



REPORT ON THE NOMINATION OF JUDGE AMY CONEY BARRETT AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT



ABOUT THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The principal mission of the Lawyers' Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity – work that continues to be vital today. Among its major areas of work are Educational Opportunities, Fair Housing & Community Development, Voting Rights, Criminal Justice, Economic Justice and Judicial Diversity. Since its inception, the Lawyers' Committee has been committed to vigorous civil rights enforcement, the pursuit of equal justice under law, and fidelity to the rule of law.

Lawyers' Committee for Civil Rights Under Law
1500 K Street, N.W., 9th Fl.
Washington, DC 20005
press@lawyerscommittee.org



Judge Amy Coney Barrett
Judge, U.S. Court of Appeals for the Seventh Circuit
Nominated September 26, 2020 to United States Supreme Court

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I. EXECUTIVE SUMMARY

Amy Coney Barrett of the Seventh Circuit Court of Appeals is being considered for the position of Associate Justice of the United States Supreme Court. Judge Barrett's nomination is intended to fill the seat vacated by the death of Associate Justice Ruth Bader Ginsburg. This report examines Judge Barrett's fitness to serve in this position based on her record on key issues over the course of her legal career, including the past three years as a judge on the Circuit Court of Appeals.

Every term, critical cases on issues of great public importance come before the Supreme Court, including cases concerning the interpretation and application of the Constitution and federal civil rights laws. In evaluating nominees to the Court, the Lawyers' Committee for Civil Rights Under Law ("Lawyers Committee") has employed a rigorous standard with two distinct components: (1) exceptional competence to serve on the Court, and (2) a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws. After reviewing the currently available record of Judge Barrett, we have concluded that there is sufficient cause to oppose Judge Barrett's confirmation.

The Lawyers' Committee believes that Judge Barrett is competent to serve on the Court, although not exceptionally so in light of her relatively narrow experience, which satisfies the first prong of our standard. As for the second prong, the Lawyers' Committee requires a demonstrated respect for the importance of protecting civil rights based on authored opinions, statements, and articles. Judge Barrett's record demonstrates that she is predisposed to side with law enforcement at the expense of defendants' constitutional rights, and with employers and business interests in disputes with employees and consumers. With respect to our long-standing focus on voting rights we note that we are currently

involved in major cases on this issue. We are also aware that there are many pending voting rights cases surrounding the 2020 election, several of which may make their way to the Supreme Court. Based on her record, we believe she will narrowly construe the Constitution and civil rights statutes in a way that limits their scope and effectiveness, and that she will defer to state and local efforts to suppress the vote. In particular, her suggestion in her dissent in *Kanter v. Barr* that the rights to serve on juries and to vote belong "only to virtuous citizens" is cause for great concern among those who recognize that the right to vote is foundational to all civil rights.¹ In sum, her record raises serious questions regarding her ability to respect precedents addressing voting rights, reproductive rights, marriage equality, and other areas of core importance to our civil rights mission. Therefore, because Judge Barrett fails to satisfy the second prong of our standard, the Lawyers' Committee strongly opposes this nomination.

We believe that Judge Barrett has demonstrated views that are inconsistent with a commitment to fair interpretation and application of civil rights law. Regardless of whether her religious or other personal views influence her decisions—and in her Seventh Circuit confirmation hearings she distanced herself from that position—Judge Barrett's judicial philosophy of strict textualism and originalism threatens the individual rights that have been established by the Supreme Court for decades. Particularly in the areas of civil rights, criminal justice, immigration law, and reproductive freedom, Judge Barrett's strict textualist and originalist approach to interpreting statutes and the Constitution tends to favor the government and corporations over the individual, the employer over the employee, and the immigration official over the immigrant.

While Judge Barrett appears to have an outstanding intellect, her judicial philosophy creates serious obstacles to protecting the rights of African Americans and people of color, the disadvantaged, and the most vulnerable in our society. Originalism, as a theory of constitutional interpretation, purports to rely on the understanding of the constitutional text

1 *Kanter v. Barr*, 919 F.3d 437, 463 (7th Cir. 2019).

when the language was adopted.² Not only can this approach lead to a high degree of speculation about the Framers' subjective understanding, but it also expressly rejects consideration of a society's evolving view of what justice requires. Many Supreme Court Justices have recognized that a later society's values and its standards for justice, liberty, and equality may be more demanding than those that existed at the time the applicable constitutional text was adopted. See, for example, Justice Kennedy's statement in *Obergefell v. Hodges*:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the rights of all persons to enjoy liberty as we learn its meaning. (576 U.S. at 664)

Because, in the originalists' view, constitutional values are frozen at the time the constitutional text was ratified, the originalist theory often gives no voice or consideration to many of the important constitutional issues facing our country today—such as women's rights, LGBTQ rights, and personal privacy—that were simply not contemplated at the time the Constitution was adopted, when the expectations of equality were far different than in our present day. While Judge Barrett's careful writing style and learned recitation of history give her opinions the appearance of impartiality, a close look at those opinions reveals that she advances a very conservative ideological agenda.

In addition to her basic approach to constitutional interpretation, another concern is her views on the well-established doctrine of stare decisis. The doctrine, one of judicial restraint and deference

to long-standing precedent, is historically an important consideration for the Court in analyzing constitutional and statutory claims. Her willingness to consider overturning key precedents that she personally believes were wrongly decided could move the country backwards for decades to come. We strongly urge opposition to Judge Barrett's confirmation.

Finally, it is noteworthy that, in an interview that has just resurfaced from 2016, Judge Barrett weighed in on the politically charged issue of whether it was appropriate to confirm Justice Scalia's replacement during an election year, arguing that confirmation should wait until after the election because an immediate replacement would have "dramatically flip[ped] the balance of power."³

II. BIOGRAPHY

Amy Coney Barrett was born in a suburb of New Orleans, Louisiana in 1972. She attended St. Mary's Dominical High School, a Catholic girls' school in New Orleans and graduated magna cum laude in 1994 from Rhodes College, a Tennessee liberal arts college affiliated with the Presbyterian Church, with a degree in English Literature. After graduation, Barrett attended Notre Dame Law School on a full-tuition scholarship where she excelled, serving as the Executive Editor of the *Notre Dame Law Review*. While at Notre Dame, Barrett served as a Research Assistant for law professor William K. Kelley, former Deputy Counsel to President George W. Bush.

After law school, Judge Barrett worked as a summer associate at Covington & Burling, before holding two high-profile judicial clerkships, first with Judge Laurence Silberman of the U.S. Court of Appeals for the District of Columbia Circuit from 1997 to 1998, and then with the late Justice Antonin Scalia, from 1998 to 1999.

² "Originalism maintains both that constitutional text means what it did at the time it was ratified and that this original meaning is authoritative. This theory stands in contrast to those that treat the Constitution's meaning as susceptible to evolution over time. For an originalist, the meaning of the text is fixed as long as it is discoverable." Amy Coney Barrett, Originalism and Stare Decisis, 92 NOTRE DAME L. REV. 1921, 1921 (2017) [hereinafter, "Barrett, Originalism."]

³ Meghan Roos, *In Resurfaced Clip, Amy Coney Barrett Says it Would've Been Inappropriate for Obama to Nominate SCOTUS Judge Who Could 'Flip Balance of Power'*, NEWSWEEK (September 23, 2020 at 2:11PM), <https://www.newsweek.com/resurfaced-clip-amy-coney-barrett-says-it-wouldve-been-inappropriate-obama-nominate-scotus-1533913>.

Following her Supreme Court clerkship, Judge Barrett spent a year practicing law at Miller, Cassidy, Larroca & Lewin, a prestigious Washington, D.C. litigation boutique, which merged with Baker Botts in 2001. During her confirmation process for the Seventh Circuit, Barrett was not able to recall most of the cases on which she worked at Baker Botts and indicated that she never argued any appeals. Judge Barrett was a member of the *Bush v. Gore* legal team, which represented then-Governor George W. Bush. Judge Barrett began her academic career in 2001, when she spent a year as an adjunct professor (Spring 2001) and then as a law and economics fellow at George Washington Law School (2001-2002) before heading to Notre Dame in 2002 to teach federal courts, constitutional law and statutory interpretation. She continued there until 2017, when she joined the Seventh Circuit.

While at Notre Dame, Judge Barrett served by appointment of the Chief Justice of the United States Supreme Court on the Advisory Committee for the Federal Rules of Appellate Procedure and as the Chair of the Association of American Law Schools Federal Courts Section. Barrett was a member of the Federalist Society, the influential conservative legal organization, from 2005 to 2006, and again from 2014 to 2017.

President Trump nominated Judge Barrett to the U.S. Court of Appeals for the Seventh Circuit on May 8, 2017. In response to written questions from Democratic senators during her confirmation hearing, Barrett suggested that she rejoined the Federalist Society because it gave her “the opportunity to speak to groups of interest, engaged students on topics of mutual interest,” but she suggested she had never attended the group’s national convention.⁴

After the confirmation hearing, the New York Times reported that Barrett was a member of a group called the “People of Praise,” a group that swears an oath of loyalty to one another and “teaches that

husbands are the heads of their wives and should take authority for their family.”⁵ Legal experts referenced in the Times article questioned Barrett’s potential “independence and impartiality” in light of this apparent affiliation. Barrett declined the Times’ request for an interview.⁶

The group does not publicly disclose its membership, but Judge Barrett has not denied being a member of the group and the Times provided pages of the *People of Praise* magazine, “Vine & Branches” mentioning and picturing Judge Barrett, which have since disappeared from the group’s website.⁷

On October 31, 2017, Barrett was confirmed to the Seventh Circuit by a vote of 55 to 43. In addition to support from Republican Senators, three Democratic senators—her home state senator, Joe Donnelly; Tim Kaine of Virginia; and Joe Manchin of West Virginia—crossed party lines to vote for her, while two Democratic senators (Claire McCaskill of Missouri and Robert Menendez of New Jersey) did not vote.

Barrett has been married for over 18 years to Jesse Barrett, a partner in a South Bend law firm who spent 13 years as a federal prosecutor in Indiana. They have seven children, including two children who were adopted from Haiti. At her confirmation hearing, Judge Barrett described her youngest child, Benjamin, as having special needs that “present unique challenges for all of us.”

4 Amy How, *Profile of a potential nominee: Amy Coney Barrett*, SCOTUSBLOG (Sept. 21, 2020, 5:00PM), <https://www.scotusblog.com/2020/09/profile-of-a-potential-nominee-amy-coney-barrett/>.

5 Laurie Goodstein, *Some Worry About Judicial Nominee’s Ties to a Religious Group*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/us/amy-coney-barrett-nominee-religion.html>.

6 *Id.*

7 *Id.*

III. ANALYSIS OF JUDGE BARRETT'S JUDICIAL OPINIONS

In her short tenure as a judge on the Seventh Circuit, starting only in 2017, Judge Barrett has issued a number of opinions and joined a number of others that are of concern to the Lawyers' Committee.

A. Workers' and Civil Rights

In the area of workers' rights, Judge Barrett has demonstrated an inclination to side with the employer rather than the employee and to interpret narrowly the protection of the federal discrimination statutes.

A case decided shortly after her confirmation to the Seventh Circuit, *EEOC v. AutoZone*, 875 F.3d 860 (7th Cir. 2017), provides a window into her judicial view of Title VII discrimination cases. In that case, Judge Barrett, along with four other judges on the Court of Appeals,⁸ refused the federal government's request for an *en banc* review in a case in which AutoZone intentionally segregated employees for placement into different facilities on the basis of race. A three-judge panel ruled for AutoZone principally because the intentional maintenance of racially segregated facilities did not diminish plaintiff's "pay, benefits or job responsibilities." *Id.* at 861. Plaintiff, an African-American male, alleged that AutoZone transferred him out of a Chicago location in an effort to make it a predominantly Hispanic store, and that AutoZone had "Hispanic" and "African-American" stores in Chicago depending on the location and the demographics of the communities predominantly served. AutoZone's practice of employee segregation by race deprived people who did not belong to a designated racial group of employment opportunities in their preferred geographic location. *Id.*

In a strong dissent from the denial of *en banc* review, Judges Diane Wood, Ilana Rovner, and David

Hamilton wrote that, under "the panel's reasoning, a separate-but-equal arrangement is permissible under Title VII as long as the 'separate' facilities really are 'equal'" *Id.* at 861. Because that view was "contrary to the position that the Supreme Court has taken in analogous equal protection cases as far back as *Brown v. Board of Education*, 347 U.S. 483 (1954)," AutoZone's practice was "easily" an adverse employment action that limited job opportunities and therefore cognizable under Title VII. *Id.* at 862. It is deeply troubling that Judge Barrett did not appreciate that the employer's action was an obvious violation of Title VII.

In a recent decision, *Smith v. Illinois Department of Transportation*, 936 F.3d 534 (7th Cir. 2019), Judge Barrett authored a panel decision holding that an African-American traffic patrol driver failed to make the case that he was fired in retaliation for his complaints of racial bias by his coworkers. Judge Barrett wrote that a jury could reasonably conclude that his unsafe driving and poor job performance led to his dismissal.

In upholding a trial court's grant of summary judgment in favor of the Illinois DOT, Judge Barrett said the worker failed to tie his firing to his allegations of bias. In nixing Smith's claim that he was subjected to a hostile work environment based on his race, Judge Barrett also concluded that he failed to connect the harassment he says he experienced—such as profanities hurled at him by co-workers—to his race, which is a category protected by Title VII.

"While the epithets may have made for a crude or unpleasant workplace, 'Title VII imposes no 'general civility code,'" Judge Barrett wrote, quoting a 2013 Supreme Court ruling in *Vance v. Ball State University*, 570 U.S. 421 (2013), a decision authored by Justice Samuel Alito, holding that only employees with the authority to hire, fire or promote others are deemed to be supervisors whose actions impose vicarious liability on employers under Title VII. 936 F.3d at 561.

"Because Smith introduced no evidence that his supervisors swore at him because he was black, the profanity that he describes does not establish a hostile

⁸ The judges joining with Judge Barrett were Judges Easterbrook, Sykes, Flaum and Kanne. The opinion was authored by Judge Sykes, a Trump appointee.

work environment under Title VII,” Judge Barrett added. *Id.* “The n-word is an egregious racial epithet,” Judge Barrett wrote. “That said, Smith can’t win simply by proving that the word was uttered. He must also demonstrate that [a colleague’s] use of this word altered the conditions of his employment and created a hostile or abusive working environment. And he must make this showing ‘from both a subjective and an objective point of view.’ He introduced no evidence that [the colleague’s] use of the n-word changed his subjective experience of the workplace.” *Id.*

This decision demonstrates Judge Barrett’s lack of understanding of what a racial slur means to an African-American worker. For her to conclude that this did not create a hostile work environment from his perspective is simply incomprehensible.

In another case, *Kleber v. Carefusion Corp.*, 914 F.3d 480 (2019), Judge Barrett joined a decision upholding the dismissal of plaintiff’s claim for age discrimination on a theory of disparate impact liability. The decision held, based on a narrow statutory construction of the Age Discrimination in Employment Act, that the disparate-impact language applied only to current employees and not to job applicants. The decision, which the dissent argued “undermined the stated purpose” of the statute with its “wooden and narrow textual interpretation,” *id.* at 507, meant that an employer was free to discriminate in hiring based on age.

B. Criminal Justice

In the area of criminal justice and prisoners’ rights, Judge Barrett’s dissent in *Schmidt v. Foster*, 891 F.3d 302 (7th Cir. 2018), is notable for her unwillingness to protect a defendant’s rights. There, a Wisconsin man admitted that he shot his wife seven times, killing her in their driveway. The man argued that his charge should be second-degree murder (rather than first-degree murder) because he was provoked. At a pretrial hearing in chambers where prosecutors were not present and the defendant’s attorney was not allowed to speak, the judge rejected the claim of provocation. The Seventh Circuit sent the case back to the lower court, ruling that the hearing violated the man’s right to counsel. *Id.* at 321.

Judge Barrett dissented, arguing that the lower court decision would not have been “contrary to” or an “unreasonable application of” clearly established federal law on a habeas review because the Supreme Court has never addressed the type of pretrial hearing that occurred and that it was non-adversarial. While acknowledging that “perhaps the right to counsel should extend to a hearing like the one the judge conducted...,” she found that federal law “precludes us from disturbing a state court’s judgment on the ground that a state court decided an open question differently than we would—or, for that matter, differently than we think the [Supreme] Court would.” *Id.* at 326.

In *Estate of Biegert v. Molitor*, 968 F.3d 693 (7th Cir. 2020), Judge Barrett authored a decision for a unanimous panel, which also included Judges Diane Sykes and Frank Easterbrook, that is relevant to the current national discourse on law enforcement’s use of deadly force. The issue in *Biegert* was whether police officers used excessive force in responding to an emergency call from a mother reporting her concerns over her son’s attempted suicide. In a scuffle at the scene, the son was shot after he had armed himself with a kitchen knife and began stabbing one of the responding officers. Writing for the Court, Judge Barrett “evaluat[ed] the reasonableness of the officers’ actions with the understanding the situation they faced was tense, uncertain and rapidly evolving and required them to make split second judgments about how much force to apply to counter the danger [] posed.” *Id.* at 701. The Court found that the officers did not initially resort to lethal force but rather increased their use of force as the physical resistance rose. The officers “might have made mistakes and those mistakes may have even provoked [] violent resistance,” but that did not mean their conduct violated the Fourth Amendment because the officers did not create a dangerous situation that might have led to the need to use deadly force. *Id.* at 698. By noting that the officers’ mistakes may, in fact, have provoked the victim’s violent resistance, Judge Barrett effectively acknowledged that the Court was protecting the mistaken actions of the police even when those actions led to the killing of a troubled young man.

In one of her articles, Judge Barrett called the *Miranda* doctrine, which can result in the exclusion

of evidence if a confession is made in the absence of a warning of the right to remain silent, an example of “the court’s choice to over-enforce a constitutional norm” that goes beyond constitutional meaning and that the Miranda warnings “inevitably excludes from evidence even some confessions freely given.” *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 170 (2010).

C. Reproductive Rights

By every indication, Judge Barrett would likely look to restrict reproductive rights and ultimately dismantle *Roe v. Wade*. Her public statements on the issue, judicial decisions, strict originalist approach to constitutional analysis, and negative view of stare decisis all point towards the conclusion that she would not recognize *Roe*’s federal fundamental right to privacy if appointed to the High Court.

In 2006, Judge Barrett signed her name to a local newspaper advertisement placed by the St. Joseph County Right to Life Group, of which Barrett and her husband were members, which declared that “it’s time to put an end to the barbaric legacy of *Roe v. Wade* and restore laws that protect the lives of unborn children.”⁹ Notably, this advertisement was not disclosed to the Senate during her 2017 confirmation hearing.

In 2013, *Notre Dame Magazine* wrote about Judge Barrett’s participation and presentation in a program titled “*Roe* at 40: the Supreme Court, Abortion and the Culture War that Followed.” The article stated that Barrett spoke of her conviction that life begins at conception and her belief that, “[b]y creating through judicial fiat a framework of abortion on demand in a political environment that was already liberalizing abortion regulations state-by-state, *Roe* and *Doe v. Bolton* ‘ignited a national controversy.’”¹⁰ Similarly, in a talk at Jacksonville University in 2016, Barrett said of abortion jurisprudence, “I think the question of

whether people can get very late-term abortions, you know, how many restrictions can be put on clinics, I think that would change.”¹¹

Judge Barrett’s judicial decisions give further credence to the generally held assumption that she would aim to curtail, if not completely dismantle *Roe*. Judge Barrett has squarely confronted the issue of abortion as a judge twice—both times in dealing with requests for en banc review.

In 2018, in *Planned Parenthood of Ind. and Ky., Inc. v. Comm’r of Ind. State Dept. of Health*, 917 F.3d 532 (7th Cir. 2018), Judge Barrett joined a dissent from an opinion denying en banc review of a three-judge panel ruling striking down as unconstitutional two Indiana laws—one requiring fetal remains to be either buried or cremated after an abortion, and a second banning abortions solely because of the sex or disability of a fetus. The State did not seek en banc review of the decision on the sex and disability statute—it did seek review of the decision on the burial statute—because “only the U.S Supreme Court has the power to decide whether to change the rule of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which holds that a ‘State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.’” 917 F.3d at 533. Thus, in an opinion concurring in the denial of en banc review, Judges Wood, Rovner and Hamilton wrote that the State had waived its right to have the Seventh Circuit reconsider because “the Supreme Court does not need essays from different federal judges to assist its own thinking.” *Id.* at 534.

Yet Judge Easterbrook, joined by Judge Barrett, penned his own essay on the law, stating that *Casey* and other decisions hold that “until a fetus is viable, a woman is entitled to decide whether to bear a child,” but “there is a difference between ‘I don’t want a child’ and ‘I want a child, but only a male’ or ‘I want only children whose genes predict success in life.’”

9 Colby Itkowitz, *Barrett signed ad in 2006 decrying ‘barbaric legacy’ of *Roe v. Wade*, advocating overturning the law*, WASH. POST (Oct. 1, 2020), https://www.washingtonpost.com/politics/courts_law/amy-coney-barrett-roe-v-wade/2020/10/01/530072aa-0412-11eb-b7ed-141dd88560ea_story.html.

10 John Nagy, *Students, faculty mark 40 years of *Roe**, NOTRE DAME MAGAZINE (Jan. 25, 2013), [https://magazine.nd.edu/stories/lazy-i-students-faculty-mark-40-years-of-roe/](https://magazine.nd.edu/stories/lazy-i-students-faculty-mark-40-years-of-ro/).

11 Elizabeth Dias & Adam Liptak, *To Conservatives, Barrett Has ‘Perfect Combination’ of Attributes for Supreme Court*, N.Y. TIMES (Sept. 20, 2021), <https://www.nytimes.com/2020/09/20/us/politics/supreme-court-barrett.html>.

Planned Parenthood of Ind. and Ky., Inc. (Easterbrook, J., dissenting), 917 F.3d at 536. Easterbrook expressed doubt that the Constitution bars states from enacting laws preventing parents from “using abortion as a way to promote eugenic goals.” *Id.* By the reasoning espoused by Judges Easterbrook and Barrett, a state could flatly ban an abortion even if it was very early in pregnancy based on the subjective purpose of the woman, and a court would have to examine her motivation. On the fetal remains issue, Easterbrook, again joined by Barrett, argued that the disposal statute did not place a “substantial obstacle in the path of a woman seeking an abortion” and that there was no need to leave the matter to Justices. *Id.* at 538. The dissent likened fetal burial statutes to animal welfare statutes (prohibiting animal abuse, for example), which are rational, “not simply because all mammals can feel pain and may well have emotions, but also because animal welfare affects human welfare.” *Id.* at 537. Judge Easterbrook, joined by Judge Barrett, wrote that the state had a legitimate interest in passing the burial statute because it was entitled to legislate in order to promote “public morals.” *Id.*

In 2019, Barrett again dissented from a decision to deny en banc review in *Planned Parenthood of Ind. and Ky., Inc. v. Box*, 949 F.3d 997 (7th Cir. 2019), stating that she wanted the full Seventh Circuit to hear a challenge to an Indiana law requiring young women to notify their parents before obtaining an abortion. She joined the short dissent of Judge Michael Kanne, who wrote that, given the “existing unsettled status of pre-enforcement challenges in the abortion context” the issue should be decided by a full court. *Id.* at 999. In advocating for a full court review, the dissenters emphasized that “[p]reventing a statute from taking effect is a judicial act of extraordinary gravity in our federal structure.”¹²

In a First Amendment case involving abortion, *Price v. City of Chicago*, 915 F.3d 1107 (7th Cir. 2019), Judge Barrett joined Judge Sykes’ opinion upholding Chicago’s ordinance preventing anti-abortion protesters from getting within a prescribed distance of those seeking abortion care at clinics. The Chicago

ordinance was closely modeled after a Colorado law that was upheld by the Supreme Court in 2000 in *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480 (2000). Despite upholding the ordinance, the decision made clear that the Supreme Court’s decision in *Hill v. Colorado* compelled the result and that therefore “the road plaintiffs urge is not open to us in our hierarchical system.” *Price*, 915 F.3d at 1119. Judge Sykes, joined by Judge Barrett, appeared to invite the Supreme Court to overturn *Hill*, writing that because the *Hill* decision “remains binding on us the plaintiffs must seek relief in the High Court.” *Id.*

At her confirmation hearing, many senators inquired about why Barrett did not reference *Roe* as an example of a judicial super-precedent in her Texas Law Review article on stare decisis. Judge Barrett dodged the question, answering that she had “neither offered my definition of super-precedent nor undertaken an independent analysis of whether any particular case qualifies as a super-precedent under the definition employed by the schools whose work I cited.”¹³

D. Second Amendment

Judge Barrett’s Second Amendment jurisprudence reflects an originalist viewpoint that makes her more likely to expand individuals’ rights to obtain and use guns than to uphold reasonable restrictions on the purchase and use of guns.

In *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), the Court of Appeals upheld the mail fraud conviction of the owner of an orthopedic footwear company, who argued that the federal and state laws that prohibit people convicted of felonies from having guns violated his Second Amendment right to bear arms. The majority held that the government had shown that the prohibition was reasonably related to the government’s goal of keeping guns away from people convicted of serious crimes.

Judge Barrett dissented and authored a lengthy historical recitation of gun laws involving felons and

¹² Ultimately, the state filed a petition for certiorari and the Justices sent the case back to the lower courts for another look in light of their decision in *June Medical Services v. Russo*, (a decision striking down a Louisiana law that requires doctors who perform abortions to have the right to admit patients at nearby hospitals).

¹³ Emily Czachor, *Amy Coney Barrett on Abortion, Roe v. Wade and Judicial Precedent in Her own Words*, NEWSWEEK (Sept. 23, 2020), <https://www.newsweek.com/amy-coney-barrett-abortion-roe-v-wade-judicial-precedent-her-own-words-1533707>.

the mentally infirm. At the time of the country's founding, she wrote, founding-era legislatures took gun rights away from people who were believed to be dangerous in order to protect public safety. The laws at issue, however, were too broad in her view because they banned people like the plaintiff from having a gun without any evidence that he posed a risk or was dangerous. Barrett stressed that the Second Amendment "confers an individual right, intimately connected with the natural right of self-defense and not limited to civic participation." *Id.* at 463.

The majority opinion—authored by two judges appointed by President Reagan—emphasized that Barrett's position was in conflict with that of every appellate court that had addressed the issue. *See, e.g., Melinda v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019); *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014); *United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012).

E. Immigration

In the area of immigration law, Judge Barrett's decisions suggest she favors the prerogative and wide discretion of the Executive Branch over the individual rights and liberties of immigrants.

Most prominently, Judge Barrett would have upheld the Trump Administration's "public charge" rule, penalizing and denying immigrants permanent resident status for exercising their right to use Congressionally available federal benefits.

In *Cook Cnty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020), Judge Barrett dissented from Judge Diane Wood's majority decision leaving in place a preliminary injunction entered by the trial court, blocking the Trump Administration's rule preventing immigrants who the Executive Branch deemed likely to receive public assistance in any amount, at any point in the future, from entering the country or adjusting their immigration status. The rule—requiring most aliens seeking to extend their nonimmigrant status or change their status to show that they have not received public benefits for more than 12 months, in total, within a 36-month period—purported to implement the "public-charge" provision in the Immigration and Nationality Act. Judge Wood, writing for the

majority, found that it "does violence to the English language and the statutory context" to say that "public charge" covers a person who receives "only *de minimus* benefits for a *de minimus* period of time." *Id.* at 229. The rule penalized immigrants holding green cards when Congress explicitly permitted those immigrants access to such benefits.

In her lengthy dissent Judge Barrett faulted the majority for narrowly defining a public charge as referring "exclusively to primary and permanent dependence" on the state. After recounting the history of the term "public charge", she found that, rather than serving as a shorthand for a certain type or duration of aid, "public charge" referred to a lack of self-sufficiency that officials had broad discretion to estimate and "[n]either state legislatures nor Congress pinned down the term any more than that." *Id.* at 242. She wrote that the statute "gives DHS relatively wide discretion to specify the degree of benefit usage that renders someone a 'public charge,' that DHS' definition was reasonable, that what the challengers were objecting to was "this policy choice," and that "litigation is not the vehicle for resolving policy disputes." *Id.* at 254. She also noted that the Welfare Reform Act, "hardly reflects a congressional desire that immigrants take advantage of available public assistance" and that it is "not unreasonable to describe someone who relies on the government to satisfy a basic necessity for a year...as falling within the definition of a term that denotes a lack of self-sufficiency." *Id.* at 253. In February 2020, a divided Supreme Court issued an emergency order allowing the federal government to begin enforcing the rule while its appeals were pending.

In *Yafai v. Pompeo*, 912 F.3d 1018 (7th Cir. 2019), Barrett again sided with the government over individual immigrant rights. There, writing for a three-judge panel, she upheld the denial of a Yemeni woman's visa application on the ground that she had sought to smuggle two children into the United States. The woman, Zahoor Ahmed, had told the embassy that the children she was accused of smuggling had died in a drowning accident and provided documentation. The consular official cited no evidence to support the smuggling accusations. Over a vigorous dissent by Judge Kenneth Ripple (a Reagan appointee), Barrett's opinion concluded that, while there was no evidence of smuggling, federal courts lacked the authority to hear the case under the "consular non-reviewability 8

doctrine.” She held that, even without supporting evidence, as long as the consular official cites a statute or regulation as the basis of the denial, the decision could not be reviewed by the court.

In his dissent, Judge Ripple suggested the consular officer may have operated on a “stereotypical assumption” when concluding that the woman was smuggling children and declared that “[w]e have a responsibility to ensure that such decisions, when born of laziness, prejudice or bureaucratic inertia, do not stand.” *Id.* at 1029, 1030.

In a stinging dissent from the denial of en banc review of the decision, Judge Diane Wood wrote that “by holding that we are compelled to leave unexamined the government’s no-admissibility determination, the panel has wiped out our ability to vindicate any constitutional claims brought by a U.S. citizen affected by a visa denial.” *Yafai v. Pompeo*, 924 F.3d 969, 977 (7th Cir. 2019). She continued that, “[a]t its root, due process requires that the person subject to a governmental action be given enough information to be able to know what the accusation against her is. A regime in which the consular official can just say “no” and the U.S. citizen spouse must guess both about the accusation that supposedly supported that decision and—critically—what facts lay behind the “no” is not worthy of this country.” *Id.* at 983.

F. LGBTQ Rights

Judge Barrett has not authored any significant judicial opinions in the area of LGBTQ rights. However, when asked in the 2016 Jacksonville University lecture series about the *Obergefell v. Hodges* decision in which the Supreme Court brought marriage equality to all 50 states, Barrett questioned whether it was the Court’s role to establish this right. She pointed to Chief Justice John Roberts’ dissent which indicated that those advocating for same-sex marriage could lobby state legislatures and said “the dissent’s view was that it wasn’t for the court to decide...So I think *Obergefell*, and what we’re talking about for the future of the court, it’s really a who decides question.”¹⁴

In the same lecture, Barrett said that Title IX protections likely do not extend to transgender Americans, claiming it’s a “strain on the text” to reach that interpretation. She continued:

When Title IX was enacted, it’s pretty clear that no one, including the Congress that enacted that statute, would have dreamed of that result, at that time. Maybe things have changed so that we should change Title IX, maybe those arguing in favor of this kind of transgender bathroom access are right. That’s a public policy debate to have. But it does seem to strain the text of the statute to say that Title IX demands it.¹⁵

Judge Barrett’s position is plainly out of step with the Supreme Court’s decision last term in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020), in which Justice Neil Gorsuch, writing for the Court, held that Title VII’s protection against discrimination based on “sex” extended to gay and transgender individuals. As Justice Gorsuch explained, “those who adopted the Civil Rights Act might not have anticipated” its application to these communities, but “[o]nly the written word is the law, and all persons are entitled to its benefit.” *Id.* at 1737.

G. Healthcare

There are no opinions by Judge Barrett squarely addressing access to healthcare, but her writings and statements on the Affordable Care Act make plain her views on this issue.

In her article “Countering the Majoritarian Difficulty,” then-Professor Barrett wrote that in *NFIB v. Sebelius*, Chief Justice Roberts “pushed the Affordable Care Act beyond its plausible meaning.” Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 Const. Comment 61 (2017). She criticized Justice’s Roberts failure to stick to being a statutory textualist and cited (and implicitly agreed with) Justice Scalia’s dissents in *Sebelius* and *King v. Burwell*, where he wrote that “the statute known as Obamacare should be renamed “SCOTUScare” in “honor of the Court’s

14 Jacksonville University, Hesburgh Lecture 2016: Professor Amy Barrett at the JU Public Policy Institute, (Dec. 5, 2015), <https://www.youtube.com/watch?v=7yjTEdZ81II>.

15 *Id.*

willingness to rewrite” the statute in order to keep it afloat.” *Id.*

Moreover, while at Notre Dame, Barrett also opposed portions of Obamacare. Barrett signed a “statement of protest” in 2012, condemning the accommodation that the Obama administration created for religious employers who were subject to the Affordable Care Act’s birth control mandate. The “statement of protest” suggested that the accommodation “changes nothing of moral substance and fails to remove the assault on individual liberty and the rights of conscience which gave rise to the controversy.”¹⁶

IV. ANALYSIS OF JUDGE BARRETT’S THEORY OF CONSTITUTIONAL INTERPRETATION

Because Judge Barrett has been a judge for only three years, her positions on many civil rights issues can be gleaned principally from her tenure as a legal scholar. During her 16 years as a full-time law professor, Barrett’s academic scholarship was prolific. However, much of her writing focused on approaches to statutory interpretation, constitutional law and civil procedures, providing little clarity on her stance on civil rights. That said, during her confirmation hearing, some of her articles were the focus of much attention and criticism as they signaled a threat to protecting the rights of women and people of color.

Without a body of opinions on civil rights issues, a jurist’s approach to legal analysis can often serve as a useful proxy. On this score, Judge Barrett is a strict textualist and originalist, an approach that can

limit the Court’s willingness to uphold and enforce measures designed to protect people of color, women and other marginalized groups. This has serious implications for issues of concern to the civil rights community. Originalists look to the world as it existed in 1787. But we live in the 21st century. An originalist will read the Equal Protection Clause, the Due Process Clause, and the Bill of Rights generally based on the views, to the extent they can be ascertained, of the society at the time these clauses were adopted. There is no doubt that in many areas fundamental to our current understanding of liberty and equality the views of these earlier societies were much narrower than our own. Without a more expansive reading of the Constitution, *Brown v. Board of Education*, *Griswold v. Connecticut*, *Roe v. Wade*, *Obergefell v. Hodges*, and many other landmark rulings, would have reached a different result. Justice Ruth Bader Ginsburg, whose seat Judge Barrett has been nominated to fill, understood this and applied an evolving rather than static reading of the Constitution in her decisions, most notably in *United States v. Virginia*, 518 U.S. 515, 558 (1996) (explaining that “[a] prime part of the history of our Constitution...is the story of the extension of constitutional rights and protections to people once ignored or excluded.”). In contrast, Judge Barrett rejects the idea that evolving social values are relevant.¹⁷

Judge Barrett does not put significant emphasis on established precedent and has publicly advocated for the Supreme Court to move away from the doctrine of stare decisis. See Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013). In this article she stated that “[s]tare decisis is not a hard-and-fast rule in the court’s constitutional cases,” that “there is little reason to think reversals” would do the Court’s reputation great damage, and that she “tend[ed] 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 rather than a precedent she thinks is clearly in conflict with it.” *Id.* at 1726, 1728. In a footnote, Barrett noted that scholars exclude *Roe v.*

16 Amy Howe, *Potential nominee profile: Amy Coney Barrett*, SCOTUSBLOG (Jul. 4, 2018, 2:40 PM), <https://www.scotusblog.com/2018/07/potential-nominee-profile-amy-coney-barrett/>.

17 See Amy Coney Barrett, *Congressional Originalism*, 19 J. OF CONST. L. 1, 5 (Oct. 2016) [hereinafter, Barrett, “Constitutional Originalism.”] (“A nonoriginalist may take the text’s historical meaning as a relevant data point in interpreting the demands of the Constitution, but other considerations, like social justice or contemporary values, might overcome it. For an originalist, by contrast, the historical meaning of the text is a hard constraint.” (citations omitted)).

Wade from the list of “super-precedents” because “the public controversy about *Roe* has never abated.” *Id.* at 1735, fn. 141.

Judge Barrett’s speeches and articles reveal her approach to constitutional interpretation and the problems that an originalist approach can create in protecting the rights of people of color and other disadvantaged communities. For example, it is very difficult to reconcile *Brown v. Board of Education*, perhaps the most important decision protecting racial equality ever decided, with an originalist approach to interpretation.¹⁸ It is doubtful that the Congress that adopted the Fourteenth Amendment Equal Protection Clause in 1868 had a contemporaneous concept of equal protection that would prohibit segregated schools. A strict application of originalism would lead a Supreme Court Justice today to reject the core holding of *Brown* and even vote to overrule it. This is particularly true if a Justice places little weight on *stare decisis* in constitutional interpretation, which appears to be Judge Barrett’s position.

A possible escape from this dilemma is to view certain cases, which have become part of our long-established legal framework, as “super-precedents.” According to Judge Barrett, these super-precedents have five characteristics: endurance over time, support by political institutions, influence over constitutional doctrine, widespread social acceptance, and widespread judicial agreement that they are no longer worth revisiting.¹⁹ As noted above, Judge Barrett has said that *Roe v. Wade* cannot be viewed as a “super-precedent.” Based on her reasoning, as long as an opinion remained controversial among a significant segment of the public, it would not fall into the category of super-precedents. In a society in which there are deep cultural divisions over abortion,

gay marriage and perhaps even racial segregation and school prayer, the constitutional resolution of these issues could be revisited at any time.

Justice Scalia took the view that some precedents, even though they cannot be justified based on originalism, should not be overruled based on pragmatic considerations. That is why he referred to himself as a “faint-hearted” originalist.²⁰ However, it is not clear that Judge Barrett believes that a Justice is entitled to view any case as a “super-precedent, deserving of substantial deference and that the Supreme Court should rely on pragmatic considerations in refusing to overrule past precedent.”²¹

According to Judge Barrett, the principal way that the Court avoids overruling non-originalist long-established precedent is to control the issues that come before the Court.²² The fact is, however, that the Justices do not entirely control the agenda of the Court and some Justices may want to consider super-precedents even if Judge Barrett does not. Therefore, it is important to understand how Judge Barrett would address super-precedents, such as *Brown v. Board of Education*, if the opportunity arises.

A recent article by Judge Barrett exploring one of the more obscure Constitutional clauses, the Suspension Clause, underscores her tendency to hew closely to original meaning. In *Suspension and Delegation*, 99 CORNELL L. REV. 251 (2014), then-Professor Barrett advocated a strict textualist and originalist interpretation of the Suspension Clause, which provides that [t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Art. I, § 9, clause 2. Based on the language of the clause, Barrett concluded that the Suspension Clause

18 See, e.g., Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC, Aug. 24, 2012 (“It is a singular embarrassment for textual originalists that the most esteemed judicial opinion in American history, *Brown v. Board of Education*, is nonoriginalist.”)

19 Barrett, *Congressional Originalism* at 14.

20 See Posner, *The Incoherence of Antonin Scalia*; Barrett, *Originalism* at 1942.

21 “Originalists...have difficulty identifying a principled justification for following such precedent, even when the consequences of overruling it would be extraordinarily disruptive.” *Originalism* at 1. “[Most] originalists insist that the Constitution’s original meaning is binding law that cannot be overcome by other considerations, including pragmatic ones.” *Congressional Originalism* at 4.

22 “In sum, the rules of adjudication – constitutional, jurisdictional and procedural – promote efficiency and stability in narrowing the Court’s agenda. Unless originalism or any other constitutional theory requires a Justice to undertake the task of rooting out all errors from the United States Reports, super-precedents need never put any Justice, originalist or not, in a dilemma.” *Congressional Originalism* at 22.

may be invoked only when an actual invasion or rebellion has occurred, not before, and that Congress has wrongfully invoked it many times before an invasion or rebellion has occurred or even been reasonably foreseeable. The article also concludes that Congress may delegate the suspension power to the Executive, but it may only do so in the specific circumstances (rebellion or invasion) enumerated in the Constitution.

In a similar vein, but with a wider lens, Judge Barrett grappled with the problems of canons of statutory construction, which “advance policies independent of those expressed in... [a] statut[e]”—like the rule of lenity, which requires courts to construe ambiguous criminal statutes in favor of defendants—for textualists who view judges as “faithful agents” of the legislatures and duty bound to give effect to the legislators’ will. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010). Barrett concluded that the use of substantive canons may be squared with “faithful agency,” but only insofar as the canons are connected to reasonably specific constitutional values and promote those values. These canons may “push—though not force—statutory language in directions that better accommodate constitutional values,” but they may not “advance a constitutional value at the expense of a statute’s plain language.” *Id.* at 112.

Professor Barrett has even gone so far as to propose that, in some cases, the doctrine of stare decisis should be limited by the Due Process Clause in a manner similar to how the Due Process Clause limits the application of issue preclusion. See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1012 (2003) (calling into question whether the preclusive effect of precedent can offend a litigant’s—particularly a nonparty litigant’s—due process rights because it precludes the re-litigation of certain issues).

V. CONCLUSION

In evaluating nominees for the Supreme Court, the Lawyers’ Committee for Civil Rights Under Law requires a demonstrated respect for the importance of protecting civil rights as evidenced by judicial opinions as well as the nominee’s statements, scholarly articles, speeches, or other sources of information. In sum, based on all of the information provided in this Report, we conclude that the appointment of Judge Amy Coney Barrett to the United States Supreme Court would move the Court backward and lead to devastating Court rulings in the areas of civil rights, voting rights, criminal justice, employment discrimination, abortion rights, immigration, and health care. For these reasons, we oppose her nomination and urge that she not be confirmed.

VI. APPENDIX A

Board of Directors' Letter Urging Postponement of Supreme Court Nomination Process



**LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
UNDER LAW**

1500 K Street, NW
Suite 900
Washington, DC 20005

Tel: 202.662.8600
Fax: 202.783.0857
www.lawyerscommittee.org

September 24, 2020

United States Senate
Washington, D.C. 20510

**Re: Board of Directors of the Lawyers' Committee for Civil Rights Under Law
Urges Postponement of Supreme Court Nomination Process Until the Presidential
Election Has Been Decided and the Next President Inaugurated on January 20, 2021**

Dear Senator:

We, the undersigned members of the Board of Directors of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), urge the Senate to postpone consideration of the next United States Supreme Court nominee until after the federal elections now in process have been decided, the new Senate seated, and the President inaugurated on January 20, 2021. Since its founding in 1963, at the request of President John F. Kennedy, the Lawyers' Committee has been devoted to the principle of equal justice for all with a particular focus on racial justice.

As members of the bar, we expect and rely upon adherence to the rule of law and the legitimacy of our courts in upholding our democracy. The passing of Justice Ruth Bader Ginsburg is a grievous loss for our country as she valiantly fought for the protection of civil rights for all throughout her career. The court vacancy created by her death comes at a time when absentee and early voting are already underway in this year's presidential and senatorial elections. In this unprecedented circumstance, we believe it is highly inappropriate for a Supreme Court nominee to be confirmed until after the elections have been decided, the new Senate seated, and the President inaugurated. Never before in our country's history has a Supreme Court nominee been confirmed while a presidential election was already underway.¹ When a Supreme Court vacancy occurred near the end of President Abraham Lincoln's first term, he waited until after he was re-elected to nominate Salmon Chase.²

In 2016, when the Senate was faced with a nomination of a new Justice following the death of Associate Justice Antonin Scalia in February of an election year, the Senate Majority Leader refused to allow a hearing or a vote on President Barack Obama's nomination of Judge Merrick Garland. While there is precedent for the consideration and confirmation of nominees by the Senate more than six months before the election, which would have made prompt consideration of Judge Garland's nomination appropriate, proceeding with the nomination

¹ <https://www.scotusblog.com/2016/02/supreme-court-vacancies-in-presidential-election-years/>;
<https://www.nytimes.com/interactive/2020/09/19/us/politics/supreme-court-vacancies-election-year.html>.

² Supreme Court Chief Justice Roger B. Taney died in October 1964.
https://supremecourthistory.org/timeline_taney.html. President Abraham Lincoln nominated Salmon Chase to become the next Chief Justice on December 6, 1964 after the November election.
https://supremecourthistory.org/timeline_salmonchase.html.

process while the election is underway and its conclusion only six weeks away would unduly politicize the selection of a new Associate Justice and risk lasting damage to the confidence of the American people in the Supreme Court and thus to our democracy.

It is imperative to members of the bar and all who call America home that we apply rules and processes with consistency. Surely, if the Senate believed that consideration of President Obama's nominee was inappropriate nine months before the election, then the Senate must conclude that consideration of President Trump's expected nominee would be even less so as it comes fewer than 40 days before election day. As voters continue to head to the polls and cast their ballots over that short time, they will decide both who will be the next President and the composition of a new Senate. The voters must be allowed to determine the persons who will nominate and confirm our next Associate Justice of the Supreme Court.

Thank you for your consideration of our position.

Respectfully,³

Thomas Sager, Co-Chair, Ballard Spahr LLC	Wilmington, DE
Shira Scheindlin, Co-Chair, Stroock & Stroock & Lavan LLP	Brooklyn, NY
Eleanor Smith, Secretary, Zuckerman Spaeder LLP	Washington, DC
David Smith, Treasurer, Schnader Harrison Segal & Lewis LLP	Philadelphia, PA
Nicholas Christakos, General Counsel	Rockville, MD
Kristen Clarke, President & Executive Director	Washington, DC
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Robert Harrington, Robinson, Bradshaw & Hinson, P.A.	Charlotte, NC
James P. Joseph, Arnold & Porter LLP	Washington, DC
Adam Klein, Outten & Golden LLP	New York, NY
Jane Sherburne, Sherburne PLLC	Washington, DC
Edward Soto, Weil, Gotshal & Manges LLP	Miami, FL
Joseph West, Duane Morris, LLP	Washington, DC
Kevin Armstrong, Mitchell Hamline School of Law	St. Paul, MN
Roy L. Austin, Jr., Harris, Wiltshire & Grannis, LLP	Washington, DC
Adam Banks, Weil, Gotshal & Manges LLP	New York, NY
Daniel Barr, Perkins Coie LLP	Phoenix, AZ
Judy Barraso, Barrasso Usdin Kupperman Freeman & Sarver, LLC	New Orleans, LA

³ Please note, the signatories listed below have joined solely in their personal capacity. The firms, organizations, and universities listed are provided for identification purposes of the signatory only.

Lynne Bernabei, Bernabei & Kabat PLLC
Laura Besvinick, Stroock & Stroock & Lavan LLP
Jonathan I. Blackman, Cleary Gottlieb Steen & Hamilton LLP
Jack Block, Retired
Benjamin Blustein, Miner, Barnhill & Galland, P.C.
David Bodney, Ballard Spahr LLP
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Bill Bradley, Eversheds Sutherland (US) LLP
Alvin Bragg, New York Law School
Chava Brandriss, Davis Wright Tremaine LLP
Terrel Broussard, Broussard Dispute Solutions, LLC
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Douglass Cassel, Notre Dame Law School
Todd Chandler
Jim Chanin, Law Offices of James B. Chanin
Michael Chanin, Retired
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Eleanor M. Fox, New York University School of Law
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Sarah Harrington, Goldstein & Russell, P.C.
Keith Harrison, Crowell & Moring LLP

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Mississippi Center for Justice
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Brian Melendez, Barnes & Thornburg LLP
Becky Monroe, Leadership Conference on Civil and Human Rights
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John Nonna, Westchester County
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Eva Pulliam, Arent Fox LLP
Tracie Ransom, Ransom Strategies Group LLC
John Relman, Relman Colfax PLLC
Julissa Reynoso, Winston & Strawn LLP

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Washington, DC
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Brenda Wright, Demos

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About the Lawyers' Committee for Civil Rights Under Law – The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee), a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee for Civil Rights Under Law is to secure, through the rule of law, equal justice for all, particularly in the areas of voting rights, criminal justice, fair housing and community development, judicial diversity, economic justice, educational opportunities, hate crimes and more. For more information, please visit <https://lawyerscommittee.org>.

Lawyers' Committee for Civil Rights Under Law
1500 K Street, N.W., Suite 900
Washington, DC 20005
press@lawyerscommittee.org