



OCTOBER 2020 | FACT SHEET

Supreme Court Vacancy: What's at Stake for Workers' Rights

The Trump Administration and Senate Majority Leader Mitch McConnell are refusing to work on relief for Americans who are facing hunger, record unemployment, and evictions so that they can instead push through Judge Amy Coney Barrett's nomination in the middle of an election and a pandemic. The Senate must stop this sham nomination process and focus on the relief and care the country needs.

We are facing a pandemic and historic unemployment, and women are leaving the labor force in record numbers because of lack of work and supports for working parents. In **September alone, over 800,000 women left the workforce.**¹ Women – especially Black women and Latinas – are struggling to make ends meet. Instead of engaging in a partisan fight over a Supreme Court nomination even as people are already voting, the Senate should be focused on helping Americans by passing critical COVID relief packages.

Even if we were not amid a pandemic, economic crisis, and recession, Judge Barrett's nomination would be harmful for women workers and their families. Barrett's statements and the opinions she wrote and joined show a fundamental disregard for issues that are crucial to women workers: health care, equal pay, stopping institutional racism, and the ability of people to assert their rights collectively in court. **In fact, an analysis of her opinions showed that 89% of the opinions she wrote were pro-business and 83% of the opinions she joined were pro-business.**²

Judge Believes the Affordable Care Act Is Invalid.

President Trump and his Administration have targeted the Affordable Care Act (ACA) and its protections from day one of his presidency. This includes backing a lawsuit being heard by the Supreme Court in November that seeks to invalidate the law in its entirety. One week after the election, the Court will hear oral argument in *California v. Texas*, a lawsuit brought by a group of states opposed to the law, led by Texas.³ Their goal is to achieve through the courts what Congress refused to do: dismantle the entire ACA.

Barrett has already indicated how she will rule on this case. In 2017, Barrett published a law review article criticizing the Supreme Court's 2012 decision to uphold the ACA, saying that Chief Justice Roberts pushed the language of the law "beyond its plausible meaning to save the statute."⁴ She signaled support for the dissent's view, which would have invalidated the law. In reference to the 2015 Supreme Court case again upholding the law, Barrett said the dissent had "the better of the legal argument."⁵ There is every reason to believe – if confirmed – she would be a fifth vote to strike down the ACA.

- Losing the ACA will end health insurance coverage for millions including protections for pre-existing conditions; between one third and half of all women and girls in the United States have pre-existing conditions for which they could have been denied or excluded coverage, or charged a higher premium, before the ACA.⁶
- The ACA banned the practice of charging women significantly more than men for the same health insurance — a practice known as “gender rating.” If we lose the ACA, gender rating could come back.⁷
- Without the ACA, there are no safeguards ensuring that plans cover women’s needs. Pre-ACA, health insurance companies not only charged women more for health coverage based on their sex, but the coverage did not meet women’s health needs. Most plans in the individual market failed to cover services important to women such as maternity coverage.⁸ Before the ACA, out-of-pocket costs kept people from accessing the women’s preventive care they needed. Thanks to the ACA, last year 61.4 million women had this coverage, ensuring access to critical preventive care.⁹

Judge Barrett Blames Women, Not Employers, for Pay Discrimination.

The gender wage gap shortchanges millions of working women. Women in the U.S. who work full time, year round are typically paid only 82 cents for every dollar paid to their male counterparts.¹⁰ This translates into \$10,194 less per year in median earnings women lose to the wage gap each year. Black women working full time, year round typically make only 62 cents for every dollar paid to their white, non-Hispanic male counterparts. For Latinas this figure is only 54 cents, for Native Hawaiian and Pacific Islander women it is 61 cents, and for Native women it is 57 cents. Yet when faced with being paid less than men doing the same jobs, Judge Barrett blamed herself, not her employer.

- In a speech in 2020,¹¹ 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 then men who were doing the same job. 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 the pay difference was due to her own behavior: “Being paid less was a consequence of not standing up for myself.”¹²
- The contrast with Justice Ginsburg, whom Judge Barrett would replace if confirmed, could not be more profound. In her seminal dissent in *Ledbetter v. Goodyear Tire*, Justice Ginsburg understood that “[c]ompensation disparities . . . are often hidden from sight” and noted how the benefited employees. “But when a woman is paid less than a similarly situated man, the employer reduces its costs each time the pay differential is implemented.”¹³ Women workers need a Supreme Court Justice who recognizes that when an employer pays a woman less for when she is doing the same work as a man it is not the woman’s fault. It is discrimination.

Judge Barrett Approved of an Employer Policy of Separating Workers by Race.

The idea that separate facilities for different races can never be equal is a bedrock principle of modern U.S. law. But in 2017, Barrett voted against the full Seventh Circuit reviewing a case where the panel decided that an 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.¹⁴ 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.”¹⁵ By voting against the rehearing and siding with the employer in this case, Judge 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.

Judge Barrett's Decisions Slam Shut the Courthouse Door for Working People.

In Judge Barrett's decisions regarding age discrimination and the enforceability of arbitration agreements, she shut the courthouse doors for millions of working people.

Age Discrimination

Protection against age discrimination is crucial for women workers. Women over the age of 55 are a growing part of the labor force and will make up over 25% of women in the labor force by 2024.¹⁶ Older women need to work because they do not have the financial security to retire; the recession and the effects of COVID-19 will only make that problem worse. Yet studies have found that “for older women, the [employment] discrimination is more severe and starts much earlier than it does for older men.”¹⁷

- Judge Barrett joined an opinion concluding that job applicants have not legal protection from hiring practices that have the effect of discriminating against them based on their age. 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 affect older workers are not necessary for any compelling business interest.¹⁸ 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.¹⁹ The Seventh Circuit determined that the law did not protect applicants – it only protected those who already worked at the employer.²⁰ The dissenting justices, including two Republican appointees, likened the decision to “[w]earing blinders that prevent sensible interpretation” of the statute’s language. 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.”²¹ 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.

Collective Action by Workers

Frequently, the only way workers can enforce their rights is to come together as a group to bring class actions or collective actions. For example, in wage cases, each worker may have only lost a small amount of money, so a legal case on behalf of only one worker makes no financial sense. Cases on behalf of a group of workers, however, can bring relief to all the workers and make the employer change its policies. To avoid collective enforcement, employers make workers sign agreements that require workers to arbitrate disputes, instead of bringing them in courts, and that prohibit the workers from coming together to enforce their rights. These arbitration agreements are usually part of the employment contract – workers must sign them in order to have or keep their job.

- In *Wallace v. Grubhub Holdings, Inc.*, 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 pay violations.²² 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.²³ 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.
- In *Herrington v. Waterstone Mortgage Corp.*, Judge Barrett wrote the opinion vacating an order awarding Pamela Herrington and 174 other employees \$10 million for overtime and minimum wage violations.²⁴ 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 Corp. v. Lewis*, that each of the 175 people had to individually arbitrate their claims.²⁵ In vacating the award, Barrett sent the decision back down to the lower court to decide if the

collective claims had any path forward.²⁶ 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.²⁷ 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 it, Justice Ginsburg rightly observed: “If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries.”²⁸

Conclusions

A Supreme Court with Judge Barrett on it would further limit the rights of working people. She should not be confirmed. Instead prioritizing a rushed process to put their nominee onto the Court before the election, the President and the Senate should be focused on COVID-19 relief.

- 1 Claire Ewing-Nelson, *Four Times More Women Than Men Dropped Out of the Labor Force in September*, NAT’L WOMEN’S L. CTR., Oct. 2020, at 1, <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/10/september-jobs-fs1.pdf>.
- 2 Adam Feldman, *Empirical Scotus: A Comprehensive Look at Judge Amy Coney Barrett*, SCOTUSBLOG (Oct. 9, 2020, 3:31 PM), <https://www.scotusblog.com/2020/10/empirical-scotus-a-comprehensive-look-at-judge-amy-coney-barrett/>.
- 3 *California v. Texas*, No. 19-840 (5th Cir. filed Jan. 3, 2020), consolidated with *Texas v. California*, No. 19-1019 (5th Cir. filed Feb. 14, 2020).
- 4 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>.
- 5 On Point, *SCOTUS Upholds State Health Care Subsidies*, WBUR (June 15, 2015), <https://www.wbur.org/onpoint/2015/06/25/scotus-obamacare-upheld-john-roberts-antonin-scalia>.
- 6 CTR. FOR MEDICARE & MEDICAID SERVS., AT RISK: PRE-EXISTING CONDITIONS COULD AFFECT 1 IN 2 AMERICANS <https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/preexisting> (last visited Oct. 12, 2020); NAT’L P’SHIP FOR WOMEN & FAMS., MOVING BACKWARD: EFFORTS TO UNDO PRE-EXISTING CONDITION PROTECTIONS PUT MILLIONS OF WOMEN & GIRLS AT RISK 1 (2018), <https://bit.ly/2TZz3l5>.
- 7 Brigette Courtot and Julia Kaye, *Still Nowhere to Turn: Insurance Companies Treat Women like a Pre-Existing Condition*, NAT’L WOMEN’S L. CTR., 2009, at 3, <https://bit.ly/2uclaiX>.
- 8 Danielle Garrett, *Turning to Fairness: Insurance Discrimination Against Women Today and The Affordable Care Act*, NAT’L WOMEN’S L. CTR., Mar. 2012, at 7, http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf.
- 9 NWLC calculations based on U.S. Census Bureau, 2019 Current Population Survey (CPS), Annual Social and Economic Supplement (ASEC) and Centers for Medicare & Medicaid Services (CMS), 2019 Marketplace Open Enrollment Period (OEP) Public Use Files.
- 10 Amanda Fins, *Women and the Lifetime Wage Gap: How Many Woman Years Does It Take To Equal 40 Man Years?*, NAT’L WOMEN’S L. CTR., Mar. 2020, <https://nwlc.org/wp-content/uploads/2019/03/Women-and-the-Lifetime-Wage-Gap-v2.pdf>.
- 11 Amy Coney Barrett, Judge on the U.S. Court of Appeals for the Seventh Circuit, Address at Notre Dame’s Pasquerilla West Hall’s Women’s Empowerment Week Brunch (Mar. 1, 2020), available in Judge Barrett’s response to the Senate Judicial Questionnaire, Attachments to Question 12.D., <https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20SJQ%20Attachments%20to%20Question%2012.d.2.pdf>.
- 12 *Id.*
- 13 *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 650-51 (2007) (Ginsburg, J., dissenting).
- 14 *EEOC v. AutoZone, Inc.*, 875 F.3d 860 (7th Cir. 2017).
- 15 *Id.* at 861-62.
- 16 Victoria Lipnic, U.S. EQUAL EMP. OPPORTUNITY COMM’N, THE STATE OF AGE DISCRIMINATION AND OLDER WORKERS IN THE U.S. 50 YEARS AFTER THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) (2018), <https://www.eeoc.gov/reports/state-age-discrimination-and-older-workers-us-50-years-after-age-discrimination-employment>.
- 17 Patrick Button, Written Testimony Before the Equal Employment Opportunity Commission, on June 14, 2017, on the subject of “The ADEA@50 More Relevant than Ever,” <https://www.eeoc.gov/meetings/meeting-june-14-2017-adea-50-more-relevant-ever/button>; Edith S. Baker, *Is There Age Discrimination in Hiring?*, U.S. BUREAU OF LABOR STATISTICS: MONTHLY LABOR REVIEW (April 2017), <https://www.bls.gov/opub/mlr/2017/beyond-bls/is-there-age-discrimination-in-hiring.htm>.
- 18 914 F.3d 480 (7th Cir. 2019).
- 19 *Id.* at 481-82.
- 20 *Id.* at 481.
- 21 *Id.* at 494.
- 22 970 F.3d 798 (7th Cir. 2020).
- 23 *Id.* at 802-03.
- 24 907 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 BLOG (Oct. 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/>.
- 25 138 S. Ct. 1612 (2018).
- 26 *Herrington*, 907 F.3d at 511.
- 27 *Id.* at 509-10.
- 28 *Epic Sys. Corp.*, 138 S. Ct. at 1647 (Ginsburg, J., dissenting).