National Association of Women Lawyers Supreme Court Committee
Statement of Qualification – Judge Amy C. Barrett
(October 10, 2020)

The National Association of Women Lawyers ("NAWL")[1] Committee for the Evaluation of Supreme Court Nominees ("Committee") has completed an extensive review of the qualifications and background of the Honorable Amy C. Barrett, the Presidential nominee for the United States Supreme Court to fill the vacancy created by the death of Justice Ruth Bader Ginsburg.

Consistent with NAWL's mission to advocate on behalf of women's legal rights, NAWL concludes Judge Barrett is "Not Qualified" because she has failed to demonstrate the requisite commitment to women's rights or issues that have a special impact on women.[2] Specifically, NAWL is concerned that (i) Judge Barrett's strict judicial philosophy of originalism is fundamentally at odds with a commitment to women's rights and (ii) Judge Barrett's stated personal views on reproductive rights will lead her to support further restrictions, if not elimination, of women's autonomy in their reproductive rights decisions.

Earlier NAWL submitted a letter to the Senate Judiciary Committee expressing deep concern with the Senate's rushed confirmation process. We reaffirm our concern. Our constituents view the selection of a U.S. Supreme Court justice as the most profound function of government, which uniquely involves the legal profession and has the broadest and deepest effect on the rights of our citizenry, especially its women. A thoughtful and methodical confirmation process that includes a thorough investigation and equal opportunity for full and fair input not only preserves our democratic processes, but also reassures our citizens that the right person was selected for this noble seat. Anything less casts doubt on the process and the nominee.

OUR PROCESS

NAWL's Committee, which includes a distinguished array of law professors, appellate practitioners, and lawyers, founded its conclusion upon (i) a comprehensive review of Judge Barrett's publicly available writings and decisions and (ii) in-depth personal interviews by Committee members with key individuals having information regarding Judge Barrett, the various roles she has assumed during the course of her professional life, and her treatment of litigants, attorneys, employees, and colleagues, particularly those who are women.[3] Consistent with the stated mission of the Committee, our assessment focused on Judge Barrett's personal integrity, professional competence, judicial temperament, and "demonstrated

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[1] Founded in 1899, NAWL is the nation's oldest professional organization devoted to the interests and progress of women lawyers and women's legal rights.
[2] While we appreciate the President nominating a woman, the Nominee's gender identity does not demonstrate a *de facto* commitment to women's rights or issues that have a special impact on women.
[3] On September 29, 2020, NAWL sent Judge Barrett a letter advising her that the Committee would be evaluating her nomination "with an emphasis on laws and decisions regarding women's rights or that have a special impact on women," and inviting her to participate in an interview as part of the evaluation process. Judge Barrett did not respond to the Committee's request.

commitment to women's rights or issues that have a special impact on women."[4] A nominee may meet one or several of the criteria but, in all cases, must meet the last category to be considered "Qualified" pursuant to the Committee's process. A copy of the Committee's Mission and Procedures and its previous statements about nominees to the United States Supreme Court may be found at www.nawl.org/SupremeCourtNominations.

An extensive review of almost 120 opinions, concurrences, and dissents written or joined by Judge Barrett, as well as articles and books she authored or coauthored, our interviews of several dozen litigants, former law clerks, former and current colleagues, and others who have interacted with Judge Barrett persuaded the Committee that Judge Barrett is "Not Qualified" because she has failed to demonstrate the requisite "commitment to women's rights or issues that have a special impact on women."[5]

Specifically, the Committee concluded from this research that (i) Judge Barrett's judicial philosophy of originalism is fundamentally at odds with a commitment to women's rights and (ii) Judge's Barrett's personal views on reproductive rights will lead her to support further restrictions on, if not the elimination of, women's autonomy in their reproductive rights decisions.

JUDGE BARRETT'S JUDICIAL PHILOSOPHY IS INCOMPATIBLE WITH A COMMITMENT TO WOMEN'S RIGHTS

Judge Barrett identifies herself as an originalist and has stated that Justice Scalia's jurisprudence is her jurisprudence.[6] According to Judge Barrett's writings, her judicial philosophy:

> [M]aintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative. This theory stands in contrast to those that treat the Constitution's meaning as susceptible to evolution over time. For an originalist, the meaning of the text is fixed so long as it is discoverable.[7]

A judicial example of Judge Barrett's adherence to originalism is evidenced in her dissent in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), in which she delved into "founding-era" history to conclude that non-violent felons would have enjoyed Second Amendment rights at the founding and so they should do so today.[8]

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[4] National Association of Women Lawyers Manual for the Committee for the Evaluation of Supreme Court Nominees is available at www.nawl.org/SupremeCourtNominations.
[5] As stated in footnote 2, while we appreciate the President nominating a woman, the Nominee's gender identity does not demonstrate a *de facto* commitment to women's rights or issues that have a special impact on women.
[6] In her remarks from the White House Rose Garden upon her nomination on September 26, 2020, Judge Barrett stated, "His judicial philosophy is my judicial philosophy," referring to her mentor, Justice Antonin Scalia. *See also* "Justice Scalia was the public face of modern originalism." Originalism and Stare Decisis at 1921 (2017).
[7] Amy C. Barrett, Originalism and Stare Decisis, 92 Notre Dame L. Rev. 1921 (2017). Available at: https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4734&context=ndlr
[8] See Kanter v. Barr, 919 F.3d 437 (7th Cir. Mar. 15, 2019) (Barrett, A., dissenting) (arguing that dispossession laws that bar convicted felons from obtaining licenses to carry firearms are unconstitutional). "Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." ""[I]f the challenged law regulates activity falling outside the scope of the right as originally understood, then 'the regulated activity is categorically unprotected.'" (quoting Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011)."

This opinion demonstrates not only Judge Barrett's adherence to an originalist approach, but her tendency to frame the historical record in ways that favor one outcome over another.

There is no doubt that Judge Barrett believes originalism is the only correct Constitutional analysis in almost every case. The Committee has serious concerns that Judge Barrett's commitment to an originalist approach will interfere with her ability to uphold and apply core constitutional protections embraced by NAWL's mission, but which were not recognized at the time of our nation's founding, when women were deprived of the most basic rights and powers under the law.

The Amicus Brief of the ERA Coalition and Advocates in the Women's Movement in *Virginia v. Ferriero*[9] outlines the Framers' intentional exclusion of women:

> When our Nation declared its independence and confirmed in 1776 that "all men are created equal," women were not included. A free married woman had no legal identity separate from her husband; she could not vote, make contracts, institute lawsuits, write a will, sell land, or keep her own wages[10] ... The denial of rights for women was no coincidence. Both law and culture at the time regarded women as inferior, weak, and in need of protection[11] …. Against this backdrop, the Framers did *not* regard women as part of the Constitution's "We the People," despite their use of what now appears to be a gender-neutral term.[12]

In *U.S. v. Virginia,*[13] we see the application of originalist jurisprudence on women's rights in Justice Scalia's dissent. In addressing whether the refusal of the Virginia Military Institute to accept female candidates was constitutional, Justice Scalia said:

> [I]t is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).

Given Judge Barrett's devotion to originalism and the jurisprudence of Justice Scalia, we are left to believe that her starting point for analyzing women's issues would be the same as Justice Scalia.

Stare decisis is no safeguard against Judge Barrett's originalist philosophy. Judge Barrett has made clear that in her view, originalism trumps *stare decisis* writing:

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[9] Virginia v. Ferriero, F.Supp.3d (June 2020) at 5-6.

[10] *See* Mary Beth Norton, Liberty's Daughters: The Revolutionary Experience of American Women, 1750–1800, 46 (1980)

[11] *See* Ruth Bader Ginsburg, Remarks on Women Becoming Part of the Constitution, 6 Law & Ineq. 17, 20 (1988); see also Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

[12] Contrast Amicus Br. of Eagle Forum at 17 (relying on what is apparently a post-King-James translation of the Bible as evidence that the 1776 phrase "'all men are created equal'" was meant to recognize the inherent equality of "all of humanity," despite undeniable evidence that the drafters of that phrase did not regard or treat women, Native Americans, or Black people as "equal" to White men in any meaningful sense).

[13] 518 U.S. 515 (1996).

> I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.[14]

She approvingly highlighted how Justice Scalia "repeatedly argued that the Court should overrule its cases holding that a woman has a substantive due process right to terminate her pregnancy."[15] Judge Barrett has all but stated that she will do the same, even in the face of almost 50 years of precedent.

Judge Barrett has even suggested that "rigid application" of *stare decisis* "unconstitutionally deprives a litigant of the right to a hearing on the merits of her claim."[16] Judge Barrett has signaled she will not "accept the body of precedent standing for the 'proposition that the Due Process Clause guarantees certain (unspecified) liberties rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty.'"[17] Those unspecified Due Process Clause liberties include the right to abortion, contraception, gay marriage, and others.

Judge Barrett's mechanical application of originalist judicial philosophy, as outlined, demonstrates a lack of understanding and concern for the individuals affected by her decisions, who are often those already disenfranchised and disadvantaged. During numerous interviews, counsel and colleagues expressed concern that Judge Barrett's rigid judicial philosophy and decisions reflect either a lack of understanding of the consequences of her decisions or a serious disregard for how these consequences negatively affected lives. Concern was expressed that Judge Barrett's approach will result in the greatest hardship to women, including immigrant women, Native people, people of color, LGBTQ+ and other marginalized individuals. Interviewees brought to our attention the perception that Judge Barrett lacks significant and meaningful contact with these communities.

The Committee's concern in this regard is manifest in Judge Barrett's dissenting opinion in the 2020 case of *Cook County v. Wolf* in which the 7th Circuit addressed the current Administration's revised definition of "public charge" and the often-devastating impact on immigrants.[18] Judge Barrett's lengthy dissent reflects a lack of simple compassion, as well as a failure to understand the deep fear that undocumented and documented non-citizens experience and their frequent inability to parse the fine points of public benefits and immigration law.[19]

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[14] Precedent and Jurisprudential Disagreement at 1728.
[15] Originalism and Stare Decisis at 1932.
[16] Amy C. Barrett, Stare Decisis and Due Process, 74 U. Colo. L. Rev. 1011, 1013 (2003). Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/450
[17] Originalism and Stare Decisis at 1935. (Barrett quoting Scalia, J., concurring in *Albright*, 510 U.S. at 275).
[18] Cook Cty. v. Wolf, No. 19-3169, 962 F.3d 208 (7th Cir. 2020).
[19] Today, Department of Justice statistics demonstrate that Native women are more likely to be murdered, abused, and sexually assaulted than any other U.S. population. The Committee notes that Justice Ginsburg authored United States v. Bryant, 136 S.Ct. 1954 (2016), wherein the Court confirmed that as pre-constitutional sovereigns that pre-date the United States, Tribal Nations retain their inherent sovereignty to protect their women citizens from domestic violence and abuse. Justice Ginsburg's replacement, therefore, must carry this same commitment to preserving tribal sovereignty and addressing the epidemic of violence against Native women and girls in this

JUDGE BARRETT'S PERSONAL VIEWS ON REPRODUCTIVE RIGHTS

Central to NAWL's mission is the protection of women's rights, including their agency over their own health and wellbeing. Judge Barrett's originalist philosophy, as well as her public opposition to reproductive choice, raise serious concerns that petitioners to the court who are pro-reproductive choice will not obtain a fair hearing before her.

Judge Barrett made her anti-choice position clear when she signed a 2006 advertisement defending the "right to life from fertilization until natural death"[20] and a 2012 letter entitled, "Unacceptable," in opposition to the Obama Administration's religious accommodation to the contraceptive mandate under the Affordable Care Act. The letter opposes the provision of "abortion-inducing drugs, contraception, and sterilization" under insurance plans, and calls the accommodation "morally obtuse," and an "assault on religious liberty and the rights of conscience," and a "grave violation of religious freedom [that] cannot stand."[21] Given her unequivocal public stance on these issues, Judge Barrett would at the very least need to recuse herself from hearings and deliberations that involve an asserted right to life and tensions between religious beliefs and reproductive health choices.

In her 1998 article, *Catholic Judges in Capital Cases*, Barrett (with her co-author) writes, apropos of the Church's teachings, "[t]he prohibitions against abortion and euthanasia (properly defined) are absolute; those against war and capital punishment are not….[A]bortion and euthanasia take away innocent life."[22] Judge Barrett makes a distinction between what she deems as "innocent life" and "others." As Judge Barrett implies, her commitment to life is uneven, carving out exceptions where a crime has been committed. This perspective not only raises serious concerns about her ability to be impartial in matters related to abortion, but also could have a disproportionate impact on Latinx, Blacks, and other people of color who are overrepresented in the criminal system.

The nominee has not yet authored any majority or dissenting opinions[23] on matters of reproductive rights. However, between 2018 and 2019 Judge Barrett elected to join three opinions that strongly indicate her opposition to abortion rights and forecast her approach to reproductive rights matters if elevated to the

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country. The Committee has reviewed Judge Barrett's judicial opinions and orders to date, and unfortunately, during her short time in service on the Court of Appeals, she has yet to adjudicate a case implicating questions of federal Indian law (other than one per curiam that dealt with questions of religious freedom). Schlemm v. Carr, 760 Fed. Appx. 431 (7th Cir. 2019). While the Committee makes no assumptions that Judge Barrett *would* disregard the Constitution's command that treaties with Tribal Nations constitute the "supreme law of the land," history demonstrates that a nominee's commitment to safety for Native woman cannot be assumed—it must be demonstrated. For far too long, it has been overlooked.

[20] See two-page ad from 2006 published in the South Bend Tribune of Indiana signed by Judge Barrett.
[21] Available at: https://www.afj.org/wp-content/uploads/2020/01/Barrett-Becket-Fund-Letter.pdf
[22] Amy C. Barrett & John H. Garvey, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 307 (1997-98). Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/527
[23] Justice Ginsburg details the importance of dissenting opinions, writing about her dissent in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) which led Congress to respond by passing the Lilly Ledbetter Fair Pay Act. *see* Ginsburg, Ruth Bader, "The Role of Dissenting Opinions" (2010). Minnesota Law Review. 428. https://scholarship.law.umn.edu/mlr/428

Supreme Court.[24] The Committee is particularly concerned with what Judge Barrett has described as "vertical" *stare decisis,* whereby lower courts are bound to apply Supreme Court precedent even if the court disagrees with it, but the Supreme Court is not so bound. Judge Barrett has stated in her writings that the Supreme Court is not bound by precedent if the prior case was wrongly decided and in need of "correction."[25] This openness to overruling firmly established Supreme Court precedent where she believes it is wrongly decided leaves significant room for Judge Barrett's previously articulated personal beliefs to guide her judicial analysis.

The Committee is further concerned that Judge Barrett holds strong, pre-formed opinions that interfere with her ability to fairly consider not only matters of abortion rights, but also the rights to contraception, sterilization, in-vitro fertilization, and many other matters of a highly personal nature. Given the nominee's adherence to originalism and her long line of consistent public statements, the Committee believes that the nominee will support additional restrictions on, if not elimination of, women's autonomy in their reproductive rights, which will undoubtedly cripple women's ability to remain equal members of society.

CONCLUSION

The Committee has found that Judge Barrett has not demonstrated a commitment to women's rights or issues that have a special impact on women, and we therefore find that under NAWL's standard, she is Not Qualified to assume the position of Associate Justice of the Supreme Court of the United States.

The mission of NAWL is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success.

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[24] *See* Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Department of Health (Easterbrook dissenting, joined by Barrett)(arguing for rehearing en banc on Indiana law regarding fetal remains after abortion or miscarriage); Planned Parenthood of Indiana and Kentucky v. Box (Kanne dissenting, joined by Barrett)(arguing for rehearing en banc on parental notification law); Price v. City of Chicago (joining panel that upheld Chicago abortion clinic buffer zone nearly identical to that upheld in Hill v. Colorado, but arguing that Hill has been called into question).

[25] Amy C. Barrett, Stare Decisis and Due Process, 74 U. Colo. L. Rev. 1011, 1013 (2003), "I argue that in its rigid application-when it effectively forecloses a litigant from meaningfully urging error-correction-stare decisis unconstitutionally deprives a litigant of the right to a hearing on the merits of her claims. To avoid the due process problem, I argue that stare decisis must be flexible in fact, not just in theory."