

**CENTER *for***  
**REPRODUCTIVE**  
**RIGHTS**

**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 7, 2020**

# CENTER *for* REPRODUCTIVE RIGHTS

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## EXECUTIVE SUMMARY

The Center for Reproductive Rights uses the power of law to advance reproductive rights as fundamental human rights around the world. For over twenty-eight years, our game-changing litigation, legal policy, and advocacy work—combined with our unparalleled expertise in the use of constitutional, international, and comparative human rights law—has transformed how reproductive rights are understood by courts, governments, and human rights bodies. Through our work on five continents, we have played a key role in securing legal victories before national courts, United Nations Committees, and regional human rights bodies on reproductive rights issues including access to life-saving obstetrics care, contraception, maternal health and safe abortion services, as well as the prevention of forced sterilization and child marriage.

In the United States, we litigate extensively in federal and state courts to ensure reproductive health services are available across the country. Since our founding, we have been involved in every major Supreme Court case on abortion rights. In the last four years, we won two Supreme Court cases—the landmark *Whole Woman’s Health v. Hellerstedt* (2016), and just this last term, *June Medical Services v. Russo* (2020). These decisions each protected access for millions seeking to exercise their constitutional right to abortion.

On September 18, 2020, the American people lost a champion of equal justice under law with the passing of Justice Ruth Bader Ginsburg. She understood the critical value of legal rights in uprooting oppressive structures that exacerbate societal inequalities. She fought to dismantle sex discrimination and understood that women must have control over their fertility and receive fair treatment during pregnancy if they are to achieve gender equality. Justice Ginsburg’s passing came on the cusp of a presidential election, in the middle of a pandemic and economic crisis, and a national moral reckoning over the nation’s past and present manifestations of racial oppression.

Just eight days later, President Trump nominated Judge Amy Coney Barrett to fill the vacancy created by Justice Ginsburg’s death and serve as an Associate Justice to the U.S. Supreme Court.

This report provides an analysis of Judge Barrett’s record on reproductive rights. To prepare this report, we conducted an extensive review of Judge Barrett’s judicial opinions, academic articles, speeches, and public statements as they impact issues such as access to contraception, abortion, maternal health care, and fertility treatment.

The evidence in Judge Barrett’s record suggests that she stands all too ready, if not eager, to undermine women’s basic liberty rights. Her judicial opinions in two abortion rights cases suggest upending the Supreme Court’s established law on both the substantive right to abortion and the procedural safeguards that allow the right to be protected. In one case, she suggests that the government may prohibit a woman from having an abortion if it does not like her reasons. In another case, she suggests revisiting the long-standing ability of abortion providers to sue to block restrictions before they go into effect.

Judge Barrett’s hostility to the right to abortion revealed in these opinions is presaged in her writings, speeches, and statements in which she unequivocally subscribes to a conservative judicial philosophy of originalism that rejects constitutional protections for abortion rights. She does not recognize *Roe v. Wade* (1973) and its extensive progeny over almost a half century as super precedents deserving of *stare decisis*.

Moreover, Judge Barrett has criticized the Supreme Court’s decisions upholding key provisions of the Affordable Care Act (ACA). The ACA has been a critical advancement for women’s health, not only by expanding health insurance coverage to millions, but specifically by providing affordable contraceptive care, requiring coverage of maternal health care, and ending the practice of excluding health coverage for people with pre-existing conditions, including denying obstetric care coverage to women who had had cesarean sections.

Finally, before she was on the bench, Judge Barrett advocated publicly for “the right to life from fertilization,” which has legal implications for abortion care, contraception, and fertility treatments. In 2006, she signed onto a newspaper advertisement that called to end *Roe v. Wade* and restore laws restricting abortion. In 2012, she signed onto a letter that called contraception and sterilization “gravely immoral and unjust” and grossly mischaracterized emergency contraception as an “abortion-inducing drug.” This public advocacy raises momentous doubt about her ability to fairly rule in cases involving reproductive healthcare and rights.

**Based on our in-depth analysis of Judge Barrett’s record on reproductive rights, we urge members of the United States Senate to reject her nomination to serve as the next Associate Justice on the Supreme Court**

We do not make this decision lightly. In fact, the Center for Reproductive Rights has only opposed one Supreme Court nomination in our history. We win cases before a wide range of federal judges, who have been appointed by both Republican and Democratic presidents. As an organization that litigates cases in federal courts, including in the Supreme Court, we are rigorous about factual accuracy and careful legal analysis. We are a nonpartisan, nonprofit organization that does not support or oppose political parties or candidates.

With the release of our report, we remind the Senate that the stakes of this nomination could not be higher for abortion rights. Since the election of President Trump, states have accelerated their decades-long campaign to end access to abortion. While there have been over 450 abortion restrictions passed at the state level since 2011, recent years saw more extreme bans, including Mississippi’s ban on abortion at 15 weeks, an issue now pending review at the Supreme Court. Chillingly, there are dozens of abortion rights cases heading towards 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. 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.

## I. BACKGROUND

### A. Nomination

President Donald Trump took office in January 2017 after a campaign in which he promised to nominate judges who would overturn *Roe v. Wade*. “That’ll happen automatically, in my opinion, because I am putting pro-life justices on the court,” he said at the final presidential debate.<sup>1</sup> To bolster his *Roe*-reversal promise, then-candidate Trump released during the 2016 campaign a list of judges from which he pledged to pick his Supreme Court nominees. For advice on assembling the list of potential Supreme Court nominees, candidate Trump relied on the Federalist Society and the Heritage Foundation.<sup>2</sup>

Judge Barrett was not on the original list released during the 2016 campaign. She was added to an updated list released by the White House in November 2017.<sup>3</sup> White House Counsel Don McGahn announced the additional five judges at a Federalist Society convention, saying all “have a demonstrated commitment to originalism and textualism.” He added: “They all have paper trails. They all are sitting judges. There’s nothing unknown about them. What you see is what you get.”<sup>4</sup>

### B. Biography

Judge Barrett, 48 years old, has been a judge on the Seventh Circuit Court of Appeals since November 2017. Prior to her appointment to the Seventh Circuit, she was a professor at the University of Notre Dame Law School, where she has taught since 2002. Judge Barrett has taught courses on federal courts, constitutional law, and statutory interpretation, and continues to teach as a sitting judge.

Before her time at Notre Dame, Judge Barrett worked as an associate attorney at Baker Botts, L.L.P., for approximately three years. She clerked for Supreme Court Justice Antonin Scalia from 1998 to 1999 and Judge Laurence H. Silberman of the D.C. Circuit from 1997 to 1998. She earned her J.D. from Notre Dame and her B.A. in English literature from Rhodes College.

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<sup>1</sup> Irin Carmon, *2016 Debate: On Abortion, Trump and Clinton Give Passionate Answers*, NBC NEWS (Oct. 20, 2016), <https://www.nbcnews.com/storyline/2016-presidential-debates/abortion-trump-clinton-let-it-all-hang-out-n669586>.

<sup>2</sup> Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html>.

<sup>3</sup> Nolan D. McCaskill, *Trump releases updated short list of potential Supreme Court nominees*, POLITICO, Nov. 11, 2017, <https://www.politico.com/story/2017/11/17/trump-supreme-court-nominees-247441>.

<sup>4</sup> *Id.*

## II. JUDGE BARRETT’S JUDICIAL OPINIONS QUESTION ABORTION RIGHTS

The Supreme Court recognized that the Constitution protects a woman’s right to decide whether to continue a pregnancy nearly fifty years ago in *Roe v. Wade*. Two decades after *Roe*, the Court reaffirmed that core holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. A little over four years ago, the Court again faithfully applied *Roe* and *Casey* in *Whole Woman’s Health v. Hellerstedt*, preserving abortion access for millions of women in Texas in the face of calculated attempts by state legislators to close clinics. And just this past term, in the last in-person case argued before Justice Ginsburg, the Court yet again upheld Supreme Court precedent in *June Medical Services v. Russo* to strike down a Louisiana law identical to the Texas law rendered unconstitutional in *Whole Woman’s Health*.

These cases stand for the fundamental principle that a woman’s control over her own reproductive decisions is essential to her individual health, liberty, dignity, and autonomy. The decision about if, when, and how to have a family is critical to ensuring that women can fully realize their economic, employment, and educational opportunities.<sup>5</sup>

In the United States, one in four women will have an abortion by age forty-five,<sup>6</sup> and fifty-nine percent of women who obtain abortion care have had at least one previous birth.<sup>7</sup> Women cite a range of reasons for seeking abortion care, including responsibility to their families and existing children, finances, and education and work goals.<sup>8</sup> Some women also seek an abortion due to concerns about their own health or the health of the fetus.<sup>9</sup> Abortion care is extremely safe, as confirmed by a comprehensive 2018 report issued by the National Academies of Science, Engineering, and Medicine.<sup>10</sup> In fact, the risk of death associated with childbirth is approximately fourteen times higher than that associated with abortion, and every pregnancy-related complication is more common among women having live births than among those having abortions.<sup>11</sup> The negative impact of being turned away from a wanted abortion has also been rigorously documented in recent years.<sup>12</sup> Women who are denied a wanted abortion and give

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<sup>5</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 835 (1992) (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives”).

<sup>6</sup> Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*. 107 AMER. J. PUB. HEALTH 1904 (2017).

<sup>7</sup> GUTTMACHER INST., *Induced Abortion in the United States* (Jan. 2018), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>.

<sup>8</sup> See, e.g., Antonia M. Biggs, et al., *Understanding Why Women Seek Abortions in the U.S.* 13 BMC WOMEN’S HEALTH 1 (2013); Lawrence Finer, et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110 (2005).

<sup>9</sup> See Biggs, *supra* note 8; Finer, *supra* note 8; Brian L. Shaffer, et al., *Variation in the Decision to Terminate Pregnancy in the Setting of Fetal Aneuploidy*, 26 PRENATAL DIAGNOSIS 667 (2006).

<sup>10</sup> NAT’L ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, *The Safety and Quality of Abortion Care in the United States* (Mar. 2016), <http://nationalacademies.org/hmd/reports/2018/the-safety-and-quality-of-abortion-care-in-the-united-states.aspx>.

<sup>11</sup> Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTET. & GYNECOL. 215 (2012).

<sup>12</sup> ADVANCING NEW STANDARDS IN REPRODUCTIVE HEALTH, *Introduction to the Turnaway Study* (May 2018), [https://www.ansirh.org/sites/default/files/publications/files/turnaway-intro\\_5-23-2018.pdf](https://www.ansirh.org/sites/default/files/publications/files/turnaway-intro_5-23-2018.pdf).

birth instead have almost four times greater odds of living below the federal poverty line and are more likely to report an inability to cover their basic cost of living.<sup>13</sup> Over the past several years, state legislatures have made it more difficult—and for some women impossible—to access abortion, enacting over 450 restrictions on abortion access between 2011 and 2019.<sup>14</sup>

Judge Barrett’s opinions in two abortion cases suggest that her approach to constitutional interpretation rejects these core principles and fails to understand the central importance of reproductive autonomy in women’s lives.

**A. *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**

In 2016, Indiana banned abortion if it was sought solely for reasons of race, sex, or fetal diagnosis. So-called “reason bans” prevent patients from obtaining an abortion depending on their reason for seeking that care. Such bans are blatantly unconstitutional and an attempt to overturn a core holding of *Roe v. Wade*.

The Supreme Court has long held that, prior to viability, states lack the power to ban abortion. *Casey*, and *Roe* before it, hold that the right to liberty “encompass[es] a woman’s decision whether or not to terminate her pregnancy.”<sup>15</sup> The Constitution guarantees each person “the right . . . to choose to have an abortion before viability and to obtain it without undue interference from the State.”<sup>16</sup> Simply put, it is for the individual—and not the State—to make the ultimate decision whether to continue a pre-viability pregnancy.

This core principle holds true regardless of the reasons for seeking an abortion. *Casey* emphasized that the decision whether to continue a pre-viability pregnancy is a personal decision affected by “intimate views with infinite variation.”<sup>17</sup> *Casey* described it as one of “the most intimate and personal choices a person may make in a lifetime,” necessarily follows from a person’s “dignity and autonomy” and right to “retain the ultimate control over her destiny and her body.”<sup>18</sup> It involves “personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it,” and must be made by each person based on their own values and beliefs.<sup>19</sup> The State cannot “insist . . . upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture,” but rather

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<sup>13</sup> Diana Greene Foster, et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the United States*, 108 AMER. J. PUB. HEALTH 407 (2018).

<sup>14</sup> Elizabeth Nash, *Unprecedented Wave of Abortion Bans is an Urgent Call to Action*, GUTTMACHER INST. (May 22, 2019), <https://www.guttmacher.org/article/2019/05/unprecedented-wave-abortion-bans-urgent-call-action>.

<sup>15</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>16</sup> *Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

<sup>17</sup> *Id.* at 853.

<sup>18</sup> *Id.* at 869.

<sup>19</sup> *Id.* at 853; *see also id.* (recognizing that individuals hold competing views with some believing that “the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent”).

must allow each woman to shape her own destiny based “on her own conception of her spiritual imperatives and her place in society.”<sup>20</sup>

“Reason bans” like the one in Indiana are intended to shame women and stigmatize abortion.<sup>21</sup> They address neither discrimination against nor the needs of people with disabilities or people of color. Instead, they require providers to scrutinize women for their decisions to seek abortion and take away an individual’s right to make a deeply personal decision. They encourage racial profiling of people seeking abortion care based on deeply false and racist stereotypes. And they do not address the needs of people with disabilities, which include access to health care, education, employment, and economic support as well as the ability to parent with dignity.

In this case, the district court blocked Indiana’s reason ban, in addition to a separate restriction challenged in the same filing, and the Seventh Circuit affirmed, holding the ban unconstitutional because it banned abortion prior to viability in violation of longstanding Supreme Court precedent.<sup>22</sup> Indiana sought rehearing of the Seventh Circuit panel decision *en banc*—but only as to the court’s decision striking down the separate restriction.<sup>23</sup>

Rehearing was denied and Judge Barrett signed onto a dissenting opinion by Judge Easterbrook. Although Indiana did not seek rehearing of the decision on the reason ban, and the opinion acknowledged that only the Supreme Court could address the issue, the dissenters addressed the issue anyway. Suggesting that such a ban could be upheld “because *Casey* did not consider the validity of an anti-eugenics law,” the dissenters wrote:

*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 children whose genes

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<sup>20</sup> *Id.* at 852.

<sup>21</sup> 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”). See also Brief of Amici Curiae Reproductive Justice Scholars Supporting Petitioners-Cross-Respondents, *June Medical Services, LLC. v. Russo*, 140 S. Ct. 2103 (2020) (“[T]he claim that abortion among black women is part of a genocidal plot against black people has reared its head—and been rejected—time and again over the years . . . Despite these historically inaccurate and intentionally misleading claims, however, black scholars and activists devoted to racial justice have been unwavering in their support for abortion rights and access”).

<sup>22</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Indiana State Dep’t of Health*, 888 F.3d 300 (7th Cir. 2018) (law “prohibit[s] abortions prior to viability if the abortion is sought for a particular purpose” and are “far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State”), *reh’g en banc denied*, 917 F.3d 532 (7th Cir. 2018), *cert. granted in part and denied in part, judgment reversed in part*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019).

<sup>23</sup> The case also challenged a law requiring embryonic or fetal tissue to be buried or cremated. The district court and the Seventh Circuit held this provision unconstitutional because it had no rational basis, and the Supreme Court summarily reversed. Notably, *Planned Parenthood* did not bring a claim that the law was an undue burden. See *id.* at 308-10.



predict success in life.” Using abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered. None of the Court’s abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children . . . . We ought not impute to the Justices decisions they have not made about problems they have not faced.<sup>24</sup>

This radical and extreme interpretation of decades of Supreme Court precedent using inflammatory language would gut *Roe*’s core guarantee that the government does not have the power to *ban* any person from making the ultimate decision to choose abortion prior to viability—which is precisely what the Indiana law would do.<sup>25</sup>

Because Indiana was not even seeking review of the reason ban and there was no reason to address its constitutionality, the dissenters, including Judge Barrett, were throwing down the gauntlet for the Supreme Court’s conservative members. Justice Thomas, who has repeatedly called for the reversal of *Roe v. Wade*,<sup>26</sup> picked up the argument in an opinion written when the Court declined to review the Seventh Circuit’s ruling that Indiana’s reason ban is unconstitutional.<sup>27</sup> Judge Barrett’s apparent alignment with Justice Thomas on this issue is a deeply troubling signal of her hostility to the fundamental constitutional underpinnings of abortion rights.

***B. Planned Parenthood v. Adams (later Box) (7th Cir. 2019): Judge Barrett questioned long-standing precedent that abortion providers may challenge restrictive laws before they go into effect***

In 2017, Indiana enacted new restrictions on minors’ access to abortion care, which were preliminarily blocked by the district court, and the Seventh Circuit rejected Indiana’s partial appeal of that decision.<sup>28</sup> The Seventh Circuit then denied the state’s petition for rehearing *en*

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<sup>24</sup> *Planned Parenthood of Ind. & Ky., Inc.*, 917 F.3d at 536.

<sup>25</sup> See Brief of Amici Curiae Reproductive Justice Scholars, *supra* note 21; Brief of Amici Curiae Disability Advocates, *supra* note 21 (“Eugenics was about coercion; abortion [today]. . . is about autonomy.” Accordingly, restricting abortion “is more reminiscent of the eugenic practices of yesteryear,” as both efforts deny autonomy and dictate people’s reproductive decisions).

<sup>26</sup> See *June Medical Services, LLC v. Russo*, 140 S. Ct. 2103, 2150 (2020) (Thomas, J., dissenting) (“*Roe* is grievously wrong for many reasons, but the most fundamental is that its core holding—that the Constitution protects a woman’s right to abort her unborn child—finds no support in the text of the Fourteenth Amendment.”)

<sup>27</sup> Justice Thomas concurred in the decision to deny review on the reason ban (he did not dissent). He noted, however, that “the Court will soon need to confront the constitutionality of laws like Indiana’s.” *Box*, 139 S. Ct. at 1784 (Thomas, J., concurring).

<sup>28</sup> Consistent with the requirements of Supreme Court abortion cases about parental involvement laws, Indiana had long provided a judicial bypass procedure that was supposed to allow minors seeking abortions to obtain them without the consent or notice of their parents. *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 974 (7th Cir. 2019), *cert. granted, judgment vacated sub nom.*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 19-816, 2020 WL 3578672 (U.S. July 2, 2020). Under Indiana’s new law, even if a judge concluded that a parent need not consent to a minor’s abortion—based on either the minor’s maturity or because the abortion is in the minor’s

*banc* over a dissent that Judge Barrett joined regarding whether the plaintiffs could even challenge the law before it went into effect.<sup>29</sup> Despite the fact that pre-enforcement challenges are well-established in abortion jurisprudence, the dissent she joined argued that the “existing unsettled status of pre-enforcement challenges in the abortion context” deserved full court review.<sup>30</sup>

Proponents of abortion restrictions have long sought to limit pre-enforcement challenges, even though allowing these laws to take effect prior to filing a lawsuit could devastate abortion access, often with long-term effects. For example, in 2013, Texas passed an omnibus law requiring abortion providers to obtain admitting privileges at a hospital within thirty miles. Admitting privileges are difficult—often impossible—for abortion providers to obtain. Hospitals routinely deny admitting privileges to doctors who provide abortions for a broad range of reasons, including ideological opposition to abortion, or the fact that the provider is highly unlikely to meet the hospital’s minimum admissions requirement because abortion is so safe.<sup>31</sup>

Texas providers lost a pre-enforcement challenge to this law and the impact was immediate. When Texas lawmakers passed the admitting privileges law in 2013, there were more than forty abortion clinics serving patients across Texas. When the law went into effect, more than half of those clinics closed, and despite the Supreme Court’s 2016 *Whole Woman’s Health* decision striking down the law as an unconstitutional barrier to abortion, many have not reopened. As of 2019, there were only twenty-two abortion clinics operating in the state.<sup>32</sup>

Some judges, including Justice Kavanaugh in *June Medical Services*, have taken up this line of argument and have advocated for rejecting challenges that are based on rigorous evidence of a law’s impacts simply because patients and providers have not yet been harmed.<sup>33</sup> Judge Barrett’s joining of the dissent indicates that she shares these views.

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best interests—parents had to be notified about the minor’s abortion, unless the judge also found that the notice is not in the minor’s best interests. *Id.* at 975. This contradicts the confidentiality guarantee emphasized in the Court’s parental involvement cases, and, as the Seventh Circuit concluded, imposes an undue burden. *See id.* at 981-90. *See also Bellotti v. Baird*, 443 U.S. 622, 644 (1979) (holding that minors must be able to complete a confidential judicial bypass with “sufficient expedition to provide an effective opportunity for an abortion to be obtained”).

<sup>29</sup> *See id.* at 998.

<sup>30</sup> *Id.* Indiana later sought review at the Supreme Court, which granted, vacated, and remanded following *June Medical, Box*, 2020 WL 3578672. Indiana has since renewed its petition for rehearing *en banc* before the Seventh Circuit.

<sup>31</sup> *June Medical*, 250 F.Supp.3d 27, 61-64 (M.D. La. 2017). In fact, abortion is one of the safest medical procedures: patients rarely require emergency care, and in those very rare events, hospitals are well-equipped to treat any complication.

<sup>32</sup> Ashley Lopez, *Despite Supreme Court Win, Texas Abortion Clinics Still Shuttered*, KAISER HEALTH NEWS (Nov. 18, 2019), <https://khn.org/news/despite-supreme-court-win-texas-abortion-clinics-still-shuttered/>.

<sup>33</sup> *June Medical Services, LLC. v. Russo*, 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting).

### III. JUDGE BARRETT’S ACADEMIC WRITINGS AND COMMENTS QUESTION THE CONSTITUTIONAL UNDERPINNINGS OF *ROE* AND ITS STRENGTH AS PRECEDENT

#### A. Subscribes to Justice Scalia’s Judicial Philosophy

*Roe v. Wade* and the right to abortion rest on a foundation of individual liberty guaranteed by the Constitution.<sup>34</sup> The Supreme Court has applied the constitutional principle of liberty to fit the context of modern society, yielding greater protection for individual dignity and self-autonomy from government intrusion. This approach builds on and updates the principle of liberty that the Framers embedded in the Constitution and does not chain its meaning to the eighteenth and nineteenth centuries.

Beyond the right to abortion, this approach has produced landmark decisions protecting a sphere of personal and intimate decision-making, such as the right of parents to direct the education and upbringing of their children,<sup>35</sup> the right to use contraception,<sup>36</sup> and the right of same-sex couples to marry.<sup>37</sup> Modeling this approach, Justice Anthony Kennedy wrote for the Court in *Obergefell v. Hodges* that the Constitution encompasses the right of same-sex couples to marry. He rejected a history-bound method for identifying liberty rights, asserting that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries,” because “[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”<sup>38</sup>

However, some jurists and legal thinkers have argued against broadening the scope of individual liberty, advocating for limiting constitutionally-protected liberties to only those “deeply rooted in the Nation’s history and tradition.”<sup>39</sup> This narrower approach has been used to reject a right to a dignified death<sup>40</sup> and to reject a right to same-sex sexual intimacy<sup>41</sup> (a decision later overturned by the 2003 case *Lawrence v. Texas*<sup>42</sup>).

The narrow originalist approach to liberty has been invoked by Supreme Court justices, such as Justice Antonin Scalia, who disagreed with the Court’s liberty rulings on the right to abortion and marriage equality. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,

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<sup>34</sup> See Amy Myrick, *Roe and Intersectional Liberty Doctrine*, CTR. FOR REPROD. RIGHTS (2018), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Liberty-Roe-Timeline-spread-for-web.pdf>.

<sup>35</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

<sup>36</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>37</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>38</sup> *Id.* at 2598, 2602.

<sup>39</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

<sup>40</sup> *Id.* at 720.

<sup>41</sup> *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

<sup>42</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

Justice Scalia opined that there is no right to “abortion on demand” because “(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.”<sup>43</sup> Similarly in *Obergefell v. Hodges*, Justice Scalia dissented from the Court’s decision recognizing that the right to marriage extends equally to same-sex couples, accusing the majority of exercising a “claimed power to create ‘liberties’ that the Constitution and its Amendments neglect to mention.”<sup>44</sup>

Judge Barrett unequivocally subscribes to Justice Scalia’s originalist approach to constitutional interpretation. On September 26, 2020, in her remarks after being nominated by President Trump, she said: “I clerked for Justice Scalia more than 20 years ago, but the lessons I learned still resonate. *His judicial philosophy is mine, too*: A judge must apply the law as written.”<sup>45</sup>

Judge Barrett has discussed her understanding of originalism at length in academic articles and in public speaking events, including a 2016 article co-authored with Professor John Nagle, which describes originalism as undergirded by “two core principles:”

First, the meaning of the constitutional text is fixed at the time of its ratification. Second, the historical meaning of the text “has legal significance and is authoritative in most circumstances.” Commitment to these two principles marks the most significant disagreement between originalists and their critics. 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.<sup>46</sup>

In other words, for Judge Barrett, the application of enduring constitutional principles to the experiences of people today are irrelevant to constitutional interpretation.

In a lecture at Jacksonville University shortly before the 2016 election, Judge Barrett spoke to her view that substantive due process, which “the Court has relied upon in finding a right to abortion,”<sup>47</sup> is particularly controversial, because “the Court says for itself what it thinks those rights are, based on what it thinks contemporary values are at the time.”<sup>48</sup> Judge Barrett was clear that Justice Scalia was not a fan of substantive due process because he thought that the

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<sup>43</sup> *Casey*, 505 U.S. at 980 (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>44</sup> *Obergefell*, 576 U.S. at 714 (Scalia, J., dissenting).

<sup>45</sup> THE WHITE HOUSE, *Remarks by President Trump Announcing His Nominee for Associate Justice of the Supreme Court of the United States* (Sept. 26, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-announcing-nominee-associate-justice-supreme-court-united-states/> (emphasis added).

<sup>46</sup> Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 5 (2016) (footnote citations omitted).

<sup>47</sup>

Jacksonville University, *Hesburgh Lecture 2016: Professor Amy Barrett at the JU Public Policy Institute*, YOUTUBE at 29:50 (Dec. 5, 2016), <https://www.youtube.com/watch?v=7yjTEdZ81II&t=21s>.

<sup>48</sup> *Id.* at 30:11.

due process clause “doesn’t contain a substantive guarantee” that either would compel “the state . . . to provide you certain guarantees” or restrain the state from passing legislation.<sup>49</sup> To further elaborate on the originalist approach, Judge Barrett discussed *Obergefell*, highlighting the dissent’s argument that the Constitution did not speak to the question of marriage for same-sex couples and therefore it was not for the Court to decide, but rather should be determined through the legislative process.<sup>50</sup>

In a 2017 article, Judge Barrett pointedly singled out *Roe* as an example of a case where Justice Scalia believed the Court’s “error was clear” and should be overruled under traditional stare decisis factors.<sup>51</sup> Given her strong identification with Justice Scalia’s judicial philosophy, this strongly suggests that, like Justice Scalia, Judge Barrett is hostile to the foundations of the right to abortion and other essential liberty rights.

## **B. Rejects Stare Decisis for *Roe* and *Casey***

*Roe* and its progeny constitute nearly fifty years of precedential jurisprudence that has been repeatedly reapplied and reaffirmed by the Court, including just last term in *June Medical Services v. Russo* (2020). Judge Barrett’s writings make clear that, as a Supreme Court Justice, she will not be constrained by precedent or stare decisis with respect to abortion rights. As a general matter, she has little apparent hesitation for overturning past decisions, and she has specifically signaled that *Roe* and *Casey* are decidedly *not* off-limits from future reconsideration.

While Judge Barrett has recognized that some Supreme Court precedents have achieved “super-precedent” status<sup>52</sup> (e.g., *Marbury v. Madison* and *Brown v. Board of Education*), she notably and alarmingly fails to include *Roe* and *Casey* within this ultra-protected group. She has characterized *Roe* as a “prominent decision . . . whose status as super precedent . . . remains disputed.”<sup>53</sup> And she has pointed to *Casey* as an example of a decision that “shows that the Court is quite incapable of transforming precedent into superprecedent by *ipse dixit*,” meaning by the

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<sup>49</sup> *Id.* at 30:34. Judge Barrett similarly applies a narrow “as written” approach to statutory interpretation. For example, she states, “when Title IX was enacted, it’s pretty clear that no one, including Congress . . . would’ve dreamed of that result,” referring to the interpretation of Title IX as providing equal rights to transgender youth to use bathrooms designated for the gender to which they identify. She suggests instead that this is a policy change debate that should be taken back to Congress but not imposed by the courts.) *Id.* at 39:05.

<sup>50</sup> *Id.* at 31:47; *see also, id.* at 36:39 (“I think there are a number of areas . . . in constitutional law where that ‘who decides?’ issue would be big . . . is that a state decision, is that a constitutional decision; I think right to die, I think abortion.”)

<sup>51</sup> Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1931-33 (2017).

<sup>52</sup> Judge Barrett has written in depth about her understanding of the strength of stare decisis and the concept of “super precedent,” which she has described as cases that “no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds,” Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1734 (2013), or alternatively as “decisions that no serious person would propose to undo even if they are wrong,” Barrett & Nagle, *supra* note 46, at 2. These cases, she writes, share five characteristics, namely endurance over time, support by political institutions, influence over constitutional doctrine, widespread social acquiescence, and widespread judicial agreement that they are no longer worth revisiting, as evidenced by the fact that a litigant is unlikely to spend resources litigating the point in a court. *Id.* at 14, 17.

<sup>53</sup> Barrett & Nagle, *supra* note 46, at 14, n.43.

Court’s own assertion.<sup>54</sup> In her view, *Roe* and its progeny have not been widely accepted by the public—which she believes makes these decisions ripe for overruling. She has written: “If anything, the public response to controversial cases like *Roe* reflects public rejection of the proposition that stare decisis can declare a permanent victor in a divisive constitutional struggle rather than desire that precedent remain forever unchanging.”<sup>55</sup>

This view is a departure from the Court’s approach in *Casey*. The majority was well aware that *Roe* had sparked opposition. But it concluded that “to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question. Cf. *Brown v. Board of Education*. . . (*Brown II*) (‘[I]t should go without saying that the vitality of th[e] constitutional principles [announced in *Brown I*,] cannot be allowed to yield simply because of disagreement with them’).”<sup>56</sup> To the contrary, Judge Barrett does not believe that overturning watershed precedent would undermine the Court’s legitimacy: “Because there is a great deal of precedent for overruling precedent, a justice who votes to do so engages in a practice that the system itself has judged to be legitimate rather than lawless.”<sup>57</sup>

It is clear that for Judge Barrett, neither *Roe* nor *Casey* meet the standards of “super precedent.” Her writings strongly suggest that stare decisis would not be a restraint to overturning *Roe* and *Casey* should the question be presented before the Court.

#### **IV. JUDGE BARRETT’S ACADEMIC WRITINGS AND COMMENTS QUESTION THE CONSTITUTIONALITY OF THE ACA**

The Supreme Court first addressed the constitutional right to contraception in a series of cases stretching back over fifty years ago.<sup>58</sup> As the Court has recognized: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>59</sup> The Centers for Disease Control and Prevention (“CDC”) named contraception one of the ten great public health achievements of the twentieth century.<sup>60</sup> Women in the United States spend an average of thirty years trying to prevent pregnancy and ninety-nine percent of women who have ever had sexual intercourse have used

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<sup>54</sup> Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1735 (2013).

<sup>55</sup> *Id.* at 1727.

<sup>56</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (internal citation omitted).

<sup>57</sup> Barrett, *supra* note 55, at 1729.

<sup>58</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>59</sup> *Casey*, 505 U.S. at 856. The American College of Obstetricians and Gynecologists (“ACOG”) further recognizes the wide range of benefits including “female engagement in the work force, and economic self-sufficiency for women.” AM. COLL. OF OBSTET. & GYNECOL., Committee on Health Care for Underserved Women, Opinion No. 615: *Access to Contraception* (2015).

<sup>60</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, Ten Great Public Health Achievements – United States, 1990-1999 (Apr. 2, 1999), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm>.

some form of contraception, including women from every ethnic, racial, religious, and geographic background.<sup>61</sup>

The passage of the Patient Protection and Affordable Care Act (“ACA”) in 2010 was a significant advance in women’s access to reproductive health care.<sup>62</sup> It requires most employers to provide insurance coverage for contraception, among other preventive health services, at no cost. The ACA has helped guarantee no-cost contraceptive access for more than 60 million women.<sup>63</sup> The law also extended health care coverage, including for reproductive health care, to nearly 20 million people,<sup>64</sup> and prohibited discriminatory insurance practices, such as charging higher premiums based on gender.<sup>65</sup>

Access to maternal health care was critically expanded through the ACA: prior to the bill’s passage, many individual health plans did not cover maternity care, and many insurance companies treated pregnancy or past pregnancy-related procedures like cesarean sections as pre-existing conditions, which could be used as grounds for denying maternity coverage.<sup>66</sup> The ACA eliminated coverage denials based on pre-existing conditions<sup>67</sup> and included maternity care as an essential health benefit that must be part of any health insurance plan.<sup>68</sup>

The ACA is a comprehensive statute, hundreds of pages in length, that was designed to provide access to affordable health insurance for millions of previously uninsured or under-insured Americans.<sup>69</sup> Its opponents have brought numerous court challenges seeking to cripple or invalidate the statute in its entirety. The Supreme Court has largely sustained the law to date,

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<sup>61</sup> Kimberly Daniels, et al., *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, 62 NAT’L HEALTH STATISTICS REPORTS 1 (Feb. 14 2013), <https://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf>; JO JONES ET AL., *Current Contraceptive Use in the United States, 2006–2010, and Changes in Patterns of Use Since 1995*, 60 NAT’L HEALTH STATISTICS REPORTS 1 (Oct. 18, 2012); Rachel K. Jones & Joerg Dreweke, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use*, GUTTMACHER INST. (Apr. 2011), [https://www.guttmacher.org/sites/default/files/report\\_pdf/religion-and-contraceptive-use.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/religion-and-contraceptive-use.pdf).

<sup>62</sup> The Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 *et seq.* (2010).

<sup>63</sup> NAT’L WOMEN’S LAW CTR., *The Affordable Care Act’s Birth Control Benefit: Too Important to Lose* (Jun. 25, 2018), <https://nwlc.org/resources/the-affordable-care-acts-birth-control-benefit-too-important-to-lose/>.

<sup>64</sup> Nicholas Bakalar, *Nearly 20 Million Have Gained Health Insurance Since 2010*, N.Y. TIMES (May 22, 2017), <https://www.nytimes.com/2017/05/22/health/obamacare-health-insurance-numbers-nchs.html>.

<sup>65</sup> See Danielle Garrett, *Turning to Fairness*, NAT’L WOMEN’S LAW CTR. (2012), [https://www.nwlc.org/sites/default/files/pdfs/nwlc\\_2012\\_turningtofairness\\_report.pdf](https://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf).

<sup>66</sup> *See id.*

<sup>67</sup> Larry Levitt, *Protecting People with Pre-Existing Conditions Isn’t as Easy as it Seems*, KAISER FAM. FOUND. (Oct. 5, 2020), <https://www.kff.org/policy-watch/protecting-people-with-pre-existing-conditions-isnt-as-easy-as-it-seems/>.

<sup>68</sup> 42 U.S.C. § 18022(b)(1)(D). Research shows that uninsured pregnant women receive fewer prenatal care services, and are more likely to experience pregnancy related complications and adverse birth outcomes whereas increased access to care and services improves outcomes for both mothers and their children. *See, e.g.*, AM. COLL. OF OBSTET. & GYNECOL., Committee on Health Care for Underserved Women, Opinion No. 552: *Benefits to Women of Medicaid Expansion Through the Affordable Care Act* (2013).

<sup>69</sup> The Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 *et seq.* (2010).

rejecting cramped readings of the text that would upend the ACA’s core purpose of ensuring affordable, comprehensive health care coverage for all Americans.<sup>70</sup>

In *King v. Burwell* (2015), in a 6-3 opinion by Chief Justice Roberts, the Court held that tax credits are available to eligible citizens for insurance purchased on an exchange created under the ACA, whether the exchange was set up by a state or the federal government. The Court looked to the text of the ACA as a whole, and its structure, history, and purpose to conclude that Congress did not intend that people in some states would be excluded from receiving the subsidies. The dissenters would have read the statutory language to mean that only people whose states had decided to set up exchanges—and not where the federal government stepped in to establish exchanges—could get the tax credit.<sup>71</sup> Because over 30 states chose not to set up exchanges,<sup>72</sup> millions would have lost the subsidies that made them able to afford health insurance, which was the very purpose of the ACA. In a 2015 radio show, Judge Barrett said that Justice Scalia “had the better of the legal argument”<sup>73</sup> and implausibly claimed that one cannot really know what Congress intended.<sup>74</sup>

Judge Barrett also criticized Chief Justice Roberts’s controlling opinion in *NFIB v. Sebelius* (2012), which upheld the ACA’s “individual mandate,” a requirement that everyone have health insurance, as a legitimate exercise of Congress’s taxing authority.<sup>75</sup> Had the Court’s four dissenters prevailed, the entire ACA would have been held unconstitutional. In a law review article, Judge Barrett accused the Chief Justice of having “pushed the Affordable Care Act beyond its plausible meaning to save the Statute” and that “deference to democratic majority should not supersede a judge’s duty to apply clear text.”<sup>76</sup> She characterized Chief Justice Roberts as “creatively interpreting ostensibly clear statutory text,” which she said is an “approach . . . at odds with the statutory textualism to which most originalists subscribe.”<sup>77</sup> Quoting Justice Scalia’s *King* dissent, Judge Barrett wrote that the Court’s treatment of the ACA means that the “statute known as Obamacare should be renamed ‘SCOTUScare’ in honor of the

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<sup>70</sup> See *NFIB v. Sebelius*, 567 U.S. 519 (2012) (holding that the law’s requirement that individuals purchase health insurance or pay a tax was a valid exercise of Congress’s taxing power); *King v. Burwell*, 135 S. Ct. 435 (2015) (rejecting a challenge to the law’s tax credit subsidies for individuals purchasing health insurance). The ACA also expanded eligibility for Medicaid. However, as a result of the Supreme Court’s decision in *NFIB*, which effectively made the Medicaid expansion optional for states, 567 U.S. at 580-88, many states with the worst health disparities have refused to expand Medicaid, resulting in coverage gaps that impact health care overall, including before, during, and after pregnancy. See Rachel Garfield, et al., *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAM. FOUND. (2018), <https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/>.

<sup>71</sup> *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting).

<sup>72</sup> *Id.* at 2504.

<sup>73</sup> On Point with Tom Ashbrook, *SCOTUS Upholds State Health Care Subsidies*, WBUR (June 25, 2015), <https://www.wbur.org/onpoint/2015/06/25/scotus-obamacare-upheld-john-roberts-antonin-scalia>.

<sup>74</sup> *Id.* at 2:18.

<sup>75</sup> *NFIB v. Sebelius*, 567 U.S. 519 (2012) (holding that the law’s requirement that individuals purchase health insurance or pay a tax was a valid exercise of Congress’s taxing power).

<sup>76</sup> Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 31 CONST. COMM. 61, 80 (2017).

<sup>77</sup> *Id.* at 84.



Court’s willingness to ‘rewrite’ the statute in order to keep it afloat.”<sup>78</sup> Her critical assessment of the Court’s ACA decisions indicates that she takes a rigid and narrow approach to legal analysis that discounts the intent of complex statutory schemes and the consequences of the Court’s jurisprudence for people’s lives.

On November 10, 2020, the Supreme Court will hear yet another case challenging the ACA’s constitutionality. At stake is health insurance coverage for 20 million Americans who get their health insurance under the ACA as well as the 133 million Americans with pre-existing conditions who may not be excluded from insurance coverage whether they obtain it under the ACA or from other sources.<sup>79</sup>

## **V. JUDGE BARRETT HAS PUBLICLY ADVOCATED AGAINST REPRODUCTIVE HEALTH CARE AND REPRODUCTIVE RIGHTS**

Judge Barrett’s judicial record and judicial philosophy standing alone manifest opposition to the Supreme Court’s five-decades of constitutional jurisprudence protecting reproductive rights. Her public advocacy further underscores her hostility to constitutional guarantees to reproductive autonomy and access to reproductive health services.

That Judge Barrett personally opposes abortion is clear from her membership from 2010 through 2016 in the Notre Dame chapter of University Faculty for Life (“UFL”)<sup>80</sup> and the enthusiastic support for her nomination from groups opposed to reproductive rights.<sup>81</sup>

Her personal views, however, are not the basis for our opposition; it is her public advocacy positions on what the law should be that is relevant to her nomination. Our concern is not that she personally opposes abortion and forms of contraception and holds views that could impact fertility treatment practices. It is that she would deny others the legal right to reproductive

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<sup>78</sup> *Id.* (quoting *King v. Burwell*, 135 S. Ct. 2480, 2507 (2015) (Scalia, J., dissenting)).

<sup>79</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVS., Assistant Sec’y for Planning and Evaluation, *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act* (Jan. 5, 2017), <https://aspe.hhs.gov/system/files/pdf/255396/Pre-ExistingConditions.pdf>; CTR. ON BUDGET AND POL’Y PRIORITIES, *Chart Book: Accomplishments of Affordable Care Act* (Mar. 19, 2019), <https://www.cbpp.org/research/health/chart-book-accomplishments-of-affordable-care-act>.

<sup>80</sup> From 2010 to 2016, Judge Barrett was a member of UFL, which was founded in 1989 (the Notre Dame chapter began in 2010). The UFL “promote[s] research, dialogue and publication by faculty who respect the value of human life from conception to natural death.” Abortion, infanticide and euthanasia are their three primary areas of focus. They state that: “Because we believe the evidence is on our side, we would like to assure a hearing for our views in the academic community.” While “[t]he media regularly show pro-life people as mindless zealots,” UFL hopes its presence will change that. *University Faculty for Life*, University of Notre Dame, <https://ufl.nd.edu/about-ufl/> (last accessed Sept. 29, 2020).

<sup>81</sup> *See, e.g.*, “Faith and Freedom Coalition Executive Director Timothy Head: ‘Amy Coney Barrett is the principled conservative we need on the Supreme Court bench right now. She is an accomplished woman of the law and someone who practices the pro-life values she preaches.’” *What They Are Saying: Support for President Donald J. Trump’s Nomination of Judge Amy Coney Barrett to the Supreme Court*, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY, <https://publicpool.kinja.com/subject-wtas-support-for-president-donald-j-trump-s-1845195716> (Sept. 27, 2020). *See also A Historic Opening for Anti-Abortion Activists*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/podcasts/the-daily/supreme-court-trump-roe-v-wade.html>.

autonomy and access to reproductive services. Indeed, her public advocacy disparaging contraception and abortion and defending “the right to life from fertilization” cast momentous doubt about whether she can fairly adjudicate cases involving reproductive rights.

### **A. Publicly advocated to defend “the right to life from fertilization”**

In 2006, Judge Barrett was a signatory to a full-page newspaper advertisement sponsored by St. Joseph County Right to Life that was placed in the South Bend Tribune on the *Roe v. Wade* anniversary.<sup>82</sup> The ad covered two pages. One page called *Roe v. Wade* “an exercise of raw judicial power” and declared “[i]t’s time to put an end to the barbaric legacy of *Roe v. Wade* and restore laws that protect the lives of unborn children.”<sup>83</sup> The other page listed signatories, including then-Professor Barrett, to this statement: “We, the following citizens of Michiana, oppose abortion on demand and defend the right to life from fertilization to natural death.”<sup>84</sup> This statement was not merely an expression of personal opposition to abortion or a call for cultural change—it was a call to legal action to “defend the right to life.” And the ad made clear that the most important line of defense was overturning *Roe v. Wade* and legally prohibiting abortion.<sup>85</sup>

It is also important to understand the implications of Judge Barrett’s advocacy of defending “the right to life *from fertilization*.” Fertilization refers to the union of an egg and sperm that can happen within the body in the fallopian tube or outside the body in a petri dish.<sup>86</sup> A fertilized egg is not a pregnancy.<sup>87</sup> A pregnancy happens if, and when, a fertilized egg implants in the uterine wall.<sup>88</sup> Anti-reproductive rights advocates conflate fertilization with personhood and advocate that legal personhood should adhere at fertilization. This view leads to attacks on contraceptives such as intrauterine devices (IUDs), and emergency contraception, and

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<sup>82</sup> Stephanie Kirchgaessner, *Revealed: Amy Coney Barrett supported group that said life begins at fertilization*, GUARDIAN (Oct. 1, 2020), <https://amp.theguardian.com/us-news/2020/oct/01/amy-coney-barrett-supported-group-fertilization>; Rebecca R. Ruiz, *Amy Coney Barrett signed an ad in 2006 urging overturning the ‘barbaric legacy’ of Roe v. Wade*, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/elections/amy-coney-barrett-roe-v-wade.html>.

<sup>83</sup> See Appendix.

<sup>84</sup> *Id.*

<sup>85</sup> Judge Barrett did not disclose her endorsement of this anti-*Roe* ad in her questionnaire submitted to the Senate Judiciary Committee in connection with her Supreme Court nomination nor in connection with her nomination to the U.S. Court of Appeals for the Seventh Circuit in 2017. Both the extremity of the position she signed onto and her failure to disclose it are great cause for concern. Amy Coney Barrett, *Questionnaire for Nominee to the Supreme Court*, U.S. S. COMM. ON THE JUDICIARY (Sept. 29, 2020) [https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20\(Public\)%20\(002\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20(Public)%20(002).pdf); Amy Coney Barrett, *Questionnaire for Judicial Nominees*, U.S. S. COMM. ON THE JUDICIARY (2017), [https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ(PUBLIC).pdf).

<sup>86</sup> AM. COLL. OF OBSTET. & GYNECOL., *How your fetus grows during pregnancy* (2020), <https://www.acog.org/patient-resources/faqs/pregnancy/how-your-fetus-grows-during-pregnancy>.

<sup>87</sup> EDWARD C. HUGHES, AM. COLL. OF OBSTET. & GYNECOL., OBSTETRIC-GYNECOLOGIC TERMINOLOGY: WITH SECTION ON NEONATOLOGY AND GLOSSARY OF CONGENITAL ABNORMALITIES 299, 327 (1972).

<sup>88</sup> UNIV. OF CAL. S.F., *Conception: How it Works*, <https://www.ucsfhealth.org/education/conception-how-it-works#4> (last accessed Oct. 6, 2020). Indeed, 50 percent of fertilized eggs will never establish as a pregnancy.

even in vitro fertilization (IVF) practices.<sup>89</sup> Indeed, the Executive Director of St. Joseph County Right to Life—the organization that sponsored the ad Judge Barrett signed—advocates for the criminalization of the disposal of frozen embryos that are not used in IVF treatment.<sup>90</sup> Judge Barrett’s public advocacy of protecting “the right to life from fertilization”<sup>91</sup> places her in the extreme position of treating fertilized eggs as having a “right to life.”

### **B. Called contraception “gravely immoral and unjust” and promoted scientifically false attacks on emergency contraception**

In 2012, Judge Barrett signed a public letter opposing the Affordable Care Act’s birth control benefit, which requires that health insurance plans cover contraceptives without a co-pay. The letter was sponsored by the Becket Fund for Religious Liberty,<sup>92</sup> which represented the plaintiffs in both *Hobby Lobby v. Burwell* and *Little Sisters for the Poor v. Pennsylvania* in claiming that employers can deny workers access to contraception based on their religious or moral beliefs.<sup>93</sup> The letter calls contraception and sterilization “objectionable things” and “gravely immoral and unjust.”<sup>94</sup>

The extreme condemnation of contraception is significantly out of step with the experience of American women: ninety-nine percent of women aged 15–44 who have ever had sexual intercourse have used at least one contraceptive method.<sup>95</sup> Moreover, the letter ignores science<sup>96</sup> by repeatedly referring to emergency contraception as an “abortion-inducing drug.”<sup>97</sup> In fact, emergency contraception prevents pregnancy (which is why it is a

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<sup>89</sup> Joerg Dreweke, *Contraception is Not Abortion: The Strategic Campaign of Antiabortion Groups to Persuade the Public Otherwise*, 17 GUTTMACHER POLICY REVIEW 14 (Fall 2014), [https://www.guttmacher.org/sites/default/files/article\\_files/gpr170414.pdf](https://www.guttmacher.org/sites/default/files/article_files/gpr170414.pdf).

<sup>90</sup> Stephanie Kirchgaessner, *Revealed: Amy Coney Barrett supported group that said life begins at fertilization*, GUARDIAN (Oct. 1, 2020), <https://amp.theguardian.com/us-news/2020/oct/01/amy-coney-barrett-supported-group-fertilization>.

<sup>91</sup> In a 2013 speech at Notre Dame, Judge Barrett stated her view that life begins at conception. See John Nagy, *Students, faculty mark 40 years of Roe*, NOTRE DAME MAGAZINE (Jan. 25, 2013), <https://magazine.nd.edu/news/lazy-i-students-faculty-mark-40-years-of-roe/>. See also Christian Myers, *Law professor reflects on landmark case*, NOTRE DAME, SAINT MARY’S, & HOLY CROSS OBSERVER, (Jan. 21, 2013), <https://ndsmcobserver.com/2013/01/law-professor-reflects-on-landmark-case/>.

<sup>92</sup> John Garvey, *et al.*, *Unacceptable* (April 11, 2012), <https://s3.amazonaws.com/becketpdf/Unacceptable-4-11.pdf>; Press Release, Becket Fund for Religious Liberty, *Diverse Group of More than 500 Academics and Religious Leaders Call Obama’s HHS Statement “Unacceptable,”* (Feb. 15, 2012), <https://www.becketlaw.org/media/unacceptable/>.

<sup>93</sup> The Obama Administration had made an accommodation for employers and institutions with religious objections that allowed them to opt out of providing contraceptive coverage for their employees or students; instead, they could notify their insurer of their objection and the insurance company would provide the coverage directly to the employee or student. The Trump Administration subsequently expanded exemptions from the contraceptive coverage benefit, including by allowing employers and institutions the right to refuse to provide the benefit in their health plans for religious or moral reasons.

<sup>94</sup> Garvey, *et al.*, *supra* note 91.

<sup>95</sup> CTRS FOR DISEASE CONTROL AND PREVENTION, *Key Statistics from the National Survey of Family Growth-C Listing* (May 7, 2019), [https://www.cdc.gov/nchs/nsfg/key\\_statistics/c.htm#everused](https://www.cdc.gov/nchs/nsfg/key_statistics/c.htm#everused).

<sup>96</sup> Dreweke, *supra* note 89.

<sup>97</sup> Garvey, *et al.*, *supra* note 91.

contraceptive); it does not disrupt an established pregnancy.<sup>98</sup> Moreover, as Judge Barrett was undoubtedly well aware, the ACA does not require coverage of abortion care, and therefore no “abortion-inducing drugs” are covered by the birth control benefit<sup>99</sup> and the letter was blatantly misleading.

## CONCLUSION

After a thorough review of Judge Barrett’s judicial opinions, academic writings, and public statements, we have grave concerns about her ability to fairly adjudicate cases impacting reproductive rights.

Some will argue that Judge Barrett’s public stances on contraception, abortion, and defending “the right to life from fertilization” are simply personal views that bear no relevance to how she would apply settled Supreme Court law as a Justice. However, her record evinces a legal view that the Constitution’s protections for individual liberty do not include reproductive rights. Moreover, the virulence of her public opposition raises serious doubts about whether she will uphold the Supreme Court jurisprudence respecting differences of opinion about abortion. In *Casey*, the Court wrote that:

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.<sup>100</sup>

Reproductive rights should not be open for debate. One in four women in the U.S. will decide that ending a pregnancy is the right decision for her. The overwhelming majority of women will use contraception. Increasingly, some couples are turning to assisted reproduction in creating their families. These highly personal matters of reproduction are central to a person’s dignity and liberty and to gender equality.

**Therefore, the Center for Reproductive Rights strongly opposes the confirmation of Judge Amy Coney Barrett to serve as an Associate Justice of the Supreme Court of the United States.**

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<sup>98</sup> Dreweke, *supra* note 89, at 15.

<sup>99</sup> Alina Salganicoff et. al., *Coverage for Abortion Services and the ACA*, KAISER FAM. FOUND. (Sept. 19, 2014), <https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-and-the-aca/>.


<sup>100</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (opinion of the Court).




**APPENDIX**

**We, the following citizens of Michiana, oppose abortion on demand and defend the right to life from fertilization to natural death.**

David Adams Dan Adams Jeff Adams ...	...	...	...	...	...	...	...
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**PLEASE CONTINUE TO PRAY TO END ABORTION.**



**Roe v. Wade:**  
"an exercise of raw judicial power"  
-Supreme Court Justice Byron White

The Supreme Court's 1973 *Roe v. Wade* decision legalized abortion for any reason. Now, after more than thirty-two years under *Roe* more than 47 million unborn children have been aborted. The majority of those abortions were performed for social reasons.<sup>1</sup> Yet poll after poll continues to show that an increasing majority of Americans are opposed to abortion as a method of birth control.<sup>2</sup> And in 2000, the Supreme Court ruled that *Roe v. Wade* allowed and protected the brutal partial-birth abortion procedure -- a practice opposed by over 70% of all Americans.<sup>3</sup> 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.

**Roe v. Wade:**

More than thirty-two years...

More than 47 million children dead and counting...

St. Joseph County Right to Life, 320 N. Lafayette Blvd., South Bend, IN 46601  
 (574) 232-5433 Fax (574) 232-4793 prolife@michiana.org

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