

**Update to the Report of the Center for Reproductive Rights
on the Nomination of Judge Amy Coney Barrett
to be Associate Justice of the United States Supreme Court**

October 16, 2020

On October 7, 2020, the Center for Reproductive Rights issued a [report](#) analyzing the record of Judge Amy Coney Barrett. Based on her judicial opinions, academic articles, speeches and public statements then available, we concluded that her record evinces a legal view that the Constitution’s protections for individual liberty do not include reproductive rights. Judge Barrett’s approach to constitutional interpretation, opinions as a federal appellate judge, and public advocacy defending “the right to life from fertilization” lay bare a deep disagreement with the established constitutional protections for reproductive rights.

Since the report was issued, more documents were disclosed that support that conclusion.¹ In 2013, Judge Barrett was a signatory to an ad sponsored by Notre Dame University Faculty for Life that called for “the unborn to be protected in law.”² As with her public advocacy defending “the right to life from fertilization,” the reference to “in law” is a position as to what the law should be, not a personal position.

Judge Barrett’s testimony before the Senate Judiciary Committee on October 12-14, 2020 did not dispel those concerns. In fact, it only further intensified them.

During her confirmation hearing, Judge Barrett faced extensive questioning about her legal views on reproductive rights. Her testimony was a studied attempt to avoid providing meaningful answers. As was the case before the hearing, what remains is her record, which is directly hostile to the nearly half-century of U.S. Supreme Court jurisprudence protecting reproductive rights.

¹ CNN initially reported on October 9 that Judge Barrett had not disclosed talks given to anti-abortion student groups. See Andrew Kaczynski & Em Steck, *Amy Coney Barrett initially failed to disclose talks on Roe v. Wade hosted by anti-abortion groups on Senate paperwork*, CNN (Oct. 9, 2020),

<https://www.cnn.com/2020/10/09/politics/kfile-amy-coney-barrett-roe-v-wade-talks/index.html>. Likewise on October 14, CNN reported that Barrett’s calendars showed at least 7 speeches that she had not disclosed to the Senate Judiciary Committee. See Andrew Kaczynski & Em Steck, *Notre Dame calendars show more events not listed on Amy Coney Barrett’s Senate paperwork*, CNN (Oct. 14, 2020),

<https://www.cnn.com/2020/10/14/politics/kfile-amy-coney-barrett-calendar-disclosures/index.html>

² Lisa Mascaró, Supreme Court pick Amy Coney Barrett signed second anti-abortion ad while at Notre Dame: ‘We renew our call for the unborn to be protected in law,’ CHI. TRIBUNE (Oct. 10, 2020),

<https://www.chicagotribune.com/nation-world/ct-nw-amy-coney-barrett-abortion-ads-20201010-n2kj5kfwtfhundzomhysptap2u-story.html>. She disclosed this in a supplement to her questionnaire last Friday. See

Letter from Judge Amy Coney Barrett to Hon. Lindsey Graham & Hon. Dianne Feinstein (Oct. 9, 2020),

<https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20Supplement.pdf>.

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- **Judge Barrett flatly refused to answer whether *Roe v. Wade* (1973) was correctly decided, even though she was willing to offer her views on other Supreme Court decisions.** Multiple senators pressed her on this point. For example, when Senator Dianne Feinstein (D-CA) asked if she “agree[s] with Justice Scalia's view that *Roe* was wrongly decided,” Judge Barrett merely referenced past confirmation hearings and said she “was not going to grade precedent or give it a thumbs up or a thumbs down[.]”³ However, Judge Barrett *was* willing to give a “thumbs up” to precedent in other contexts outside of abortion rights: she told the Senate Judiciary Committee that *Brown v. Board of Education* was a “correct” decision.⁴ She also told Senator Chris Coons (D-DE) that it was “very unlikely” that *Griswold v. Connecticut* would be overturned.⁵ And she told Senator Richard Blumenthal (D-CT) that *Loving v. Virginia* was “correctly decided.”⁶

Judge Barrett was clear that she does not consider *Roe v. Wade* to be among a select group of landmark cases known as “super precedent.” Judge Barrett subscribes to the judicial philosophy of originalism that rejects constitutional protections for abortion rights. Her writings are clear that she does not view *Roe* as a “super precedent” and the principle of stare decisis would not be a restraint to overturning *Roe*. Senator Amy Klobuchar (D-MN) directly questioned Judge Barrett about [this], asking: “Is *Roe* a super precedent?” In response, Judge Barrett said that super precedent includes “cases that are so well settled that no political actors and no people seriously push for their overruling[.]” and that in her view, “*Roe* doesn't fall in that category.”⁷ In other words, Judge Barrett only views a Supreme Court decision as a “super precedent” if it is so widely accepted that no one would even file a lawsuit challenging it.

- **Judge Barrett consistently refused to provide meaningful answers about her views of the Constitution’s protections for reproductive rights.** She argued that providing meaningful answers would improperly violate her duty to provide “no hints, forecasts, or previews” on how she would rule on the Court. While she describes this as “the Ginsburg standard,” at her confirmation hearing, Justice Ruth Bader Ginsburg *did* testify that the Constitution protects a woman’s “right to decide whether or not to bear a child,” which she said was “central to a woman’s life [and] to her dignity.”⁸ There is no rule or ethical guideline preventing Judge Barrett from doing the same about her academic writings and public statements.
- **Instead, Judge Barrett merely summarized the history of Supreme Court rulings.** For example, when Senator Blumenthal asked her, “Does the Constitution protect . . .

³ 10/13 Transcript (Sen. Feinstein)

⁴ 10/14 Transcript (Sen. Graham)

⁵ 10/14 Transcript (Sen. Coons)

⁶ 10/14 Transcript (Sen. Blumenthal)

⁷ 10/13 Transcript (Sen. Klobuchar)

⁸ *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 482, 207 (1993).

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[the] right to have an abortion?,” Judge Barrett simply described the decision: “*Roe v. Wade* clearly held that the Constitution protects that a woman's right to terminate a pregnancy. [*Planned Parenthood v. Casey* upheld that central holding and spelled out in greater detail the test that the court uses to consider the legality of abortion regulations.”⁹

Judge Barrett’s answer is a purely backward-looking description of what the Court *has done*, and tells the American people nothing about what *Judge Barrett would do* if confirmed. Her answer is remarkably similar to past recitations by recent nominees, including Justices Thomas, Roberts, Alito, Gorsuch, and Kavanaugh.¹⁰ Once confirmed after avoiding providing direct answers, each of these justices went on to rule against reproductive rights from the bench.¹¹ For instance, when Justice Clarence Thomas was asked about *Roe* during his 1991 confirmation hearing, he similarly gave a descriptive answer, saying, “The Supreme Court, of course, in the case *Roe v. Wade* has found . . . as a fundamental interest a woman’s right to terminate a pregnancy.”¹² Yet less than a year after joining the Court, Justice Thomas joined a dissent in *Casey*, which argued: “We believe that *Roe* was wrongly decided, and that it can and should be overruled.”¹³

- **Judge Barrett justified alarming judicial overreach in reproductive rights cases to address issues she wants to reach.** In *Planned Parenthood v. Indiana Dep’t of Health* (7th Cir. 2018), Judge Barrett joined an opinion suggesting that the government can ban abortion based on a woman’s reason for having one. However, Indiana had not even asked the full circuit court to reconsider the constitutionality of its reason ban law. As Senator Patrick Leahy (D-VT) observed, “the issue before your court was a narrow one. Why didn't you limit your dissent to the one issue the state of Indiana was asking you to review?” In response, Judge Barrett said that she and the other dissenters addressed Indiana’s reason ban because “we had many other states enter the case as amici, urging us to take that claim up[.]”¹⁴

That amici curiae – non-party “friends of the court” – offer their unsolicited perspectives on a case is no reason for judges to opine on an issue not before them. Anti-abortion

⁹ 10/13 Transcript (Sen. Blumenthal)

¹⁰ See Nancy Northup, ‘Settled law’ is not enough to protect *Roe v. Wade*, THE HILL (Sept. 4, 2018), <https://thehill.com/opinion/judiciary/404934-settled-law-is-not-enough-to-protect-roe-v-wade>; *An Analysis of the Testimony of Judge Brett Kavanaugh on Issues Relating to Reproductive Rights Before the Senate Judiciary Committee* at 2-3, CTR. FOR REPRODUCTIVE RIGHTS (Sept. 10, 2018), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/CRR_Analysis_Kavanaugh_Testimony.pdf

¹¹ See, e.g., *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103 (2020) (Justices Thomas, Alito, Gorsuch, and Kavanaugh dissenting); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (Justices Thomas, Roberts, and Alito dissenting).

¹² *Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 1084, 127 (1991).

¹³ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting, joined by White, J., Scalia, J., and Thomas, J.).

¹⁴ 10/13 Transcript (Sen. Leahy)

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rights amici routinely ask the Court to reconsider and overrule *Roe* and *Casey*.¹⁵ She clearly chose to sign onto an extreme interpretation of Supreme Court precedent to suggest that the government does have the power to ban abortion based on a woman's reason for having one.

- **Judge Barrett used inflammatory and inaccurate rhetoric to describe unconstitutional restrictions on abortion.** Judge Barrett referred to Indiana's reason ban law as the "eugenics portion of the bill."¹⁶ This is consistent with the framing in the dissenting opinion she joined in the Indiana case, which called the reason ban "an anti-eugenics law."¹⁷ Justice Clarence Thomas later picked up this framing, saying the dissent was "correct," and describing Indiana's law as prohibiting "eugenic abortions."¹⁸

Laws like Indiana's reason ban give government the power to second-guess an individual's reason for seeking an abortion. "Reason bans" address neither discrimination against nor the needs of people with disabilities or people of color. Instead, these bans shame pregnant people and stigmatize abortion.¹⁹ They require providers to scrutinize pregnant people for their decision to seek abortion care and encourage racial profiling of abortion patients based on false and racist stereotypes. In fact, states that adopt these types of laws are less likely to adopt laws and policies that support the well-being of women, children and families.²⁰ And they do nothing to address the shameful rates of preventable maternal mortality and morbidity especially experienced by Black women in this country.²¹

The Barrett-Thomas view of reason ban laws falsely conflates the reproductive coercion of eugenics with reproductive autonomy of abortion access. As reproductive justice scholars have explained, restricting abortion "is more reminiscent of the eugenic practices

¹⁵ See, e.g., Brief Amici Curiae of 207 Members of Congress in Support of Respondent and Cross-Petitioner, *June Medical Services L.L.C. v. Russo*, 2020 WL 92198 at *29 (U.S. Jan. 2, 2020) (207 members of Congress arguing that the "Court [should] take up the issue of whether *Roe* and *Casey* should be reconsidered and, if appropriate, overruled.")

¹⁶ 10/13 Transcript (Sen. Leahy)

¹⁷ *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., with Barrett, J., Sykes, J., and Brennan, J., dissenting from denial of reh'g en banc).

¹⁸ *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring).

¹⁹ See Brief of Amici Curiae Disability Advocates in Support of Plaintiffs-Appellees, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Indiana State Dep't of Health*, 2018 WL 378975, at *9 (7th Cir. Jan. 3, 2018) (Indiana's reason ban "was not part of a broader legislative package to advance the rights or interests of the disabled community. Instead, the provisions at issue in this case are part of a nationwide campaign to restrict, and ultimately eliminate, access to abortion").

²⁰ See *Evaluating Priorities*, IBIS REPRODUCTIVE HEALTH & CTR. FOR REPRODUCTIVE RIGHTS (2020), <https://evaluatingpriorities.org/>

²¹ *Id.*

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of yesteryear,” as both efforts deny autonomy and dictate people’s reproductive choices.²²

- **Judge Barrett – at the urging of Senate Republicans – misrepresented her handling of Supreme Court precedent in an abortion “bubble zone” case.** In *Price v. City of Chicago* (7th Cir. 2019), anti-abortion protestors and advocacy groups filed a lawsuit alleging that Chicago’s “bubble zone” ordinance protecting patients entering and exiting abortion clinics violated their First Amendment and due process rights. Judge Barrett joined the opinion of the court rejecting the lawsuit, as the ordinance was nearly identical to the statute upheld by the Supreme Court in *Hill v. Colorado*. Multiple Republican Senators suggested that Judge Barrett’s opinion demonstrated her ability to neutrally apply precedent in cases involving abortion, despite her pro-life convictions.

In reality, the decision Judge Barrett joined devoted several pages of dicta to asking the Supreme Court to overturn the *Hill* precedent, which the panel deemed “incompatible with current First Amendment doctrine[.]”²³ Senator Mazie Hirono (D-HI) correctly clarified that while Judge Barrett did *technically* apply Supreme Court precedent – as was her binding duty as a lower court judge – her fidelity to that precedent was not nearly as straightforward or neutral as she presented to the Senate. Instead, the decision she joined went out of its way to offer its view that the Supreme Court should overrule that precedent.

The stakes of this nomination could not be higher: if the Supreme Court weakens or overturns *Roe v. Wade*, abortion access would be at risk in almost half of the U.S. states and three U.S territories.²⁴ Since the election of President Trump, states have accelerated their decades-long campaign to end abortion services by adopting a morass of restrictions and outright bans. As a result, there are dozens of cases heading toward the Supreme Court. Some are test cases to overturn *Roe v. Wade* or to render it meaningless by upholding laws that make abortion impossible to access.

We don’t need Judge Barrett’s “hints, forecasts, or previews” because her record is clear: she stands all too ready, if not eager, to undermine women’s basic liberty rights. The Supreme Court’s vital role in protecting and upholding civil rights and liberties – including reproductive rights – cannot be compromised by a nominee fundamentally hostile to our constitutional rights.

The Senate must oppose Judge Barrett’s confirmation.

²² Brief of Amici Curiae Reproductive Justice Scholars Supporting Petitioners-Cross-Respondents, *June Medical Services, LLC v. Russo*, 2019 WL 6609232 at *18 (U.S. Dec. 2, 2019).

²³ *Price v. City of Chicago*, 915 F.3d 1107, 1117 (7th Cir. 2019), *cert. denied*, No. 18-1516, 2020 WL 3578739 (U.S. July 2, 2020).

²⁴ See *What if Roe Fell?*, CTR. FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/what-if-roe-fell> (Twenty-four states could immediately act to prohibit abortion outright).