



OPPOSITION TO THE CONFIRMATION OF JUDGE AMY CONEY BARRETT

A REPORT BY THE NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.

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Introduction

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Founded by Thurgood Marshall in 1940, LDF has worked to pursue racial justice and eliminate structural barriers for African Americans in the areas of criminal justice, economic justice, education, and political participation for 80 years. When the President announces a nomination to the Supreme Court, LDF traditionally prepares a detailed report outlining the nominee's background, judicial philosophy, and judicial record, and assesses the import of those factors on matters of civil rights and racial justice. During the Trump Administration, we prepared such reports when then-Judge Neil Gorsuch and then-Judge Brett Kavanaugh were nominated to the Court.¹ The circumstances of Judge Amy Coney Barrett's nomination to fill the vacancy created by the passing of Justice Ruth Bader Ginsburg, however, are different and thus warrant a different approach.

We oppose the confirmation of Judge Barrett to the United States Supreme Court. We base our opposition on both the extraordinary circumstances in which this confirmation effort has unfolded, and on the record of this nominee, whose stated views and writings demonstrate that her addition to the Court would further

¹ Report, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, *The Civil Rights Record of Judge Brett Kavanaugh*, Sept. 22, 2018, https://www.naacpldf.org/wp-content/uploads/FINAL_Report-on-Brett-Kavanaugh_FINAL_11_22-2.pdf; Report, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, *The Civil Rights Record of Judge Neil M. Gorsuch*, Mar. 16, 2017, <https://www.naacpldf.org/files/about-us/LDF-Report-on-the-Civil-Rights-Record-of-Neil-Gorsuch-FINAL-3.16.2017.pdf>.

threaten core civil rights protections that hang in the balance before a sharply divided Court.

I. Where We Are and What Is at Stake

There are myriad compounding factors that make the advancement of Judge Amy Coney Barrett's nomination to the Supreme Court a direct threat to the legitimacy of our democracy. Because of the highly politicized circumstances surrounding her nomination, the truncated process the Senate majority intends to pursue over vociferous dissent from the Senate minority and the public, the overlay of the pandemic, and for additional reasons explained below, this nomination process must be halted immediately, and the vacancy on the Court should be filled after the next Congress has begun and the winner of the 2020 presidential election is inaugurated.

A. Millions of Americans Have Already Cast their Ballots and Millions More Are in the Process of Voting

More than 9 million Americans have already cast their ballot in the General Election.² In addition to the race for the presidency, races for Senate seats are on the ballot in 35 states, including the seats of 8 of the 22 members of the Senate Judiciary Committee, which is charged with the initial vetting of any nominee to the Supreme Court.

When President Obama nominated Chief Judge Merrick Garland to replace the late Justice Antonin Scalia in March 2016, Senate leadership refused to consider the nominee, asserting that the vacancy arose too close in time to the presidential election—then more than six months away. Senate leadership adamantly maintained that the American people should have an opportunity to have their voices heard through their participation in the November 2016 presidential election before the Senate considered the confirmation of a new Supreme Court justice. In Senator Thom Tillis’s words, it was “essential to the institution of the Senate and to the very health of our republic to not launch our nation into a partisan, divisive confirmation battle during the very same time the American people are casting their ballots [in the presidential primaries] to elect our next president.”³ Senator Lindsey Graham, the current chair of the Senate Judiciary Committee, also opposed moving forward with the nomination of Chief

² Tommy Beer, *Over 9 Million People Have Already Voted In The 2020 Election, The Majority Being Democrats*, FORBES, October 10, 2020, <https://www.forbes.com/sites/tommybeer/2020/10/10/over-9-million-people-have-already-voted-in-the-2020-election-the-majority-being-democrats/#2f27c4ee659a>.

³ Press Release, Thom Tillis, United States Senator, *N.C. senator cites ‘Biden rule’ in opposing any Obama court nominee*, Feb. 26, 2016, <https://www.tillis.senate.gov/2016/2/n-c-senator-cites-biden-rule-in-opposing-any-obama-court-nominee>.

Judge Garland and stated that there would be a “new rule” that no Supreme Court nominee would be considered in the last year of a President’s Term. He further stated:

I want you to use my words against me. If there’s a Republican president in 2016 and a vacancy occurs in the last year of the first term, you can say Lindsey Graham said, let’s let the next president, whoever it might be, make that nomination, and you could use my words against me and you’d be absolutely right.⁴

Other Senators agreed in 2016 that it would be improper to move forward with a Supreme Court nominee during a presidential election year because, to quote Senator John Cornyn, “the American people deserve to have a voice in the selection of the next Supreme Court justice.”⁵

⁴ Lissandra Villa, *Here’s What GOP Senators Said About the 2016 Supreme Court Vacancy—And What They’re Saying Now*, TIME, Sept. 24, 2020, <https://time.com/5892574/senate-republicans-supreme-court-vote/>.

⁵ Other Senators who advocated forcefully for this position included:

Corey Gardner (“I think we’re too close to the election. The president who is elected in November should be the one who makes this decision.”);

Chuck Grassley (“A lifetime appointment that could dramatically impact individual freedoms and change the direction of the court for at least a generation is too important to get bogged down in politics. The American people shouldn’t be denied a voice.”);

Joni Ernst (“We will see what the people say this fall and our next president, regardless of party, will be making that nomination.”);

Ted Cruz (“There is a long tradition that you don’t do this in an election year.”);

Marco Rubio (“I don’t think we should be moving on a nominee in the last year of this president’s term—I would say that if it was a Republican president.”);

Jim Inhofe (“I will oppose this nomination as I firmly believe we must let the people decide the Supreme Court’s future.”);

David Perdue (““The very balance of our nation’s highest court is in serious jeopardy. As a member of the Senate Judiciary Committee, I will do everything in my power to encourage the president and Senate leadership not to start this process until we hear from the American people.”);

Ron Johnson (““I strongly agree that the American people should decide the future direction of the Supreme Court by their votes for president and the majority party in the U.S. Senate.”);

Pat Toomey (“The next Court appointment should be made by the newly-elected president.”);

Richard Burr (“In this election year, the American people will have an opportunity to have their say in the future direction of our country. For this reason, I believe the vacancy left open by Justice Antonin Scalia should not be filled until there is a new president.”);

John Hoeven (“There is 80 years of precedent for not nominating and confirming a new justice of the Supreme Court in the final year of a president’s term so that people can have a say in this very important decision.”); and

If it would jeopardize the health of our Republic for the Senate to consider a nomination made in March of the last year of a president's term, it would most assuredly strike a blow to the integrity of our constitutional democracy for the Senate to move forward with filling a vacancy on the Court as millions of Americans are actively engaged in early voting and absentee voting to select a president and senators in contested races around the country, and less than a month before Election Day on November 3rd. Yet, that is precisely what Senate leadership is doing now.

B. The Truncated Confirmation Process Undercuts the Senate's Obligation to Thoroughly Vet Supreme Court Nominees

In its rush to move this confirmation process forward, the Senate also abdicates its obligation to carefully and fully vet any nominee for a lifetime seat on the most powerful judicial body in the world. The Senate Judiciary Committee hearings started on Monday, October 12, 2020, a mere 16 days after President Trump nominated Judge Barrett to the Court, and Senator Graham has stated that he expects to send Judge Barrett's nomination to the full Senate by October 22nd, and to confirm her as soon as October 26th, only eight days before Election Day. On this timeline, the Senate is on pace to confirm Judge Barrett as a justice on the Supreme Court within 40 days of Justice Ginsburg's death, and within 30 days of Judge Barrett's formal nomination. The timeframe for her confirmation process is

Rob Portman ("I believe the best thing for the country is to trust the American people to weigh in on who should make a lifetime appointment that could reshape the Supreme Court for generations.").

Tim Murphy, *A Long List of GOP Senators Who Promised Not to Confirm a Supreme Court Nominee During an Election Year*, MOTHER JONES, Sept. 18, 2020, <https://www.motherjones.com/2020-elections/2020/09/a-long-list-of-gop-senators-who-promised-not-to-confirm-a-supreme-court-nominee-during-an-election-year/>.

far shorter than that of the last four confirmed justices: Justice Sotomayor (66 days), Justice Kagan (87 days), Justice Gorsuch (65 days), and Justice Kavanaugh (90 days), none of whom were confirmed in a presidential election year.

This timeframe is woefully inadequate for the Senate to undertake the rigorous review of the record warranted for any nominee to our nation's highest Court. Serious questions have already been raised about recently discovered documents and information that were not included in Judge Barrett's disclosures to the Senate Judiciary Committee and they have yet to be resolved. Just days before the start of her confirmation hearing, Judge Barrett herself released new information about her participation in a controversial statement about abortion. These new revelations highlight why the Senate Judiciary Committee needs additional time to properly and thoroughly vet this nominee. Sacrificing the integrity of the Senate's constitutional duty to "advise and consent" to political expediency strikes yet another blow at the legitimacy of this process.

C. The President Has Cast Doubt on the Integrity of the Election and on the Impartiality of a Newly Constituted Supreme Court to Resolve Election-Related Disputes

Equally disturbing is the doubt the president has sowed on the integrity of the ongoing elections and on the impartiality of a newly constituted Court that would include Judge Barrett. First, the President has sought to undermine and delegitimize an ongoing election by asserting baseless claims of fraud, which have been roundly refuted. He has even taken the unprecedented step of refusing to

commit to the peaceful transfer of power if he loses the election.⁶ Second, the President has tainted this confirmation process and the nominee by publicly stating that Judge Barrett’s nomination must move forward so that she can be in place should matters related to the election go before the Court.⁷ Specifically, President Trump has said, referring to the outcome of the election, “I think this will end up in the Supreme Court. And, I think it’s very important that we have nine Justices.”⁸ He further shared his belief that “having a 4-4 situation is not a good situation.”⁹ The implication of the President’s statements—that he expects this nominee to assist with ensuring his reelection—is repugnant to the integrity of the Supreme Court, and has tainted the legitimacy of the confirmation process for this seat. And rather than recognize the unseemly implications of President Trump’s statements and remove any questions about her impartiality, Judge Barrett has thus far refused calls to recuse herself from any case involving a contested presidential election for 2020.¹⁰ Given that Judge Barrett worked as a young lawyer on one of the legal teams representing George W. Bush in the only other contested

⁶ Matthew Choi, *Trump declines to commit to a peaceful transition of power after election*, POLITICO, Sept. 23, 2020, <https://www.politico.com/news/2020/09/23/trump-peaceful-transition-of-power-420791>; Nick Niedziadek, *Pence sidesteps question about peaceful transfer of power*, POLITICO, Oct. 7, 2020, <https://www.politico.com/news/2020/10/07/pence-vp-debate-transfer-of-power-427665>; Alana Abramson, *Trump Repeatedly Attacked Mail-In Voting During the Debate. There’s No Evidence Behind His Claim*, TIME, Sept. 30, 2020, <https://time.com/5894501/trump-repeatedly-attacked-mail-in-voting-during-the-debate-theres-no-evidence-behind-his-claim/>.

⁷ Peter Baker and Maggie Haberman, *Trump Selects Amy Coney Barrett to Fill Ginsburg’s Seat on the Supreme Court*, N.Y. TIMES, Sept. 25, 2020, <https://www.nytimes.com/2020/09/25/us/politics/amy-coney-barrett-supreme-court.html>.

⁸ Josh Wingrove, *Trump Talks Up Need for Full Court as He Casts Doubt on Election*, BLOOMBERG, Sept. 23, 2020, <https://www.bloomberg.com/news/articles/2020-09-23/trump-says-supreme-court-needs-ninth-justice-to-decide-election>.

⁹ *Id.*

¹⁰ See Andrew Desiderio and Marianne Levine, *In Senate questionnaire, Barrett won’t pledge to recuse herself from 2020 election cases*, POLITICO, Sept. 29, 2020, <https://www.politico.com/news/2020/09/29/amy-coney-barrett-recuse-election-cases-423248>.

presidential election of the modern era, where she specifically worked on questions surrounding the legality of absentee ballots, President Trump’s comments and Judge Barrett’s failure to commit to recuse further undermine the integrity of her nomination and the confirmation process just weeks before Election Day.¹¹

D. The Threat to Core Civil Rights Protections

The stakes of this nomination could not be higher for racial equality and civil rights in this country. The Supreme Court is already far more conservative than it has been at any point in modern history. The Court is bitterly divided on key issues, and we have already witnessed a substantial erosion in the Court’s commitment to civil rights. For example:

- **Voting Rights:** After the Supreme Court immobilized Section 5 of the Voting Rights Act of 1965 in *Shelby County, Alabama v. Holder*,¹² voters throughout the country have had to rely on other provisions, including Section 2 of the Voting Rights Act, to challenge laws and policies that deny or abridge the right to vote for African Americans and other people of color. The Supreme Court is poised to consider the contours of Section 2 of the Voting Rights Act this term in *Brnovich v. Democratic National Committee*.¹³ In recent months, and often in closely divided decisions, the Court has also summarily lifted lower court injunctions that blocked state laws requiring voters with pre-existing health conditions to meet onerous requirements for submitting absentee ballots that could expose them to COVID-19 infection in order to vote. In one of those cases, Justice Ginsburg, speaking for four dissenting justices, wrote that she feared the Court’s order lifting the lower court’s injunction “will result in massive disenfranchisement.”¹⁴ In another 5-4 decision two years ago, the Court narrowed two other important voting rights laws, the National Voter Registration Act and the Help America Vote Act,

¹¹ Beth Reinhard and Tom Hamburger, *How Amy Coney Barrett played a role in Bush v. Gore — and helped the Republican Party defend mail ballots*, WASH. POST, OCT. 10, 2020, https://www.washingtonpost.com/politics/amy-coney-barrett-bush-gore/2020/10/10/594641b8-09e3-11eb-991c-be6ead8c4018_story.html.

¹² 570 U.S. 529 (2013).

¹³ No. 19-1257.

¹⁴ *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1209 (2020) (Ginsburg, J., dissenting); see also *Merrill v. People First of Alabama*, No. 19A106, 2020 WL 3604049 (July 2, 2020); *Andino v. Middleton*, No. 20A55, 2020 WL 5887395 (Oct. 5, 2020).

ruling that those laws permitted the State of Ohio to purge voters simply because they had not voted in three federal election cycles and had not responded to a mailing.¹⁵

- **Economic Justice:** Because it is so difficult to prove intentional discrimination, the disparate impact provisions of Title VII of the Civil Rights Act of 1964 and the Fair Housing Act of 1968 are essential to remedy and deter racial discrimination in employment and housing. Although Title VII's disparate impact provision was recognized by the Court almost 50 years ago and has been repeatedly reaffirmed by Congress since that time, the Court effectively narrowed that provision in a 5-4 decision in 2009.¹⁶ In a concurring opinion in that case, Justice Scalia made remarkable assertions that this essential tool to remedy discrimination leads to improper "racial decisionmaking" and that there is a "war between disparate impact and equal protection."¹⁷ Additionally, the Court sharply divided in the 2015 decision recognizing that the Fair Housing Act prohibits disparate impact discrimination, with Justice Anthony Kennedy (who retired in 2018) writing for a 5-4 majority that included Justice Ginsburg.¹⁸ The Trump Administration recently announced a new rule that seeks to undermine that decision.¹⁹
- **Affirmative Action:** The past several years have seen an onset of increased criticism of and challenges to race conscious admission policies at colleges and universities, despite the fact that widespread discrimination results in Black, Latinx, and Native American students consistently being denied equal access to high quality K-12 education. As recently as 2016, a bare majority of justices, in a decision by Justice Kennedy, agreed to uphold one such policy used by the University of Texas at Austin.²⁰ The issue is likely to return to the Court. A conservative-led organization has spearheaded a challenge to Harvard College's race conscious admissions policy,²¹ and in a reversal of positions it took in 2013 and 2016, the United States Department of Justice has now taken up positions opposing affirmative action in college admissions.²² In fact, on October 8, the Department of Justice itself took the

¹⁵ *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

¹⁶ *Ricci v. DeStefano*, 557 U.S. 557 (2009).

¹⁷ *Id.* at 594 (Scalia, J., concurring).

¹⁸ *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015).

¹⁹ See, e.g., NAT'L LOW INCOME HOUS. COAL., *Preliminary Analysis of HUD's Final Disparate Impact Rule*, Sept. 14, 2020, <https://nlihc.org/resource/preliminary-analysis-huds-final-disparate-impact-rule>.

²⁰ See *Fisher v. Texas*, 136 S. Ct. 2198 (2016).

²¹ Joan Biskupic, *Affirmative action: Challenge to Harvard's admissions practices hits federal appeals court*, CNN, Sept. 16, 2020, <https://www.cnn.com/2020/09/16/politics/affirmative-action-harvard/index.html>.

²² See, e.g., U.S. DEPT OF JUSTICE, Press Release, *Justice Department Finds Yale Illegally Discriminates Against Asians and Whites in Undergraduate Admissions in Violation of Federal Civil-*

extraordinary step of filing suit against Yale University, challenging Yale's affirmative action program. In its complaint, the Department of Justice asserts that it is in a position to define who is "Asian," for purposes of this Complaint, asserting that "references to Asian applicants exclude racially favored Asian applicants who identify, at least in part, as from a favored Asian-American subgroup, such as applicants who identify as Cambodian, Hmong, Laotian, or Vietnamese."²³

- **Abuse of Executive Authority:** Since his inauguration, President Trump has used the weight and authority of his office to implement xenophobic policies. On January 27, 2017, President Trump signed his first travel ban, which immediately banned nationals from seven Muslim-majority countries from entering the United States.²⁴ In a notorious 5-4 decision, the Supreme Court upheld a revised version of this discriminatory ban.²⁵ In another case, the Court, by a narrow 5-4 margin, vacated the Trump Administration's attempt to chill Latinx participation in the Census by adding a question about citizenship status for pretextual reasons.²⁶ Undeterred, the Administration has implemented new tactics designed to ensure that people of color are undercounted in the Census. Lower courts have again blocked its efforts, and the Administration currently has another application pending in the Supreme Court.²⁷ In yet another example of executive overreach, President Trump re-appropriated military funds to build a border wall that Congress unequivocally rejected. The lower courts blocked his action, but the Supreme Court stayed the injunction in a 5-4 ruling without opinion and refused to lift the stay in another 5-4 ruling without any explanation by the majority.²⁸
- **Criminal Justice:** Every Term, the Court issues momentous decisions, which are usually sharply divided, in key criminal justice cases. For example, in recent terms, the Court has repeatedly denied relief in death penalty cases by 5-4 votes, even preventing the lower courts from considering powerful

Rights Laws, Aug. 13, 2020, <https://www.justice.gov/opa/pr/justice-department-finds-yale-illegally-discriminates-against-asians-and-whites-undergraduate>.

²³ Complaint, *United States v. Yale Univ.*, No. 3:20-cv-01534 (D. Conn. Oct. 8, 2020), <https://www.justice.gov/opa/press-release/file/1326306/download>.

²⁴ Steve Almasy and Darran Simon, *A timeline of President Trump's travel bans*, CNN, Mar. 30, 2017, <https://www.cnn.com/2017/02/10/us/trump-travel-ban-timeline/index.html>.

²⁵ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

²⁶ *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019); Andrew Chung, *What's the big deal about adding a citizenship question to U.S. Census?*, REUTERS, July 9, 2019, <https://www.reuters.com/article/us-usa-census-citizenship-explainer/whats-the-big-deal-about-adding-a-citizenship-question-to-u-s-census-idUSKCN1U42DT>.

²⁷ See Hansi Lo Wang, *Trump Officials Ask Supreme Court To Block Order That Extends Census Counting*, NPR, Oct. 7, 2020, <https://www.npr.org/2020/10/07/920206851/appeals-court-denies-another-attempt-to-end-census-early-by-trump-officials>.

²⁸ See *Trump v. Sierra Club*, 140 S. Ct. 1 (2019), *motion denied by*, 140 S. Ct. 2620 (2020).

evidence that federal executions authorized by Attorney General Bill Barr this summer—the first federal executions in 17 years—were unconstitutional;²⁹ expanded, over a dissent joined by Justice Ginsburg, the scope of the judge-made doctrine known as qualified immunity, which has thwarted suits to hold police officers liable for violence and other misconduct;³⁰ and overturned notorious laws that had been motivated by racism and anti-Semitism and had permitted felony convictions by nonunanimous juries in Louisiana and Oregon, with Justice Ginsburg joining the majority, and over a sharp dissent by three Justices.³¹ A new case concerning the scope of this latter decision is currently pending before the Court.³²

- **Health Care:** Access to quality health care is a racial justice issue, especially during the COVID-19 pandemic, which has had a particularly devastating impact on communities of color. The Supreme Court has twice upheld the Affordable Care Act by narrow majorities, with Justice Ginsburg casting a pivotal vote to uphold the law each time.³³ Judge Barrett, by contrast, wrote that Chief Justice Roberts “pushed the Affordable Care Act beyond its plausible meaning to save the statute.”³⁴ There is now yet another challenge to the Affordable Care Act pending before the Court, and the Trump Administration is urging the Court to invalidate the law.³⁵

These represent just of a few of the areas where core civil rights protections are at stake.

E. The Context in Which This Supreme Court Nomination Has Unfolded

Judge Barrett’s nomination to the Supreme Court comes at an unprecedented moment in our nation’s history. The COVID-19 pandemic has upended all aspects of society, having infected more than 7.7 million Americans and caused more than 214,000 deaths since March. The disease, the likes of which our nation has not faced

²⁹ See *Kisela v. Hughes*, 138 S. Ct. 1148 (2018).

³⁰ See *Barr v. Lee*, 140 S. Ct. 2590 (2020); *Barr v. Purkey*, 140 S. Ct. 2594 (2020).

³¹ *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

³² *Edwards v. Vannoy*, No. 19-5807.

³³ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *King v. Burwell*, 576 U.S. 473 (2015).

³⁴ Amy C. Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61 (2017).

³⁵ See Brief for Federal Respondents, *California v. Texas*, Nos. 19-840, 19-1019, 2020 WL 3577478 (June 2020), https://www.supremecourt.gov/DocketPDF/19/19-840/146406/20200625205555069_19-840bsUnitedStates.pdf.

since the Spanish Flu in 1918, has caused not only a public health crisis, but also a severe economic crisis. Many people face deep financial hardship and housing instability because of the federal government's delayed and inadequate response to the pandemic; today, nearly one-fourth of Americans expect someone in their household to lose their job or to take a pay cut before Election Day, and nearly one-third face eviction before the end of the year.³⁶ Black-owned businesses have been hit the hardest by the economic fallout for the virus and have had the least access to financial aid provided by the government.³⁷ It has been estimated that 40% of Black-owned small businesses will not survive the duration of the virus.³⁸

However, since passing the Coronavirus Aid, Relief, and Economic Security (CARES) Act in late March 2020, Congress has failed to provide further economic relief to ordinary families and small businesses. Although the House of Representatives passed a new, robust COVID-19 relief bill on May 15, 2020, the Senate has failed to move that legislation forward. Instead, the Senate has prioritized judicial nominations, filling the federal courts at breakneck speed and with an unrelenting sense of urgency.

³⁶ UNITED STATES CENSUS BUREAU, Household Pulse Survey, Expected Loss in Employment Income, <https://www.census.gov/data-tools/demo/hhp/#/?measures=FJR> (showing percentage of adults who expect someone in their household to have a loss in employment income in the next 4 weeks) (last visited Oct. 7, 2020); UNITED STATES CENSUS BUREAU, Household Pulse Survey, Likelihood of Eviction or Foreclosure, <https://www.census.gov/data-tools/demo/hhp/#/?measures=EVR> (showing percentage of adults living in households where eviction or foreclosure in the next two months is either very likely or somewhat likely).

³⁷ Lauren Leatherby, *Coronavirus Is Hitting Black Business Owners Hardest*, N.Y. TIMES, June 18, 2020, <https://www.nytimes.com/interactive/2020/06/18/us/coronavirus-black-owned-small-business.html>.

³⁸ Khristopher J. Brooks, *40% of black-owned businesses not expected to survive coronavirus*, CBS NEWS, June 22, 2020, <https://www.cbsnews.com/news/black-owned-businesses-close-thousands-coronavirus-pandemic/>.

Against this backdrop, Justice Ginsburg passed away on September 18, 2020. That same day, Senate Majority Leader Mitch McConnell announced that President Trump's nominee would receive a vote in the Senate. The following day, President Trump announced his intent to nominate someone to fill Justice Ginsburg's seat forthwith, and his chief of staff and legal counsel contacted Judge Barrett about filling the vacancy. President Trump offered Judge Barrett the nomination on September 21, 2020, and she accepted that same day, a mere three days after Justice Ginsburg's passing.

The President formally nominated Judge Barrett to fill Justice Ginsburg's Supreme Court seat on September 26, 2020, at a ceremony and reception held outdoors in the Rose Garden and inside the White House, where the guests interacted without the masks and social distancing recommended by the Centers for Disease Control and Prevention to limit the spread of COVID-19 infection. Since that event at the White House, a number of attendees, including President Trump, First Lady Melania Trump, and two senators on the Senate Judiciary Committee—Thom Tillis of North Carolina and Mike Lee of Utah—have tested positive for COVID-19 and entered quarantine. Other members of the Committee, including Senator Josh Hawley, were present at the White House ceremony. Senator Lee attended an in-person meeting of the Senate Judiciary Committee five days after the White House ceremony. At the hearing, he spoke forcefully and animatedly without a mask in the presence of his Committee colleagues. Despite requests from their Democratic colleagues that all members of the Committee submit to COVID-

19 testing prior to the beginning of the scheduled hearings, Republican members of the Committee have refused to do so, imperiling the health and safety of Committee members, Committee staffers, housekeeping and support workers, and members of the press.

To conduct a rushed confirmation process in the absence of testing and protocols in place to protect members of the Senate Judiciary Committee and other workers who support the Committee in the Senate building from COVID-19, infection, and without first acting to provide adequate relief to the millions of Americans suffering from the health and economic fallout of this mismanaged pandemic, reflects the decision of Senate leadership to prioritize a political power grab over common sense health safeguards and without providing desperately needed economic relief to the American people.

II. Judge Barrett's Record

As stated above, a Supreme Court confirmation process would be illegitimate regardless of the nominee and regardless of the president. But the nomination of Judge Barrett to the nation's highest court raises additional concerns. In the past four years, President Trump has appointed more than 200 federal judges, many of whom lack a commitment to enforcing key Supreme Court precedent protecting civil rights and civil liberties and a disturbing number of whom have been deemed "unqualified" by the American Bar Association. The Supreme Court itself is at a precipice, and, as noted above and further explained below, Judge Barrett's addition to the Court would threaten core civil rights protections in this country.

Judge Barrett's scholarship reflects a strong commitment to a judicial philosophy known as originalism, and in particular suggests a kind of originalism that is far more extreme than even Justice Scalia's, who was widely understood to be one of the most conservative justices on the Roberts Court. Judge Barrett has written that the entire Fourteenth Amendment is "possibly illegitimate," that *Brown v. Board of Education*, which ended legal apartheid in the United States, may have been incorrectly decided, and that the entire administrative state may be untenable from an originalist perspective. She has signed a newspaper advertisement stating: "It's time to put an end to the barbaric legacy of *Roe v. Wade*." And she made a speech suggesting that Title IX of the Civil Rights Act does not protect transgender persons.

Although Judge Barrett has indicated that she would not overrule *Brown* and a few cases that she has identified as "superprecedent," she has written that she

“tend[s] to agree with those who say that it . . . is more legitimate for [a justice] to enforce her best understanding of the Constitution” rather than adhere to the doctrine of stare decisis if she believes a precedent is clearly incorrect.³⁹ That approach would call into question key Supreme Court precedent guaranteeing equal rights under the law for people of color, for women, and for LGBTQ persons.

A. *LGBTQ Rights*

On five separate occasions, Judge Barrett was a paid speaker in connection with the Blackstone Legal Fellowship, which is run by the Alliance Defending Freedom (ADF).⁴⁰ The ADF has been designated as a hate group by the Southern Poverty Law Center as a result of its support for the recriminalization of sexual acts between consenting LGBTQ adults in the U.S. and criminalization abroad; defense of state-sanctioned sterilization of transgender people abroad; and its contentions that LGBTQ people are more likely to engage in pedophilia.⁴¹ At her confirmation hearing for the Seventh Circuit Court of Appeals, Judge Barrett acknowledged that she knew the Blackstone Fellowship was an ADF Program at the time of her paid speaking engagements.⁴² The curriculum for the Blackstone Fellowship Program included readings such as *The Homosexual Agenda: Exposing the Principal Threat*

³⁹ Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1728 (2012-13),

<https://texaslawreview.org/wp-content/uploads/2015/08/Barrett.pdf>.

⁴⁰ See Emma Brown & Jon Swaine, *Amy Coney Barrett, Supreme Court nominee, spoke at program founded to inspire a ‘distinctly Christian worldview in every area of law’*, WASH. POST (Sept. 27, 2020), https://www.washingtonpost.com/politics/coney-barrett-christian-law-fellowship-blackstone/2020/09/27/7ae41892-fdc5-11ea-b555-4d71a9254f4b_story.html.

⁴¹ See SOUTHERN POVERTY LAW CENTER, *Extremist Files, Alliance Defending Freedom* <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> (last visited Oct. 12, 2020).

⁴² See Video, Judge Barrett Confirmation Hearing for Seventh Circuit Court of Appeals, Senate Judiciary Committee, Sept. 8, 2017, <https://www.youtube.com/watch?v=B0C620T8knU&feature=youtu.be>, at 2:00-2:40.

to *Religious Freedom Today*, and *The ACLU vs. America: Exposing the Agenda to Redefine Moral Values*, both co-authored by Alan Sears, President, CEO, and General Counsel for ADF.⁴³ Notably, Mr. Sears was a guest at the September 26th White House ceremony announcing Judge Barrett's nomination. Judge Barrett's record suggests that she is aligned in her beliefs with those who oppose marriage equality and full rights for LGBTQ persons. Indeed, as discussed below, she has expressly indicated that she does not believe transgender persons are protected by a key civil rights law.

Lest there be any doubt about how quickly LGBTQ rights could be imperiled, at the start of the October 2020 term, Justices Clarence Thomas and Samuel Alito wrote an opinion voicing a scathing critique of the Court's decision guaranteeing the equal right of gay people to civil marriage in *Obergefell v. Hodges*,⁴⁴ based on the same judicial philosophy espoused by Judge Barrett.⁴⁵ Her addition to the Court could potentially create a majority vote in favor of overruling *Obergefell* and reversing the clock on LGBTQ marital rights.

B. Abortion Rights

The right to choose and other reproductive rights are also in peril if Judge Barrett is confirmed to the Supreme Court. Notably, President Trump has stated he

⁴³ See BLACKSTONE LEGAL FELLOWSHIP, Core Curriculum, July 26, 2011, <http://www.blackstonelegalfellowship.org/Resources/ResourceOverview> [<https://web.archive.org/web/20110726060717/http://www.blackstonelegalfellowship.org/Resources/ResourceOverview>].

⁴⁴ 576 U.S. 644 (2015).

⁴⁵ See *Davis v. Ermold*, No. 19-926, 592 U.S. __ (2020), 2020 WL 5881537 (Statement of Thomas, J.).

would only nominate justices who will overturn *Roe v. Wade*,⁴⁶ and Judge Barrett has signed a newspaper advertisement stating: “It’s time to put an end to the barbaric legacy of *Roe v. Wade*.”⁴⁷

Entrenching a 6-3 conservative majority on the Supreme Court would undermine basic civil rights protections for generations of women on one of the most contentious legal issues of our time. This underscores the critical need for voters to determine the Congress and President they want to fill this vacancy on the Court that will likely decide the future of access to abortion and reproductive rights.

C. Judge Barrett’s Extreme Originalist Philosophy

Judge Barrett’s extensive writings allow an assessment of her judicial philosophy beyond the relatively few years she has been an appellate judge. Her writings and speeches, and statements to which she has signed on or endorsed, reflect her support for positions that raise grave concerns about her fidelity to precedent and to the rule of law, including core civil rights protections.

At her nomination ceremony, Judge Barrett said that as a Supreme Court justice, she would employ the same judicial philosophy as did Justice Scalia, for whom she clerked. But, although Judge Barrett and Justice Scalia both subscribe to the judicial philosophy known as originalism, she appears inclined to apply a version of the doctrine that goes well beyond Justice Scalia’s philosophy and one

⁴⁶ Meridith McGraw and Nancy Cook, *Trump walks abortion tightrope on SCOTUS pick*, POLITICO, Sept. 25, 2020, <https://www.politico.com/news/2020/09/25/trump-supreme-court-abortion-421443>.

⁴⁷ Debra Cassens Weiss, *Amy Coney Barrett signed 2006 ad calling for end to ‘barbaric legacy of *Roe v. Wade*’*, ABA JOURNAL, Oct. 2, 2020, <https://www.abajournal.com/news/article/barrett-signed-2006-add-calling-for-end-to-barbaric-legacy-of-roe-v.-wade>.

that would be fundamentally inconsistent with the Fourteenth Amendment's express commitment to equal rights under law.

In Judge Barrett's words, "[o]riginalism maintains both that the constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative."⁴⁸ As critics of originalism have noted, the doctrine requires judges to "moonlight as amateur historians to discern what the public hundreds of years ago understood constitutional provisions to mean."⁴⁹ Worse still, originalism risks freezing in place the prejudices of those who ratified constitutional provisions centuries ago, at a time when most Black people were enslaved, and full citizenship was limited to white men. As Justice Brennan stated in a similar context, originalism risks turning the Constitution into a "stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."⁵⁰ Indeed, when the Supreme Court finally recognized (in 2003) that the Constitution prohibits the criminalization of intimate conduct among consenting same-sex adults, Justice Kennedy forcefully refuted the idea that the meaning of the liberty and equality embodied in the Constitution should be limited to the narrow understanding of those who ratified the constitutional text:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind

⁴⁸ Amy Coney Barrett, *Originalism and Stare Decisis*, NOTRE DAME L. REV. 1921 (2017), <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4734&context=ndlr>.

⁴⁹ LDF Kavanaugh Report, note 1, *supra* (citing *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 183, 1850, 1857–59 (2018) (Breyer, J., dissenting)).

⁵⁰ *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (Brennan, J., dissenting).

us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.⁵¹

Importantly, not all originalists are the same.⁵² Judge Barrett's writings suggest that she would employ one of the most extreme forms of originalism and one even more extreme than that embraced by Justice Scalia.⁵³

D. Judge Barrett's Extreme Originalism and *Brown v. Board of Education*

Justice Scalia believed that one consults original understanding only if the text is ambiguous. Justice Scalia said that *Brown v. Board of Education* was correctly decided because the *text* of the Equal Protection Clause prohibits segregated schools even if the majority of people in 1868 were segregationists.⁵⁴ This is a key limitation on originalism because the Constitution's text reflects certain core commitments to equal justice under the law. By contrast, if the original understanding of a constitutional provision can override the text, an original understanding that may have been informed by racist, sexist, and other prejudiced

⁵¹ *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

⁵² Amy Coney Barrett and John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 7, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1619&context=jcl> (distinguishing between "first-generation" originalists and "modern" originalists); see also Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) (distinguishing between "faint-hearted" originalists who are willing to make a pragmatic exception to stare decisis, and "fearless originalists" who reject the doctrine of stare decisis so that "if a prior precedent of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices").

⁵³ See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist."). After self-proclaiming as a faint-hearted originalist, Justice Scalia later identified as a "stout-hearted and honest originalist." See Ronald Turner, *On Brown v. Board of Education and Discretionary Originalism*, 5 UTAH LAW REV. 1143, 1155 (2015).

⁵⁴ Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* at 88 (Thomson West, 2012) (footnote omitted).

understandings of what full citizenship means and who is entitled to it may become frozen into constitutional law.

Consistent with this concern, Judge Barrett has explicitly stated that “[a]dherence to originalism arguably requires . . . the reversal of *Brown v. Board of Education*”—along with “the dismantling of the administrative state” and “the invalidation of paper money.”⁵⁵ To be clear, Judge Barrett has not expressed a definitive view about whether *Brown* was correctly decided, and she has identified it as one of a select few “superprecedents” that no judge would actually overrule. But the fact that Judge Barrett understands originalism to call all of these basic constitutional norms into question—and still adheres to the doctrine as the primary mode of constitutional interpretation—raises serious questions about her commitment to enforcing core civil rights protections. Treating *Brown* as potentially mistaken, even if untouchable, is far different from recognizing that it was correctly decided. And, in sharp contrast to Judge Barrett’s statement that *Brown* may be incorrect under her theory of constitutional interpretation, all of the current justices resoundingly agree on the correctness and importance of *Brown*, making her statements on *Brown* an extreme outlier on an already conservative Court.⁵⁶

⁵⁵ Barrett and Nagle, *supra* note 52 at 1.

⁵⁶ See Ronald Turner, *Was Brown v. Board of Education Correctly Decided?*, 79 MD. L. REV. ONLINE 41, 59 n.129 (2020), available online at <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1065&context=endnotes> (observing that during their confirmation hearings, then-Judge Roberts said that *Brown* “is more consistent with . . . the original understanding of the Fourteenth Amendment than *Plessy v. Ferguson*,” then-Judge Thomas said *Brown* “changed [his] life,” and Judge Alito exclaimed his support of *Brown* and lauded the decision as “one of the greatest, if not the single greatest thing that the Supreme Court of the United States has ever done”); see also Melissa Quinn, *Kavanaugh: Brown v. Board of Education 'single greatest moment in Supreme Court history'*, WASH. EXAM’R, Sept. 5, 2018, <https://www.washingtonexaminer.com/policy/courts/brett-kavanaugh-brown-v-board-of->

E. Judge Barrett's Questions About the Legitimacy of the Fourteenth Amendment

The Fourteenth Amendment and Congress' authority to enforce it is the foundation of almost all of our major civil rights statutes and our entire conception of equality under the law. However, Judge Barrett has stated that, from an originalist perspective, the Fourteenth Amendment is “possibly illegitimate.”⁵⁷ Although she did not elaborate on this position, she cited an article suggesting that the Fourteenth Amendment was a “purely partisan measure,” and that, from an originalist perspective, was improperly adopted because it was drafted and enacted in a Reconstruction Congress in which the Southern states were denied representation.⁵⁸ If the Fourteenth Amendment were deemed illegitimate, the Constitution's core commitment to equal protection under law would disappear. Congress would lack the power to enforce civil rights laws such as the Voting Rights Act. And all Americans would be stripped of their rights under many other constitutional provisions—including the rights to free speech, to freely exercise their religion, and to bear arms—because all of those rights only apply to the States as a result of the Fourteenth Amendment. Again, Judge Barrett has made clear she does not expect any judge to actually invalidate the Fourteenth Amendment, but

[education-single-greatest-moment-supreme-court-history](#) (then-Judge Kavanaugh calling *Brown* the “single greatest moment in Supreme Court history” that “lived up to the text of the Equal Protection Clause”); Supreme Court Gorsuch Confirmation Hearing (Day 2, Part 1), Senate Judiciary Committee, Mar. 21, 2017, <https://www.c-span.org/video/?c4662810/user-clip-gorsuch-brown-vs-board-education> at 1:31 – 1:41 (then-Judge Gorsuch stating that *Brown* “was a correct application of the law and precedent”).

⁵⁷ Barrett and Nagle, *supra* note 52 at 2.

⁵⁸ *Id.* at 2 n.4 (citing Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627 (2013)).

this pragmatic recognition is not grounded in Judge Barrett’s belief in the clear legitimacy of the Fourteenth Amendment.

By referring to the Fourteenth Amendment as “possibly illegitimate” under her own judicial philosophy, Judge Barrett has called into question how she would interpret the countless civil rights cases that rely on the Fourteenth Amendment to extend key protections against discrimination to historically marginalized groups. Her stated ambivalence about the validity of the Fourteenth Amendment under her understanding of originalism raises deep concerns about her fitness to serve on the nation’s highest court. Indeed, the very words on the frontage of the Supreme Court— “Equal Justice Under Law”—are called into question by speculation about the legitimacy of the Fourteenth Amendment.

F. Judge Barrett’s Adherence to Extreme Originalism Is Fundamentally at Odds with Changes in Societal Understanding of Equality

The Supreme Court’s decision last term in *Bostock v. Clayton County*,⁵⁹ highlights the importance of giving full effect to laws that promise equal rights under law, even as they are applied in contexts that their drafters may not have contemplated. It also highlights deep concerns with Judge Barrett’s embrace of extreme originalism and its likely impact on key civil rights protections.

In *Bostock*, the issue before the Court “was whether an employer can fire someone simply for being [gay] or transgender.”⁶⁰ The Court correctly answered that question “no.” In an opinion written by Justice Gorsuch, joined by Justice Ginsburg, the majority explained that the plain text of Title VII prohibits such

⁵⁹ 140 S. Ct. 1731 (2020).

⁶⁰ 140 S. Ct. at 1737.

discrimination. When an employer discriminates against, for example, a male employee because he is attracted to a man, the employer is discriminating “because . . . of [the employee’s] sex,” in violation of Title VII, as the employer would not have penalized a female employee attracted to a man.⁶¹ Relying on a prior opinion by Justice Scalia, the Court stressed that it did not matter whether those who drafted Title VII recognized that the law would prohibit employment discrimination against LGBTQ persons, because it is “the provisions of [Congress’s] legislative commands ‘rather than the principal concerns of our legislators by which we are governed.’”⁶² Yet, three Justices dissented from this ruling, arguing that the Court should interpret Title VII to permit employees to be fired simply because they are gay or transgender.⁶³ Judge Barrett has advocated a similar position, contending in a 2016 speech that Title IX of the Civil Rights Act, which also prohibits discrimination on the basis of sex, does not protect transgender persons from discrimination because, in her view, “no one . . . would have dreamed of that result” at the time the law was enacted.⁶⁴

Notably, Justice Scalia also recognized that changes in societal understandings (e.g., about women’s rights and the scope of “property” interests) inform the proper understanding of constitutional text, even for an originalist.⁶⁵ This is another important limitation on originalism, preventing the doctrine from

⁶¹ *Id.* at 1741-42.

⁶² *Id.* at 1749.

⁶³ *See id.* at 1754 (Alito, J., joined by Thomas, J., dissenting); *id.* at 1822 (Kavanaugh, J., dissenting).

⁶⁴ Mark Walsh, *Court Nominee Expressed Doubt That Title IX Protects Transgender Students*, EDUC. WEEK, School Law Blog, Sept. 29, 2020, https://blogs.edweek.org/edweek/school_law/2020/09/court_nominee_expressed_doubt_.html.

⁶⁵ *Georgia v. Randolph*, 547 U.S. 103, 144 (2006) (Scalia, J., dissenting).

being co-extensive with the prejudices and biases of prior generations. Judge Barrett has not endorsed these key principles that allow originalism to co-exist with our society’s fundamental commitment to equal citizenship under law. To the contrary, Judge Barrett has acknowledged that originalists adhere to the precedent of history⁶⁶ and has openly grappled with the tension between an originalist’s approach to cases that are inconsistent with the original public meaning.

G. Judge Barrett’s Extreme Originalism Undermines Stare Decisis

Finally, while Justice Scalia described himself as a pragmatic “faint-hearted originalist” who sometimes adhered to precedent that deviated from the original public meaning of constitutional text, Judge Barrett has described constitutional stare decisis as especially weak,⁶⁷ and has suggested that stare decisis may in some circumstances be unconstitutional. She has advocated for a more “flexible” understanding of stare decisis, outside of a relatively small number of superprecedents—“decisions that no serious person would propose to undo even if they are wrong”⁶⁸—including, among others, *Mapp v. Ohio*,⁶⁹ *Brown v. Board of Education*⁷⁰ and the *Civil Rights Cases*.⁷¹ Judge Barrett has stated that *Roe v. Wade* is not among the cases considered “superprecedent;”⁷² therefore, we cannot expect that Judge Barrett would follow stare decisis in determining whether the holding in *Roe* remains good law.

⁶⁶ Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1922–24 (2017).

⁶⁷ Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005).

⁶⁸ Barrett and Nagle, *supra* note 52 at 2, 13–16 (2017).

⁶⁹ 367 U.S. 643 (1961).

⁷⁰ 347 U.S. 483 (1954).

⁷¹ 109 U.S. 3 (1883).

⁷² Barrett, *Jurisprudential Disagreement*, *supra* note 39, at 1735 & n.41.

For other categories of constitutional precedent, Judge Barrett has also affirmed her belief that judges should generally decide cases consistent with their interpretation of the Constitution, instead of adhering to prior precedent as a result of reliance and stability interests under the doctrine of stare decisis.⁷³ And she has posited that to the extent there is a conflict between the original public meaning and precedent, the original public meaning is authoritative.⁷⁴

Conclusion

The nomination of Judge Barrett to the Supreme Court of the United States comes at a time when our country's commitment to the rule of law and the democratic processes that undergird our legitimacy are being stress-tested. At the apex of the third branch of government that is charged by our Constitution as the guardian and interpreter of the law, the Supreme Court must remain—and be seen as—an independent and apolitical arbiter of truth.

For the reasons set forth above, we oppose the confirmation of Judge Barrett to the Supreme Court. Indeed, the Senate should not move forward with confirmation proceedings for Judge Barrett, or any other nominee to the Supreme Court, until after the next Congress commences, and the winner of the November 2020 presidential election is inaugurated in January 2021.

⁷³ See *id.*

⁷⁴ See Barrett, *supra* note 66 at 1925–26.