The Nomination of Amy Coney Barrett

What's at Stake?
The Separation of Church and State

A report from
Americans United for Separation of Church and State

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INTRODUCTION

Our country was founded on the principle of religious freedom—a tradition and ideal that remains central to who we are today. The separation of church and state is the linchpin of religious freedom and one of the hallmarks of American democracy. It ensures that every American is able to practice their religion or no religion at all, without government interference, as long as they do not harm others. It also means that our government officials, including our judges, can't favor or disfavor religion or impose their personal religious beliefs on the law. Separation safeguards both religion and government by ensuring that one institution does not control the other, allowing religious diversity in America to flourish. Our Supreme Court must respect this fundamental principle.

The American people agree: According to a poll conducted in July of 2019 by Anzalone Liszt Grove Research on behalf of Americans United, 60 percent of likely voters say protecting the separation of religion and government is either one of the most important issues to them personally or very important.

Justice Ginsburg was a staunch supporter of the separation of church and state. Yet President Trump has nominated Amy Coney Barrett, whose record indicates hostility toward church-state separation, to fill her seat. Religious freedom for all Americans hangs in the balance with this nomination.

AT STAKE: Whether Religious Exemptions Will Be Used to Harm Others, Undermine Nondiscrimination Laws, and Deny Access to Healthcare

Religious freedom is a shield that protects religion, not a sword to harm others or to discriminate. Indeed, the Establishment Clause of the First Amendment prohibits the government from granting religious exemptions that would detrimentally affect any third party.[1] In short, the government may not make one person bear the costs of another person's religion.

Judge Barrett's record indicates that she does not respect the "do no harm" principle and is willing to grant religious exemptions even when they harm other people. This

[1] *Cutter v. Wilkinson*, 544 U.S. 709, 720, 726 (2005) (may not "impose unjustified burdens on other[s]"); *see also, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion) (may not "impose substantial burdens on nonbeneficiaries"); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985).

misuse of religion puts our civil rights, healthcare, and religious freedom at risk, particularly for women, LGBTQ people, religious minorities, and the nonreligious.

Judge Barrett supports allowing religious exemptions that deny others access to healthcare or threaten public health.

Prior to joining the bench, Judge Barrett made clear her hostility to the Affordable Care Act's guarantee of birth control coverage. In 2012, she signed on to a letter authored by the Becket Fund—a conservative legal group with a track record of bringing cases that seek to use religion to undermine reproductive rights. The letter attacked both the ACA's requirement that health insurance plans cover contraception *and* the Obama administration's accommodation process for employers with religious objections to contraceptive coverage, through which the entities could opt out of the requirement simply by filling out a form.[2] In other words, Judge Barrett believes that the mere act of filling out a form—a piece of paper relieving objectors of the need to comply with the coverage policy—is an unlawful burden on religious exercise. That's at odds with the opinions of eight of the nine federal appeals courts that upheld the accommodation as a permissible way of exempting religious objectors while still ensuring that people have access to vital healthcare.

Lawsuits challenging the ACA's birth control benefit are ongoing. In 2017, the Trump administration enacted sweeping new religious exemptions to the requirement. And earlier this year, the Supreme Court ruled that the administration has the authority under the ACA to enact those regulations.[3] But this ruling did not fully resolve the case, and the claims that the administration violated the Establishment Clause when it enacted the religious exemptions that harm people by denying them access to vital healthcare remain. Judge Barrett's views on the accommodation process suggest that she would support allowing the harmful religious exemptions to stand, denying people access to healthcare and undermining the "do no harm" principle.

Moreover, on September 3, 2020, in *Illinois Republican Party v. Pritzker*,[4] Judge Barrett joined a decision of the Seventh Circuit allowing Illinois to exempt religious services from its emergency health order banning large gatherings to slow the spread of COVID-19. As we continue to navigate through the pandemic and search for a vaccine, we need a justice who will uphold the decades-old precedent that "the right

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[2] Letter from Becket Fund for Religious Liberty (Feb. 13, 2012), *quoted in full in Cardinal Dolan Joins Protest Over 'Unacceptable' Attack on Religious Liberty*, National Catholic Register (Feb. 27, 2012), https://bit.ly/32SgEJt.

[3] *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

[4] __ F.3d __, No. 20-2175, 2020 WL 5246656 (7th Cir. Sept. 3, 2020).

to practice religion freely does not include liberty to expose the community . . . to communicable disease."[5] Given her record, Judge Barrett is likely to allow religion to be used to ignore the laws necessary to protect the health and safety of everyone.

In the near future, the Supreme Court will consider cases involving the misuse of religion to discriminate.

In addition to the healthcare cases, over the past several years the Supreme Court has issued troubling decisions in cases asking whether businesses and institutions get religious exemptions that allow them to discriminate. For example, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court set aside a state commission's decision that a bakery violated a state nondiscrimination law when it refused to sell a wedding cake to a same-sex couple, because in the Court's view, members of the commission demonstrated religious animus.[6] More cases like these are making their way through the lower courts and *will* make their way to the Supreme Court.

In fact, in November, the Supreme Court will hear *Fulton v. City of Philadelphia*, in which a taxpayer-funded foster care agency argues that it has a constitutional right to discriminate, based on its religious beliefs, against qualified LGBTQ families. The ruling could extend beyond foster care agencies and LGBTQ parents, and create a sweeping license to discriminate. Taxpayer-funded services like food banks, homeless shelters, and Head Start programs could claim a right to turn away people who need services because they are the "wrong" religion, they don't go to the "right" church, or for any other reason.

The Court will also likely hear cases in the wake of *Bostock v. Clayton County*. In *Bostock,* the Supreme Court confirmed that Title VII of the Civil Rights Act bars employers from discriminating against LGBTQ people. But the majority opinion warned that future cases will determine whether businesses could use religious freedom claims to "supersede Title VII's commands."[7]

The Court is also likely to hear more cases involving the reach of the "ministerial exception," which exempts houses of worship and religious schools from employment nondiscrimination laws when hiring and firing employees who are "ministers"—employees who preach and teach the faith. In *Grussgott v. Milwaukee Jewish Day*

[5] *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

[6] 138 S. Ct. 1719 (2018)

[7] 140 S. Ct. 1731, 1754 (2020).

School, Inc.,[8] Judge Barrett joined an opinion that essentially deferred to the employer, taking its word that the employee's position was sufficiently religious to qualify for the exemption. This troubling interpretation goes farther than Supreme Court precedent; it would effectively hand religious employers a free pass to violate civil rights laws, depriving any employee they choose of their protections.

Judge Barrett's record supporting religious exemptions that deny employees access to healthcare and protections under employment laws demonstrates that she is likely to allow claims of religious freedom to undermine other laws that bar discrimination, ensure access to healthcare, and protect public health and safety as well.

AT STAKE: Access to the Courts

One of the core protections of the Establishment Clause is ensuring everyone can decide for themselves whether and how to use their own money to support religion. The government cannot force anyone to pay for the support of someone else's religion. In order to enforce this constitutional protection, taxpayers have been able to go to court directly to challenge when the government funds religion.

Under a legal standard known as municipal taxpayer standing, municipal taxpayers have a right to sue to challenge municipal spending that violates the law, including funding of religion under the Establishment Clause. In *Protect Our Parks, Inc. v. Chicago Park District*,[9] Judge Barrett wrote an opinion exhibiting hostility to municipal taxpayer standing. Her position is concerning and suggests that if confirmed she may vote to overrule the doctrine of municipal taxpayer standing, making it even harder for plaintiffs to vindicate their rights, including the protections of the Establishment Clause.

In addition, in a May 2017 law review article,[10] Judge Barrett praised Justice Scalia's willingness to overrule precedent in certain situations, citing approvingly a Scalia opinion advocating that precedent permitting federal and state taxpayers to challenge public funding of religious activities be overruled. Overruling that precedent would upend decades of case law and prevent taxpayers from enforcing the Establishment Clause's basic protections for religious freedom.

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[8] 882 F.3d 655, 660 (7th Cir. 2018) (per curiam).

[9] 971 F.3d 722, 2020 WL 4915631, at *6 (7th Cir. 2020).

[10] *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921, 1942 n.98 (2017) (citing *Hein v. Freedom From Religion Found., Inc.,* 551 U.S. 587, 636 (2007) (Scalia, J., concurring)).

AT STAKE: Fundamental Legal Precedent on Church-State Separation

Judge Barrett has written extensively about her belief that Supreme Court justices should not be bound by legal precedent when deciding constitutional questions.[11] The failure to respect precedent would throw our legal system into chaos and threaten important Supreme Court legal precedents that define the protections of the Establishment Clause.

In her 2017 article in support of Justice Scalia's willingness to overrule precedent, Judge Barrett wrote that while there are some "super precedents" that are "so deeply embedded that their overruling is off the table," the Supreme Court's seminal church-state decision in *Lemon v. Kurtzman*—which prohibits governmental action that has a primary purpose of advancing religion, has a primary effect of advancing religion, or excessively entangles government with religion—is not one of them.[12]

And despite 75 years of Supreme Court precedent interpreting the Establishment Clause, Judge Barrett suggested in a 2019 speech that "[i]t's deeply contested exactly what it means to have an establishment of religion."[13] She suggested that the Establishment Clause may not prohibit anything more than "established churches by states or if Congress were to declare a national church."[14]

Even worse, during a panel discussion that same year, Judge Barrett suggested that the Establishment Clause may not even apply to the states, and that Justice Thomas could be correct in his radical belief that the Clause "was designed to leave the states free to establish religions and not have Congress override that."[15] She further suggested that Justice Scalia may have been correct in his erroneous view that it is constitutional for the government to favor religion over nonreligion.[16]

Adoption of any of these extreme positions would be contrary to precedent going back to 1947 that holds that the Establishment Clause prohibits far more than

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[11] *See Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011 (2003); *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317 (2005); *Precedent and Jurisprudential Disagreement,* 91 Tex. L. Rev. 1711 (2013); *Originalism and Stare Decisis, supra* note 10.

[12] *See Originalism and Stare Decisis, supra* note 10, at 1931–32.

[13] Constitutional Originalism and Continuity, The Eleanor H. McCullen Center for Law, Religion and Public Policy, Villanova University School of Law (Feb. 25, 2019), *video available at* https://bit.ly/3iJOK7v (51:43).

[14] *Id.*

[15] A Conversation with Judges Thapar and Barrett, University of Notre Dame (Mar. 28, 2019), *video available at* https://bit.ly/3lnUghL (1:06:00).

[16] *Id.*

establishing an official church, applies to the states, and bars government from favoring religion over nonreligion.[17] Judge Barrett's words paint a disturbing view of the Establishment Clause—one that would undermine religious freedom across the country and place the separation between religion and government at grave risk.

Taxpayers could be forced to pay for religious activities.

The separation of church and state guarantees that each person has the right to decide whether and how to donate money to our houses of worship, religious schools, faith-based social service providers, and other religious institutions. The government cannot force anyone to pay for the support of someone else's religion. Indeed, one of the motivations for drafting the Establishment Clause was to ensure that no one is forced to fund religious education and activities.

This year, in *Espinoza v. Montana Department of Revenue*,[18] the Supreme Court held that states cannot exclude religious schools—solely on account of their religious status—from private school voucher programs. The Supreme Court did *not* address whether states may still prohibit program funds from being used by schools for religious instruction, setting up that fight for a future Supreme Court case.

Espinoza was decided just three years after *Trinity Lutheran Church of Columbia v. Comer.*[19] In *Trinity Lutheran*, the Court held that Missouri could not exclude a church from a taxpayer-funded program that paid for playground resurfacing, but the Court emphasized that the decision only addressed nonreligious use of public funds. The Trump administration has tried to vastly extend the scope of *Trinity Lutheran*, using it to argue for expanding voucher programs across the country and carve out exemptions to church-state safeguards in federally funded social service programs. Following *Espinoza*, we expect that this administration will try to apply the cases in even more harmful ways.

We cannot afford to have a justice who would defy precedent, further eroding our religious freedom.

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[17] *See, e.g.*, *Everson v. Board of Educ.*, 330 U.S. 1, 8, 15–16 (1947).

[18] 140 S.Ct. 2246 (2020).

[19] 137 S.Ct. 2012 (2017).

Public school students could be forced to pray in school.

No students should feel excluded in their own school because of their beliefs, and no parents should have to worry that their children are being given religious instruction in a public school.

That is why for more than five decades the Supreme Court has held that the separation of church and state bars public schools from sponsoring prayer, promoting religion, or coercing students to participate in religious activities.

In the last school prayer case considered by the Supreme Court, *Santa Fe Independent School District v. Doe*,[20] Justice Ginsburg sided with students and their families who objected to school-sponsored prayer. This core constitutional protection is now on the line. Students and their parents—not public schools—should determine whether and how to participate in religious activities. And no student should be made to feel like an outsider in their own public school for not participating.

Yet Judge Barrett's writing indicates that she might overturn decades of precedent and not uphold the separation of church and state in our schools. In a May 2017 law review article, Judge Barrett praised Justice Scalia's dissent from a landmark Supreme Court decision that prohibited prayers at public school graduations.[21]

As public schools across the country continue to violate the Constitution, this issue could soon be back before the Supreme Court. For instance, in *Kennedy v. Bremerton School District*,[22] an assistant football coach insists that he had a right to pray with players and students at the 50-yard line after games. This case is in the U.S. Court of Appeals for the Ninth Circuit and could end up before the Supreme Court.

The next Supreme Court justice must ensure that public schools are welcoming and accepting of all students, regardless of their religious beliefs. The religious freedom of students and families in our public schools are at stake.

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[20] 530 U.S. 290 (2000).

[21] *Originalism and Stare Decisis*, *supra* note 10, at 1923.

[22] 869 F.3d 813 (9th Cir. 2017).

AT STAKE: Reproductive and LGBTQ Rights

Judge Barrett has twice dealt with cases involving abortion, and she has twice voted in favor of draconian regulations relating to abortions. In *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of Indiana State Department of Health*,[23] she dissented from the Seventh Circuit's refusal to reconsider a decision that struck down an Indiana statute requiring abortion providers to cremate or bury fetal remains.

A year later, in *Planned Parenthood of Indiana & Kentucky, Inc. v. Box*,[24] Judge Barrett dissented from the Seventh Circuit's refusal to reconsider an earlier circuit decision striking down an Indiana statute that required that parents be notified before a minor could obtain an abortion without parental consent. The dissent she joined characterized the majority decision as "a judicial act of extraordinary gravity."[25] And in a third case, Judge Barrett joined an opinion suggesting that Supreme Court precedent permitting states to limit the ability of protesters to block clinic entryways should be overturned.[26]

These opinions, combined with an article she wrote suggesting that she does not see *Roe v. Wade* as a "super precedent,"[27] and her willingness to support religious exemptions that deny access to birth control, demonstrate that reproductive rights are at stake.

In addition, Judge Barrett has demonstrated hostility to LGBTQ people and rights. She has misgendered transgender people; said that Title IX, which prohibits sex discrimination in educational institutions, does not extend to transgender people; and defended the dissenting justices in the marriage equality case, *Obergefell v. Hodges*.[28] Her association with anti-LGBTQ organizations is also troublesome. She has, for example, spoken at a training program for law students run by the Alliance Defending Freedom, a Religious Right legal organization that has been at the forefront of attempts to roll back LGBTQ and women's rights.[29] She was also a

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[23] 917 F.3d 532 (7th Cir. 2018).

[24] 949 F.3d 997 (7th Cir. 2019).

[25] *Id.* at 999 (Kanne, J., dissenting from denial of rehearing en banc).

[26] *Price v. City of Chicago*, 915 F.3d 1107 (7th Cir. 2019).

[27] *Originalism and Stare Decisis, supra* note 10, at 1931–32.

[28] Hesburgh Lecture 2016, Public Policy Institute, Jacksonville University (Nov. 3, 2016), *video available at* https://bit.ly/36L1dp2 (28:37).

[29] Nomination of Amy Coney Barrett to the Seventh Circuit Court of Appeals, Questions for the Record Response to Questions for Sen. Feinstein, at 7–8 (submitted Sept. 13, 2017), https://bit.ly/3j6eiwf.

member of the Federalist Society.[30] Her statements, affiliations with anti-LGBTQ groups, and willingness to use religion to discriminate demonstrates that she will undermine the rights of LGBTQ people.

We cannot afford to have a Supreme Court justice who has demonstrated such hostility to reproductive and LGBTQ rights. This nomination puts the right to love whom you choose and make decisions about your healthcare at risk.

CONCLUSION

Given Judge Barrett's troubling record on the separation of church and state, it is clear that her seat on the Supreme Court could endanger our constitutional commitment to religious freedom and lead to harm for women, LGBTQ people, religious minorities, and the nonreligious. We oppose the confirmation of Judge Barrett.

[30] U.S. Senate Judiciary Comm., Questionnaire for Judicial Nominee, https://bit.ly/33V50gx.