit judge – suggests that she poses an existential threat to our reproductive rights. If confirmed, there is every reason to believe Barrett would eviscerate the constitutional right to abortion and threaten access to birth control and other reproductive health care.

#### ***Barrett’s public statements and writings clearly lay out her extreme anti-abortion views.***

Barrett holds extreme anti-abortion views. In a 1998 article, Barrett referred to abortion as “always immoral.”<sup>4</sup> In 2006, she signed a two-page advertisement in the *South Bend Tribune* that called for the end of the legal right to abortion and referred to *Roe v. Wade* as “barbaric” and an “exercise of raw judicial power.”<sup>5</sup> In 2013, she signed an advertisement sponsored by a group at Notre Dame called the University Faculty for Life which claimed that “In the 40 years since the Supreme Court’s infamous *Roe v. Wade* decision, over 55 million unborn children have been killed by abortions,” and called for “the unborn to be protected in law,”<sup>6</sup> which would mean an end to the legal right to abortion. In a 2013 speech, entitled “*Roe at 40: The Supreme Court, Abortion and the Culture Wars that Followed*,” Barrett used inflammatory language to criticize

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<sup>4</sup> See Amy C. Barrett & John H. Garvey, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1997-1998), at 316.

<sup>5</sup> Josh Salam & Kevin McCoy, *Supreme Court nominee Amy Coney Barrett signed 2006 anti-abortion ad in Tribune*, SOUTH BEND TRIBUNE (Oct. 2, 2020), [https://www.southbendtribune.com/news/local/supreme-court-nominee-amy-coney-barrett-signed-2006-anti-abortion-ad-in-tribune/article\\_bbecc3e4-042c-11eb-b1a2-132bb4b716bb.html](https://www.southbendtribune.com/news/local/supreme-court-nominee-amy-coney-barrett-signed-2006-anti-abortion-ad-in-tribune/article_bbecc3e4-042c-11eb-b1a2-132bb4b716bb.html).

<sup>6</sup> University Faculty for Life and the Notre Dame Fund to Protect Human Life, *Paid Advertisement*, Jan. 22, 2013.

*Roe v. Wade* stating, “the framework of *Roe* essentially permitted abortion on demand, and *Roe* recognizes no state interest in the life of a fetus.”<sup>7</sup> As evidenced in a later section, the public does not know the full extent of Barrett’s record on abortion as relevant documents continue to be discovered.

Barrett has tried to explain away these views, claiming that her personal views would “have no bearing on the discharge of my duties as a judge.”<sup>8</sup> Barrett’s statements collectively suggest that her views actually drive her legal reasoning. A careful analysis of her decisions as a judge proves this to be true.

***As a judge, Barrett supported an unconstitutional abortion ban.***

In 2018, in *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner, Indiana State Department of Health*, Judge Barrett went out of her way to indicate support for an unconstitutional abortion ban and would have supported a provision targeting abortion providers.

The case concerned a law passed by Indiana in 2016, which sought to restrict abortion and target abortion providers in numerous ways, including a ban on abortion based on certain supposed reasons for seeking that care, and a requirement that embryonic and fetal tissue from an abortion or miscarriage be cremated or buried.<sup>9</sup>

The district court blocked the two provisions, holding that the attempt to ban abortion was in direct conflict with Supreme Court precedent, and finding that the state had no rational basis for the fetal tissue requirement.<sup>10</sup> After Indiana appealed, a unanimous Seventh Circuit panel affirmed the preliminary injunction for the abortion ban.<sup>11</sup> The Seventh Circuit panel (in a 2-1 decision) also upheld the district court’s decision with respect to the requirement that the tissue be buried or cremated, agreeing that the asserted state interests were not legitimate and that, even if they were, the requirement was not rationally related to those interests. Indiana asked for the full Seventh Circuit Court of Appeals to reconsider the district court’s decision only as it related to the burial or cremation requirement. The Seventh Circuit denied the request, with Barrett in the minority and joining a dissent.<sup>12</sup>

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<sup>7</sup> See Christian Myers, *Law professor reflects on landmark case*, THE OBSERVER (Jan. 21, 2013), <https://ndsmcobserver.com/2013/01/law-professor-reflects-on-landmark-case/>.

<sup>8</sup> See *Nomination of Amy Coney Barrett to the U.S. Court of Appeals for the Seventh Circuit, Questions for the Record, Questions from Senator Whitehouse: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 1-6, at 6 (Sep. 13, 2017), available at <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Whitehouse%20QFRs.pdf>.

<sup>9</sup> H.B. 1337, 119th GEN. ASSEMB., 2d. REG. SESS. (Ind. 2016).

<sup>10</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, No. 17-3163 (S.D. Ind. filed June 30, 2016) (order granting plaintiffs’ motion for preliminary injunction).

<sup>11</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 888 F.3d 300 (7th Cir. 2018), *rev’d in part, Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 18-483, 587 U. S. \_\_\_\_ (2019), 2020 WL 3578669 (2019).

<sup>12</sup> Initially, the Seventh Circuit voted to grant *en banc* reconsideration, but a circuit judge had to recuse themselves from the vote. After the recusal, there were not enough votes for *en banc* reconsideration of the case. *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm’r of Indiana State Dep’t of Health*, 917 F.3d 532, 533 (7th Cir. 2018).

Even though Indiana did not request the Seventh Circuit to reconsider the abortion ban, the dissent went out of its way to discuss the law. The dissent signed by Barrett said it was “skeptical” about the decision to strike down the abortion ban – which it renamed the “eugenics statute” – and posited that the ban could be constitutional.<sup>13</sup> The dissent signed by Barrett also argued that the decision to strike down the burial or cremation requirement was wrong. When the case later went to the U.S. Supreme Court, Barrett’s views on the abortion ban aligned with Justice Thomas, who does not believe there is a constitutional right to abortion.<sup>14</sup> Her views on the fetal tissue requirement were in direct opposition to those of Justice Ginsburg.<sup>15</sup>

Barrett’s seeming eagerness to uphold an unconstitutional abortion ban shows both a willingness to disregard longstanding core principles of *Roe v. Wade* and support for laws that allow interrogation into people’s personal decisions about pregnancy – undermining the right to privacy and creating distrust between doctors and patients. Barrett’s support of the fetal tissue requirement indicates a willingness to uphold a medically unnecessary law that is designed to burden abortion providers, making it more difficult for them to stay open, and for patients to receive care.

***As a judge, Barrett would have allowed an unconstitutional restriction on young people’s access to abortion to go into effect.***

In *Planned Parenthood of Indiana and Kentucky, Inc. v. Box* (2019), Judge Barrett joined a dissent that would have granted *en banc* review to reconsider an unconstitutional law that forced young people to tell their parents about their decision to have an abortion, even if a judge found them mature enough to decide on their own. This view is in direct contravention of longstanding U.S. Supreme Court precedent and ignores the experiences of young people seeking abortion care.

The law in question – a 2017 Indiana law – would have forced parental notification for anyone seeking abortion care under the age of 18, even if they went through the “judicial bypass” process that allows them to seek a judge’s permission to obtain an abortion without parental involvement.<sup>16</sup> As an initial matter, the district court considered whether it had the authority to issue an injunction before the law could take effect, and the district court concluded that it did. The district court found that the law threatened severe harm “for many young women in Indiana,” and that the “argument that those seeking to challenge the law must wait until evidence of this type of harm accrues is simply incorrect. The Court need not sit idly by while those most

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<sup>13</sup> *Id.* at 535.

<sup>14</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 18-483, 587 U. S. \_\_\_\_ (2019), 2020 WL 3578669 (2019), Concurring Opinion of Thomas, J., at \*19.

<sup>15</sup> Justice Ginsburg explained that rational basis was not the correct review standard for the fetal tissue requirement; because the law implicates the right to abortion, it should be considered under the “undue burden” standard, and “everything might be different”. For that reason, Justice Ginsburg said the Court should not have taken up the case to reverse the lower court. Opinion of Ginsburg, J., at \*2 (quoting 917 F. 3d, at 534, 535 (opinion of Wood, C. J.)). Where Justice Ginsburg would analyze this law under the constitutional undue burden standard – and likely strike it down – Judge Barrett did not even think it implicated the right to abortion.

<sup>16</sup> See IND. CODE § 16-34-2-4(a) (amended July 1, 2017).

vulnerable among us are subjected to unspeakable and horrid acts of violence and perversion.”<sup>17</sup> The district court concluded that the law imposed an unconstitutional undue burden on abortion. After a 2-1 panel decision affirmed the district court ruling, the state asked for the full Seventh Circuit Court of Appeals to review.<sup>18</sup>

The Seventh Circuit declined to reconsider, by a vote of 6-5, with Barrett in the minority and joining a dissent.<sup>19</sup> The dissent said that the request for full circuit review should have been granted. Ignoring Supreme Court precedent including *Planned Parenthood v. Casey* and *Whole Woman’s Health v. Hellerstedt*<sup>20</sup> the dissent argued that the abortion restriction must first go into effect before a court can assess whether the requirement would impose an undue burden.<sup>21</sup> The dissent concluded “[p]reventing a state statute from taking effect is a judicial act of extraordinary gravity in our federal structure.”<sup>22</sup>

Barrett’s position would have allowed a harmful forced parental involvement law to go into effect, nullifying longstanding Supreme Court precedent. Barrett willfully ignored the harm the law would have imposed, showing a willingness to disregard clear evidence that shows the real lived experiences of pregnant people seeking an abortion and the challenges put in place by restrictive abortion laws.

***As a judge, Barrett offered a roadmap for how to overrule Supreme Court precedent protecting patients seeking abortion care.***

In 2019, in *Price v. City of Chicago*, Judge Barrett joined a decision providing a roadmap showing how to overrule a prior Supreme Court case protecting people who seek abortion care, health care providers, and staff.

In 2009, the Chicago City Council adopted an ordinance meant to protect people seeking abortion care, as well as abortion clinic staff and providers.<sup>23</sup> The Chicago ordinance created a 50-foot bubble zone around abortion clinics, within which “sidewalk counselors,” often anti-abortion protestors, could approach patients no closer than 8 feet. The ordinance was challenged on First Amendment grounds. The district court dismissed the challenge, because the ordinance was almost identical to one that the Supreme Court had previously upheld in *Hill v. Colorado* (2000).<sup>24</sup> The case was appealed to the Seventh Circuit, and the three-judge panel, which included Barrett, unanimously affirmed the district court decision. The opinion made clear that

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<sup>17</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 273 F.Supp.3d 1013 (S.D. Ind. 2017) (order granting preliminary injunction).

<sup>18</sup> 962 F.3d 208, 235 (7th Cir. 2020).

<sup>19</sup> *Planned Parenthood of Indiana & Kentucky, Inc. v. Box*, 949 F.3d 997 (7th Cir. 2019).

<sup>20</sup> See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Whole Woman’s Health v. Hellerstedt*, 136 S.Ct. 2292 (2016).

<sup>21</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 896 F.3d 809 (7th Cir. 2018), *reh’g en banc denied*, 273 F.Supp.3d 1013(S.D. Ind. 2017).

<sup>22</sup> See IND. CODE § 16-34-2-4(a) (amended July 1, 2017).

<sup>23</sup> MUN. CODE OF CHI. § 8–4–010(j)(1); 2 J. of the Proceedings of the City Council of the City of Chicago, Illinois, Oct. 7, 2009, 72711–12.

<sup>24</sup> *Price v. Chicago*, 915 F.3d 1107 (7th Cir. 2019), *cert. denied*, No. 18-1516, 2020 WL 3578739 (July 2, 2020); *Hill v. Colorado*, 530 U.S. 703 (2000).



the judges affirmed the district court’s decision only because of the prior Supreme Court case.<sup>25</sup> The opinion went on to provide a detailed roadmap of how to reach a different result, and encouraged the plaintiffs to ask the Supreme Court to overrule its prior decision.

***Barrett is willing to reconsider precedent– and would have the opportunity to do so if confirmed.***

The abortion decisions Judge Barrett has joined while on the Seventh Circuit only affirm her willingness to disregard longstanding Supreme Court precedent with which she disagrees. As a Supreme Court justice, Barrett would have the ability to overturn that precedent. Her writings provide further proof that she would do so.

In a 2013 law review article, Barrett wrote 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>26</sup> Barrett suggested that a Supreme Court Justice can legitimately overturn a precedent that she believes is wrongly decided.<sup>27</sup> Barrett wrote, “I tend to agree with those who say that a justice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution than a precedent she thinks clearly in conflict with it.”<sup>28</sup>

Barrett has also indicated that she is aware that a Supreme Court justice could vote to eviscerate *Roe* even without overturning it outright. As she made clear in a 2016 interview – when speculating about the future of abortion – “I think the core case, *Roe*’s core holding, you know, that women have a right to an abortion, I don’t think that would change. But I think the question of how many restrictions can be put on clinics, I think that would change.”<sup>29</sup>

***Barrett holds extreme views on birth control.***

In 2012, Barrett signed a letter written by the Becket Fund, objecting to the Affordable Care Act’s requirement that insurance plans provide coverage of contraception without out-of-pocket costs. The letter refers to certain methods of birth control – which by definition *prevent* pregnancy – as “abortion-inducing drugs.”<sup>30</sup>

This extreme view – which is in opposition to all major medical and scientific views – is consistent with the view espoused in the advertisement Barrett signed in 2006, which defined life

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<sup>25</sup> 530 U.S. 703.

<sup>26</sup> Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1724 (2013), available at <http://www.texaslrev.com/wp-content/uploads/2015/08/Barrett.pdf>.

<sup>27</sup> *Id.* at 1728.

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

<sup>29</sup> See *Supreme Court nominee Amy Coney Barrett discusses abortion, Roe v. Wade*, COURIER & PRESS (Oct. 1, 2020), <https://www.courierpress.com/videos/news/nation/2020/10/01/supreme-court-nominee-amy-coney-barrett-discusses-roe-v-wade/5880922002/>.

<sup>30</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%20SJQ\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ(PUBLIC).pdf); The Becket Fund, *Unacceptable* (Feb. 27, 2011), available at <https://www.scribd.com/document/83046828/Unacceptable-2-27-11am2>.

as beginning at fertilization.<sup>31</sup> It is also a view that could threaten access to other reproductive health care, specifically fertility treatment. Indeed, the group that organized the advertisement – the St. Joseph County Right to Life, a radical organization with whom Barrett has associated – believes discarding unused or frozen embryos created during the in vitro fertilization process should be criminalized.

The 2012 letter also claimed the ACA contraceptive coverage requirement – specifically its “accommodation” – is a “grave infringement on religious liberty.”<sup>32</sup> This is despite the fact that the accommodation allows certain organizations with religious objections to *opt out* of providing coverage of birth control. There was no acknowledgment or consideration in the letter of the benefit contraceptive coverage brings to women and families, the fact that people need and want this coverage, or why an employer’s religious views should be able to dictate the care their employees receive. This issue has already been before the Supreme Court numerous times, and a majority of the Court - unlike Barrett - recognized the importance of ensuring women’s seamless access to contraceptive coverage.<sup>33</sup> Barrett’s signature on this letter - which was authored by a party litigating these cases - indicates both that she has prejudged this issue and that there is a potential conflict were another such case to come before the Court.

#### **IV. Barrett Poses a Grave Threat to Health Care**

Barrett’s prior statements suggest that if confirmed, she would be the final vote necessary to invalidate the Affordable Care Act (ACA). In a 2017 essay, Barrett argued that Chief Justice Roberts’ interpretation of the ACA 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.”<sup>34</sup> She signaled support for the dissent’s view, which would have invalidated the law. In a 2015 interview discussing *King v. Burwell*, Barrett said that the dissent, which asserted that the majority holding was “absurd,”<sup>35</sup> had “the better of the legal argument.”<sup>36</sup> Given these views, combined with the fact that the Court will hear oral arguments in the latest case designed to invalidate the ACA just one week after the election, and that President Trump promised to only appoint justices who would get rid of the ACA, Barrett’s nomination could very well mean the end of this critically important law.

#### **V. Barrett Does Not Support Equal Access to Education for Students**

The rights of students to attend school free from discrimination and harassment are already under attack. The Trump administration has already made a concerted effort to eliminate protections for transgender students and survivors of sexual harassment. Barrett’s record shows that she would further harm student survivors and transgender students seeking civil rights protections.

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<sup>31</sup> *Supra* note 5.

<sup>32</sup> *Supra* note 30.

<sup>33</sup> See *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

<sup>34</sup> Amy C. 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>35</sup> *King v. Burwell*, 576 U.S. 473, 498 (2015) (J. Scalia, *dissenting*).

<sup>36</sup> *SCOTUS Upholds State Health Care Subsidies*, WBUR (June 25, 2015), <https://www.wbur.org/onpoint/2015/06/25/scotus-obamacare-upheld-john-roberts-antonin-scalia> (last visited Oct. 9, 2020).

***Barrett ruled against accountability for sexual assault.***

In *Doe v. Purdue University*, Judge Barrett made it easier for students who are held accountable for sexual assault to sue their schools for so-called sex discrimination.<sup>37</sup> When plaintiff John Doe, a male college student, was found responsible by Purdue University for-sexually assaulting his classmate and then-girlfriend, he was suspended for an academic year and expelled from the Navy ROTC program.<sup>38</sup> Doe sued Purdue and several school officials, alleging due process and Title IX violations.<sup>39</sup> A magistrate judge dismissed the complaint for failure to state a claim, and the Seventh Circuit, in an opinion written by Barrett, reversed.<sup>40</sup>

In ruling for Doe, Barrett created a more relaxed Title IX standard that allows men disciplined for sexual assault to sue their schools for sex discrimination as long as they can raise a “plausible inference” that their schools were at least partly motivated by anti-male bias.<sup>41</sup> In contrast, student survivors must typically show that their school responded with “deliberate indifference” (i.e., acted clearly unreasonably) to their requests for help in order to allege sex discrimination under Title IX.<sup>42</sup> Barrett’s ruling turns Title IX into a statute that protects sexual harassers and rapists more than it protects their victims.

In support of her conclusion that Doe adequately alleged he was the victim of anti-male bias, Barrett pointed to the fact that the U.S. Department of Education—which is charged with addressing sex discrimination, including sexual harassment, in schools—had provided guidance for schools on their Title IX obligations to address sexual harassment and had investigated Purdue in instances unrelated to John Doe for potentially failing to respond to sexual harassment in violation of Title IX.<sup>43</sup> Barrett suggested that because the Department of Education’s Obama-era 2011 Title IX guidance indicated that “a school's federal funding was at risk if it could not show that it was vigorously investigating and punishing sexual misconduct,” the guidance added plausibility to John Doe's assertion that he had experienced sex discrimination. She reached this conclusion even though the Department guidance protected survivors of all genders equally, Doe did not allege any facts indicating anti-male bias in his specific case, and many of the unfair investigatory procedures that Doe alleged were in fact prohibited by the 2011 guidance. Barrett also described the 2011 Title IX guidance’s requirement that schools use a preponderance of the evidence standard in determining responsibility for harassment as a “lenient” standard, even though, as a judge, she was well aware that the preponderance standard is used in all civil and civil rights proceedings, including Title IX cases, and is the only standard of proof that treats both parties equally.

Barrett’s decision in *Doe v. Purdue* harms student survivors of sexual harassment and assault by making it easier for students who have been disciplined for sexual misconduct to sue their schools for sex discrimination, thus making it less likely that schools will take appropriate steps to address sexual assault and other forms of sexual harassment.

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<sup>37</sup> *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).

<sup>38</sup> *Id.* at 656.

<sup>39</sup> *Id.* at 656, 658-59.

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

<sup>41</sup> *Id.* at 669.

<sup>42</sup> See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 641-43 (1999).

<sup>43</sup> *Id.* at 668-69.

The idea that taking sexual harassment and assault seriously plausibly suggests sex discrimination against men is a disservice to all survivors of sexual violence—regardless of their gender—and a gross misinterpretation of Title IX. With student survivors currently seeking Supreme Court review in at least two Title IX sexual harassment cases<sup>44</sup> and hundreds of Title IX lawsuits being filed by disciplined male students, Barrett’s addition to the Court threatens to further chip away at protections for student survivors.

***Barrett is hostile to the rights of transgender students.***

Judge Barrett has publicly revealed her biased attitudes toward transgender students. In a 2016 lecture, then-Professor Barrett misgendered transgender students, repeatedly referring to transgender girls as “physiological males,” and echoed transphobic talking points, stating, “People will feel passionately on either side about whether physiological males who identify as females should be permitted in bathrooms especially where there are young girls present.”<sup>45</sup> In that same speech, Barrett dismissed the view that discrimination against transgender students is unlawful sex discrimination, asserting that such an interpretation of Title IX would “strain the text of the statute.”<sup>46</sup> She asserted that it was clear that no one “would have dreamed” that Title IX would protect transgender students from discrimination when the law was first passed.<sup>47</sup> Barrett’s position is noteworthy because it is contrary to the analysis Justice Gorsuch relied on when deciding in *Bostock v. Clayton County* that discrimination against transgender people in the workplace is illegal sex discrimination under Title VII.<sup>48</sup> There, the Court rejected the notion that it could ignore the language of the statute because the drafters may not have expected it to apply to specific circumstances presented in the case: “[T]he limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law.”<sup>49</sup> Thus, the court interpreted Title VII’s prohibition on sex discrimination “in accord with the ordinary public meaning of its terms at the time of its enactment” to include protections against discrimination for transgender people.

Several federal courts have followed the Supreme Court’s analysis in *Bostock* to ensure the rights of transgender students under Title IX. Since *Bostock* was decided, both the Third Circuit and Fourth Circuit have relied on its reasoning to conclude that Title IX prohibits discrimination against transgender students.<sup>50</sup> However, Barrett’s apparent hostility to the analysis relied on by the Court in *Bostock* means that, if given the opportunity, she will likely vote against applying *Bostock*’s analysis to Title IX and will instead seek to exclude transgender people from using facilities consistent with their gender identity.

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<sup>44</sup> *Bose v. Bea*, 947 F.3d 983 (6th Cir. 2020); *Kollaritsch v. Michigan State University Board of Trustees* 944 F.3d 613 (6th Cir. 2019).

<sup>45</sup> Jacksonville University, *Hesburgh Lecture 2016: Professor Amy Barrett at the JU Public Policy Institute*, at 41:18, YouTube (Nov. 3, 2016), <https://www.youtube.com/watch?v=7yjTEdZ81II>.

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

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

<sup>48</sup> 140 S. Ct. 1731 (2020).

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

<sup>50</sup> *Adams v. School Board of St. Johns County*, 968 F.3d 1306 (11th Cir. 2020); *Grimm v. Gloucester County School Board*, 2020 WL 5034430 (4th Cir. Aug. 26, 2020); *Hecox v. Little*, 2020 WL 4760138 (D. Idaho Aug. 17, 2020).

At a time when the rights of girls and women, students with disabilities, LGBTQ+ students, and other students of color are at risk, it is important for a justice to fortify these protections, not weaken them. Barrett’s prior statements and position around gender identity, sex-stereotyping, and Title IX suggest that if confirmed, she would roll back protections for students.

## **VI. Barrett Undermined Workplace Protections**

Barrett’s legal decisions and speeches about workplace equality show a disturbing willingness to undermine and limit legal protections for workers as well as an inability to recognize the realities of harassment and discrimination in the workplace.

### ***Barrett signed off on racially segregating workplaces.***

In 2017, Judge Barrett voted against *en banc* review in a case where the panel decided that the employer’s policy of assigning Black employees to a store in a predominantly Black neighborhood and Latinx employees to a store in a predominantly Latinx neighborhood did not violate Title VII.<sup>51</sup> Her colleagues, who would have reheard the case, called this a “separate-but-equal arrangement,” and pointed out that “racial segregation carries with it a unique stigma, which makes it inherently harmful” and “deliberate racial segregation by its very nature has an adverse effect on the people subjected to it.”<sup>52</sup> By voting against the rehearing and siding with the employer in this case, Barrett endorsed a rejection of the Supreme Court’s foundational precedents—dating back to *Brown v. Board of Education*—that in the context of racial segregation, separate is inherently unequal.

### ***Barrett limited workers’ ability to hold employers accountable through collective action.***

Barrett also limited the availability of class or collective arbitration for workers. In *Herrington v. Waterstone Mortg. Corp.*, Judge Barrett wrote the opinion vacating a court order awarding Pamela Herrington and 174 other employees \$10 million for overtime and minimum wage violations.<sup>53</sup> Ms. Herrington and the other employees had brought their case collectively in front of an arbitrator and won. Barrett’s ruling followed a Supreme Court decision from a few months prior, *Epic Systems*, that each of the 175 people had to individually arbitrate their claims.<sup>54</sup> In vacating the award, Barrett sent the decision back down to the lower court to decide if the collective claims had any path forward. Tellingly, while Barrett’s opinion discusses how arbitration and collective action can harm employers, she never mentions how collective action can be critical for working people to be able to get justice. In stark contrast, Justice Ginsberg dissented so strongly to the *Epic Systems* decision that she read her dissent aloud from the bench, a rare occurrence. In dissent, Justice Ginsburg rightly observed: “If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the

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<sup>51</sup> *U.S. EEOC v. AutoZone*, 875 F.3d 860 (7th Cir. 2017).

<sup>52</sup> *Id.* at 862, 861.

<sup>53</sup> 907 F.3d 502 (7th Cir. 2018); see also John Lewis, *Yet Another Opinion Addresses the Availability of Class or Collective Arbitration and Whether It Is a ‘Gateway Issue’ for the Court – Herrington v. Waterstone Mortgage Corp.*, EMPLOYMENT CLASS ACTION REPORT (October 25, 2018), <https://www.employmentclassactionreport.com/collective-action-2/yet-another-opinion-addresses-availability-class-collective-arbitration-whether-gateway-issue-court-herrington-v-waterstone-mortgage-corp/>.

<sup>54</sup> 138 S. Ct. 1612 (2018).

enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries.”<sup>55</sup>

In *Wallace v. Grubhub*, Judge Barrett wrote the opinion that denied seven thousand food delivery drivers the right to join together in a collective arbitration action to challenge their employer’s minimum wage and overtime violations.<sup>56</sup> Barrett’s decision rested on whether the drivers fit within an exemption to a law governing forced arbitration; Barrett determined that they did not fit within the exemption, and therefore were forced into arbitration.<sup>57</sup> As a result of her decision, all seven thousand drivers are being forced to seek redress through individual arbitration – a process that could take years and cost millions. In her decision, Barrett did not mention or even seem to notice the real-life harms that would result from her decision.

***Barrett voted to block age discrimination claims.***

Judge Barrett joined an opinion concluding that job applicants have no legal protection from hiring practices that have the effect of discriminating against them based on their age.<sup>58</sup> In 2019, Barrett joined the decision in *Kleber v. CareFusion Corp* and blocked older workers applying for jobs from relying on the provision of the Age Discrimination in Employment Act (ADEA) that makes it unlawful for employers to use policies that both disproportionately harm older workers and are not necessary for any compelling business interest. In *Kleber*, 58-year-old Dale Kleber was rejected from a job because he had more years of experience than the job posting sought. He sued the company under the ADEA, alleging that the requirement that applicants have “no more than 7 years” of relevant work experience disproportionately excluded older applicants.<sup>59</sup> The Seventh Circuit determined that the law did not protect applicants—it only protected those who already worked for the employer.<sup>60</sup> The dissenting justices, including two Republican appointees, likened the decision to “[w]earing blinders that prevent sensible interpretation” of the statute’s language.<sup>61</sup> Barrett and the majority instead adopted the “improbable view that the [ADEA] outlawed employment practices with disparate impacts on older workers, but excluded from that protection everyone not already working for the employer in question.”<sup>62</sup> As a result of this decision, older workers who are rejected from jobs because of something like a maximum amount of experience or a requirement that the candidate be a “recent college graduate” have no way of seeking justice—even if those requirements have absolutely no relation to what is needed to perform the job.

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<sup>55</sup> *Id.* at 1612, 1647.

<sup>56</sup> No. 18 C 4538 (N.D. Ill. Mar. 28, 2019).

<sup>57</sup> *Id.* at \*11.

<sup>58</sup> *Kleber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 306 (2019).

<sup>59</sup> *Id.* at 481-482.

<sup>60</sup> *Id.* at 481.

<sup>61</sup> *Id.* at 507.

<sup>62</sup> *Id.* at 494.



***Barrett believes women, not employers, are responsible for pay discrimination.***

In a speech in 2020, Judge Barrett recounted her own experience with pay discrimination. She discovered, after working for the same employer for several years, that she was being paid less than men who were doing the same job.<sup>63</sup> When she confronted her employer, the employer explained that Barrett had not asked for a raise, so she had not gotten one. Barrett’s view of this was that she was therefore responsible for the pay difference: “Being paid less was a consequence of not standing up for myself.”<sup>64</sup>

Barrett’s statement demonstrates her extremely limited worldview, which does not recognize the real-life experiences of people and ignores who holds power in the workplace. She fails to understand that when an employer pays a woman less when she is doing the same work as a man, it is not the woman’s fault, but the fault of the employer that has failed to follow the law. If confirmed, she would be in the position to enshrine her backwards views about gender equality in the workplace to the detriment of women workers.

**VII. Barrett Would Have Rubber-Stamped the Administration’s Anti-Immigrant Rule**

In *Cook County v. Wolf*, Judge Barrett would have allowed the Administration’s draconian “public charge” rule to be implemented.<sup>65</sup> The new rule, which diverged significantly from prior policy, would force immigrants to choose between receiving public benefits that help provide basic health care, nutrition assistance, and shelter – and potentially being separated from their families. Even before it was finalized, the “public charge” rule has had a significant chilling effect on immigrants claiming public benefits for which they are eligible.<sup>66</sup> In addition, the public charge rule placed a heavy negative weight on factors such as having a serious medical condition, limited English proficiency, having a large family, or being younger than 18 or older than 61. It also placed heavy positive weight on such factors as having higher incomes, effectively imposing a wealth test on immigrants seeking legal permanent residence.

The majority in *Cook County* upheld the injunction blocking the public charge rule on the grounds that the Department of Homeland Security (DHS) likely violated the Administrative Procedure Act. Specifically, the majority found that DHS’ interpretation of the law was likely unreasonable. The majority expressed particular concern about the fact that “DHS’s interpretation of its statutory authority has no natural limitation.”<sup>67</sup> In addition, the majority found that DHS acted in a manner that was arbitrary and capricious, by failing to adequately

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<sup>63</sup> Amy C. Barrett, “Women’s Empowerment Week Brunch,” Pasquerilla West Dormitory Brunch, Notre Dame University, Notre Dame, Indiana (March 1, 2020) (available in Judge Barrett’s response to the Senate Judicial Questionnaire, at 1210).

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

<sup>65</sup> 962 F.3d 208, 235 (7th Cir. 2020).

<sup>66</sup> See, e.g., Hamutal Bernstein, Dulce Gonzalez, Michael Karpman & Stephen Zuckerman, URBAN INSTITUTE, *Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019* (May 18, 2020), <https://www.urban.org/research/publication/amid-confusion-over-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-2019>.

<sup>67</sup> 962 F.3d at 229.

consider the chilling effect on immigrant families and the burden to state and local governments, or to adequately justify the new restrictions it imposed.<sup>68</sup>

Barrett dissented from the majority's decision, arguing that DHS' interpretation of the law was reasonable. While she acknowledged that "DHS declined to identify any limit to its discretion [to define 'public charge']," she deemed its interpretation of the law to be reasonable and would have remanded to the district court.<sup>69</sup> Barrett also downplayed the significant chilling effect of the regulation, dismissing the significance of immigrants who decline to receive benefits "out of misunderstanding or fear."<sup>70</sup> Barrett's position signals her willingness to rubber-stamp this Administration's relentless attacks on the health, well-being, and admission of immigrant communities, which are experiencing even more extreme economic distress and hardship during the pandemic.

### **VIII. Barrett's Extreme Affiliations and Her Failure to Disclose Materials Raise Questions About Her Judgment**

The two-page South Bend advertisement Barrett signed was organized by the St. Joseph County Right to Life group, an radical anti-abortion organization that believes that doctors who perform abortions should face criminal charges and that discarding unused or frozen embryos created during the in vitro fertilization (IVF) process should be criminalized. Barrett's decision to publicly support an organization whose views are so radical and harmful to those who form their families through alternative reproductive technologies (ART) should be disqualifying.

Barrett also failed to disclose the advertisement she signed sponsored by the University of Notre Dame's Faculty for Life group, a group that "seeks to promote the prolife cause at Notre Dame through a variety of academic and other activities."<sup>71</sup> The group sought to advance the view that life begins at "inception" – a view that directly contradicts with *Roe v. Wade*. Her failure to disclose multiple anti-abortion advertisements and two lectures she gave on abortion court cases to the Notre Dame campus Right to Life club in her questionnaire to the Senate Judiciary Committee, further imputes her poor judgment.<sup>71</sup>

Barrett has also associated herself with the Alliance Defending Freedom (ADF), an organization that the Southern Poverty Law Center has identified as a hate group, which has taken extreme positions against LGBTQ+ individuals and abortion under the guise of defending "religious

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<sup>68</sup> *Id.* at 231-233.

<sup>69</sup> *Id.* at 252; *see also Yafai v. Pompeo*, 912 F.3d 1018 (7th Cir. 2019) (refusing to require consular official to provide facts underlying denial of visa, despite allegation of bad faith by plaintiff).

<sup>70</sup> *Id.* at 235.

<sup>71</sup> Andrew Kaczynski and Em Steck, *Amy Coney Barrett failed to disclose talks on Roe v. Wade hosted by anti-abortion groups on Senate paperwork*, CNN (Oct. 9, 2020), <https://www.cnn.com/2020/10/09/politics/kfile-amy-coney-barrett-roe-v-wade-talks/index.html>.



liberty”<sup>72</sup> She received payment from them for leading a session in a training for law students.<sup>73</sup> At her Seventh Circuit confirmation hearing, 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. In fact, the Chief Executive Officer and general counsel for the ADF, Michael Farris, attended Donald Trump’s event announcing the nomination of Amy Coney Barrett to the Supreme Court.<sup>74</sup>

Barrett’s affiliations with ideologically extreme groups and her failure to disclose important pieces of her record to the committee demonstrates her questionable judgment and raises questions about her ability to render fair decisions on issues about abortion, LGBTQ+ equality, and other civil rights and gender justice issues.

## **IX. Conclusion**

History will condemn the nomination of Judge Amy Coney Barrett as a partisan power grab that ignored the will of the people. Her nomination represents a dangerous and nefarious attempt to dismantle our hard-fought freedoms to maintain a regime that works for the powerful and privileged. It is only under these sorts of extraordinary conditions that the Senate would be considering a nominee with a record as extreme as Barrett’s. Her record demonstrates that she would fulfill the President’s promises to gut *Roe v. Wade* and undo the Affordable Care Act. Barrett’s addition to the court would eviscerate reproductive rights and health care access, roll back civil rights protections for students and workers, and jeopardize our fundamental rights to equality—in health care, in schools, at work, and in society. The Supreme Court must have Justices who uphold core constitutional values of liberty, equality, and justice. At this crucial moment in history, we cannot allow a nominee and process that would eviscerate our constitutional rights and freedoms and undermine the Court itself.

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<sup>72</sup> SOUTHERN POVERTY LAW CENTER, *Alliance Defending Freedom*, available at: <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> (“[f]ounded 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 LGBT people on the basis of religion.” *Id.*).

<sup>73</sup> She received \$4,200 for two speeches.

<sup>74</sup> Emily Holden, *Leader of non-profit labeled ‘hate group’ attended White House Amy Coney Barrett event*, THE GUARDIAN (Oct. 5, 2020), <https://www.theguardian.com/us-news/2020/oct/05/michael-farris-amy-coney-barrett-adf?ref=hyper.com> (last visited Oct. 9, 2020).