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REPORT ON THE NOMINATION OF JUDGE AMY CONEY BARRETT TO THE SUPREME COURT OF THE UNITED STATES

# AMY CONEY BARRETT AND THE REPRISE OF JUSTICE SCALIA'S PHILOSOPHY

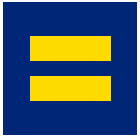
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**“Barrett went out of her way to exclusively extol Justice Scalia as her model [and as the embodiment of her judicial philosophy] – beyond the general gratitude commonly expressed about past clerkships [or] the familiar platitudes about applying the law as written... If confirmed, she would advance a legal philosophy that yielded reliably and rabidly anti-LGBTQ rulings and dissents during Justice Scalia’s tenure.”**

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## INTRODUCTION / SUMMARY

President Trump’s nomination of Judge Amy Coney Barrett to the Supreme Court of the United States is a direct threat to the constitutional rights of everyday Americans and to the LGBTQ community in particular. Barrett’s approach to constitutional issues like equal protection, personal privacy, and religious exemptions would shape the Court — and in turn the dynamic relationship between individuals and our nation’s laws — for decades to come. For LGBTQ people and other historically under-protected communities, this relationship can be particularly fragile. In our current system, the outsized role that a single justice can play demands that Supreme Court justices approach every legal issue with impartiality and a devotion to equality and fairness, independent of personal ideology and bias. Barrett’s record of legal opinions, scholarship, and statements reveal that she does not meet these basic criteria. Further, Barrett’s confirmation would mean that a full third of the Supreme Court would consist of Trump-Pence nominees — the most significant proportion of any President since the last year of Ronald Reagan’s second term. Her elevation would cement the Trump-Pence Administration’s dangerous views of the Constitution, executive power, and the rule of law into the fabric of our nation’s highest court for generations to come.



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If confirmed, Barrett would fill the vacancy created by the death of Justice Ruth Bader Ginsburg. To truly honor Justice Ginsburg's trailblazing legacy, the Senate should be respectful of the substance of what she stood for as a jurist as well as the process by which her successor is duly vetted and voted upon. During Justice Ginsburg's tenure on the Supreme Court, she consistently authored or joined opinions in cases that safeguarded the liberty and equality of LGBTQ people, including *Lawrence v. Texas*, *Christian Legal Society v. Martinez*, *United States v. Windsor*, *Obergefell v. Hodges*, and *Bostock v. Clayton County*. While these rulings have transformed the place of LGBTQ people across the United States, we have not yet achieved full legal equality. Many critical issues affecting LGBTQ people are still unresolved and being litigated in the federal courts. Unfortunately, we still face a concerted effort not only to roll back existing civil rights protections, but also to enact laws and policies that actively target LGBTQ people and seek to make it impossible for them to participate safely or openly in the shared civic life of this country.

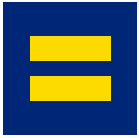
There is much to consider about Judge Barrett's legal record, about the disconcerting way her nomination is being rushed through amid a pandemic and in the middle of a national election, and about her judgment and behavior in participating in a crowded White House celebration that led to multiple coronavirus infections and violated public health rules. But at bottom, Judge Barrett's impact on the LGBTQ community is crystalized by her own, self-proclaimed judicial philosophy: that of the late Justice Antonin Scalia. In accepting the nomination at the White House, Barrett explicitly stressed that Scalia's "judicial philosophy is mine."<sup>1</sup> She underscored the "incalculable influence [Scalia had] on [her] life," and how "the lessons [she] learned [while clerking for Scalia] still resonate [20 years later]."<sup>2</sup> Barrett went out of her way to exclusively extol Justice Scalia as her model – beyond the general gratitude commonly expressed about past clerkships, the familiar platitudes about applying the law as written, or even the occasional praise that nominees offer about jurists with whom they never clerked or served.<sup>3</sup> If confirmed, she would advance a legal philosophy that yielded reliably and rabidly anti-LGBTQ rulings and dissents during Justice Scalia's tenure, including in *Lawrence v. Texas*, *Romer v. Evans*, and *Obergefell v. Hodges*. We should take Barrett at her word: she would mirror Justice Scalia, and thereby attempt to regress constitutional law and roll back basic rights for the LGBTQ community and beyond.

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1 Amy Coney Barret, Judge, U.S. Seventh Circuit Court of Appeals, Remarks Upon Receiving Nomination to the Supreme Court (Sept. 26, 2020), in *New York Times*, *Full Transcript: Read Judge Amy Coney Barrett's Remarks*, N.Y. Times (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/us/politics/full-transcript-amy-coney-barrett.html>.

2 *Id.*

3 See e.g., Brett Kavanaugh, Judge, U.S. Court of Appeals, D.C. Circuit, *From the bench: Judge Brett Kavanaugh on the constitutional statesmanship of Chief Justice William Rehnquist*, American Enterprise Institute (Sept. 18, 2017) (transcript available at <http://www.aei.org/events/2017-walter-berns-annual-constitution-day-lecture/>).



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### Justice Scalia's dissent in *Romer v. Evans*:

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**"There is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to be retained. The Court cannot be unaware of that problem;** it is evident in many cities of the country, and occasionally bubbles to the surface of the news, in heated political disputes over such matters as the introduction into local schools of books **teaching that homosexuality is an optional and fully acceptable "alternate life style."** The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities [] have high disposable income [], and of course care about homosexual rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality." *Romer v. Evans*, 517 U.S. 620, 645-646 (1996) (Scalia, J., dissenting) (citations omitted) (emphasis added).

### Justice Scalia's dissent in *Lawrence v. Texas*:

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**"Today's opinion is the product of a Court,** which is the product of a law-profession culture, **that has largely signed on to the so-called homosexual agenda,** by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . . It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. **Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home.** They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. . . . So imbued is the Court with the law profession's anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously 'mainstream.'" *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (emphasis added).

### Justice Scalia's dissent in *U.S. v. Windsor*:

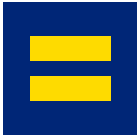
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"As I have observed before, **the Constitution does not forbid the government to enforce traditional moral and sexual norms....** [E]ven setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), **there are many perfectly valid—indeed, downright boring—justifying rationales for [the Defense of Marriage Act].** Their existence ought to be the end of this case. For they give the lie to the Court's conclusion that only those with hateful hearts could have voted 'aye' on this Act. And more importantly, they serve to make the contents of the legislators' hearts quite irrelevant. . . . As I have said, the real rationale of today's opinion, **whatever disappearing trail of its legalistic argle-bargle one chooses to follow,** is that DOMA is motivated by "bare . . . desire to harm" couples in same-sex marriages. *Supra*, at 2691. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status." *United States v. Windsor*, 570 U.S. 744, 795-799 (2013) (citations omitted) (emphasis added).

### Justice Scalia's dissent in *Obergefell v. Hodges*:

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**"[W]hat really astounds is the hubris reflected in today's judicial Putsch....** The opinion is couched in a style that is as pretentious as its content is egotistic. . . . [The majority states that] "[t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." [Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? . . . **Ask the nearest hippie . . .** . . . **[The majority] stands for nothing whatever,** except those freedoms and entitlements that this Court really likes. . . . The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis." *Obergefell v. Hodges*, 576 U.S. 644, 718-720 (2015) (Scalia, J., dissenting) (citations omitted) (emphasis added).



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## WHAT'S AT STAKE

### FULL MARRIAGE EQUALITY

The Supreme Court's landmark ruling in *Obergefell*, recognizing marriage equality, is obviously profoundly important for the LGBTQ community. At the time *Obergefell* was decided, Justice Scalia notably dissented in scathing terms which impugned the legal analysis, reputation, and the composition of the Court.<sup>4</sup> In the years since, however, growing majorities of the Supreme Court have reaffirmed the core wisdom of *Obergefell*, including in 2017 in *Pavan* (6-3 per curiam),<sup>5</sup> in 2018 in *Masterpiece Cakeshop* (7-2 majority),<sup>6</sup> and in 2020 in *Bostock* (6-3 majority).<sup>7</sup>

Judge Barrett's proactive embrace of Justice Scalia's legal philosophy raises grave concerns that she would maintain the same stance — if not commensurate vitriol — as him if given the opportunity to revisit marriage equality or its implementation. These concerns are exacerbated by two other factors: First, Barrett specifically questioned the result and role of the Supreme Court in *Obergefell*. In a 2016 speech, she stressed that “[one of the dissents] said, those who want same-sex marriage, you have every right to lobby in state legislatures to make that happen, but the dissenter's view was that it wasn't for the Court to decide... . So I think *Obergefell*, and what we're talking about for the future of the Court, it's really a 'who decides' question.”<sup>8</sup> Second, Barrett's other writings have critiqued the doctrine of stare decisis more broadly,<sup>9</sup> suggesting she may be more prone to overturn constitutional precedents than prior generations of justices.

Apart from the risk of trying to outright overturn recent precedent, Barrett's legal philosophy and record suggest she might try to weaken *Obergefell* by other means and revert to a sort of “skim milk marriage” that Justice Ginsburg warned about at oral argument in *Windsor*.<sup>10</sup> Along those lines, the three dissenters in *Pavan* formally did not question *Obergefell*, but functionally tried to undermine it by separating the freedom to marry from the terms and conditions of marriage, namely birth certificates.<sup>11</sup> Recently, Justices Thomas and Alito opined that marriage equality and its effects ought to be revisited by the Court, particularly with respect to the purported impact on religious beliefs.<sup>12</sup> Whether Barrett would channel Scalia at full volume, or try to erode marriage equality more quietly, her record suggests she would join the small chorus of justices who continue to attack *Obergefell* and its progeny.

### EDUCATION

At the federal and state levels, LGBTQ students still face significant obstacles and discrimination in obtaining a quality education in a safe environment. A prime example is how, under the Trump-Pence Administration, the U.S. Departments of Justice and Education revoked preexisting guidance regarding schools' obligations to protect transgender students and treat them equally. The Department of Education has not only abandoned efforts to protect transgender students' rights but also affirmatively targeted transgender students by declining to investigate

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4 *Obergefell*, 576 U.S. at 713-720 (Scalia, J., dissenting).

5 *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (“*Obergefell* proscribes [] disparate treatment [against same-sex couples]. As we explained there, a State may not ‘exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.’ Indeed, in listing those terms and conditions—the ‘rights, benefits, and responsibilities’ to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified ‘birth and death certificates.’”) (citations omitted).

6 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018) (“Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.”).

7 *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1754 (2020) (“In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.”).

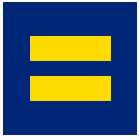
8 Jacksonville University, *Hesburgh Lecture 2016: Professor Amy Barrett at the JU Public Policy Institute*, YouTube (Nov. 3, 2016), <https://youtu.be/7yjTEdZ81ll>.

9 See, e.g., Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711 (2012-2013), [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/293](https://scholarship.law.nd.edu/law_faculty_scholarship/293); Amy C. Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011 (2003), [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/450/](https://scholarship.law.nd.edu/law_faculty_scholarship/450/).

10 Transcript of Oral Argument at 71, *United States v. Windsor*, 570 U.S. 744 (2013), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2012/12-307\\_c18e.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/12-307_c18e.pdf).

11 *Pavan*, 137 S. Ct. at 2079 (Gorsuch, J., dissenting) (“the State argued that rational reasons exist for a biology based birth registration regime, reasons that in no way offend *Obergefell*—like ensuring government officials can identify public health trends and helping individuals determine their biological lineage, citizenship, or susceptibility to genetic disorders.”).

12 *Davis v. Ermold et al., cert. denied* (No. 19–926, Oct. 5, 2020), Statement of Justice Thomas (joined by Justice Alito), p. 55, [https://www.supremecourt.gov/orders/courtorders/100520zor\\_3204.pdf](https://www.supremecourt.gov/orders/courtorders/100520zor_3204.pdf); id. at 58 (warning that “*Obergefell* will continue to have ‘ruinous consequences for religious liberty.’”) (citation omitted).



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discrimination complaints and bring litigation against schools that are inclusive of transgender students.<sup>13</sup> Given that transgender students are at high risk for harassment and abuse, these sorts of measures by the Department have the potential to visit acute harm on this already vulnerable group.

The possible addition of Barrett to the Supreme Court would only serve to exacerbate these concerns and risks faced by transgender students. Specifically, she has taken a constricted and textually unmoored view of the protections of Title IX of the Education Amendments of 1972 with respect to gender identity.<sup>14</sup> In a 2016 lecture, Barrett explained at length why and how she would rule against transgender students:

“The [United States District Court for the Middle District of North Carolina] just took up that transgender bathroom case from North Carolina. That’s a statutory question... involving interpretation of Title IX, which prohibits educational institutions that receive federal money, which almost all of them do from the Department of Education, from discriminating on the basis of sex. And the Department of Education and the Department of Justice interpreted that phrase in telling North Carolina in that case that it had to permit physiological, someone who is physiologically a boy but identifying as a girl to use the girls’ bathroom.

That is a huge shift, right, and this is why it’s made the news... It’s a shift from the prior interpretations of that statute which said that separating locker rooms and showers and bathrooms on the basis of gender were okay. That’s a big shift and it’s a ‘who decides’ question, so that’s pending on the court, and you know there are a lot of reasons one might say that’s a public policy debate. People will feel passionately on either side about whether physiological males who identify as females should be permitted in bathrooms, especially where there are young girls present. We’ve seen all these debates. It’s a ‘who decides’ question.

**When Title IX was enacted, it’s pretty clear that no one, including the Congress that enacted that statute, would have dreamed of that result, at that time.** Maybe things have changed so that we should change Title IX, maybe those arguing in favor of this kind of transgender bathroom access are right. That’s a public policy debate to have. **But it does seem to strain the text of the statute to say that Title IX demands it.** So is that the kind of thing where the court should interpret the statute to kind of update it? To pick sides in this public policy debate? Or, should we go to our Congress, should we go to our legislators and say ‘this is the policy we want to have now we have new recognition of the rights of transgender people and we wan[t to] shift the policy.’<sup>15</sup>

Barrett’s discussion of Title IX and transgender students is troubling in several respects. First, it advances a limiting interpretation of Title IX that is contradicted by the Supreme Court’s precedents in *Oncle v. Sundowner Offshore Services*<sup>16</sup> as well as in *Bostock v. Clayton County*.<sup>17</sup> A wide majority of the Court in *Bostock* reaffirmed that the plain text of existing civil rights protections (in Title VII) necessarily prohibits discrimination against LGBTQ persons. (The logic of *Bostock* also suggests the Department of Education’s latest actions are legally baseless and likely to be struck down.)

Second, in her 2016 speech, Barrett seems determined to depart from her ostensible adherence to textualism and instead rely upon, not just the legislative history of Title IX as an informative tool, but as the dispositive means of narrowing the statute. Third, when attempting to reframe questions of statutory interpretation and the legal rights of transgender students as a “policy debate,” Barrett only discussed the substantive arguments on one side *against* transgender access. Moreover, she did so by nodding to familiar, gender-based tropes about the supposed danger that transgender children pose when and where “young girls [are] present.” Barrett also mis-gendered transgender women as “physiological males” in her remarks.

## RELIGIOUS EXEMPTIONS

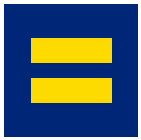
13 See, e.g., Luke Broadwater and Erica L. Green, *DeVos Vows to Withhold Desegregation Aid to Schools Over Transgender Athletes*, N.Y. Times (Sept. 18, 2020), <https://nyti.ms/3mBwjyA>.

14 *Hesburgh Lecture*, supra note 8.

15 *Id.* (emphasis added).

16 *Oncle v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998).

17 *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020).



Over the course of the last century, the Supreme Court has sought to strike a careful balance among the Constitution's guarantee of equal protection, its prohibition against the establishment of religion, and its protection of the free exercise of religious practice. In our diverse and pluralist democracy, neutral laws of general applicability, including vital anti-discrimination protections, have long applied to all citizens. Moreover, the Court has previously rebuffed efforts to eviscerate anti-discrimination laws on the basis of theological arguments.<sup>18</sup> But in recent years, that enduring principle has come under attack from a concerted effort to distend and constitutionalize religious exemptions under a variety of circumstances and laws, many of which involve LGBTQ persons and equality.

Today, more than ever, Supreme Court justices must demonstrate an appreciation for the delicate relationship between the Equal Protection Clause, the Establishment Clause, and the Free Exercise Clause — and the importance of safeguarding the rights of vulnerable populations, as well as religious minorities. Some of Barrett's scholarship indicates that she may not be willing to adhere to this vital mandate — or even provide a straight answer about how she might strike this balance. For example, in a 1998 law review article, Barrett essentially argued that judges have a duty to prioritize faith over legal precedent.<sup>19</sup> At her earlier Senate Judiciary hearing, Barrett was asked about this argument, but failed to provide a clear indication about whether her writing indicates how she would rule from the bench.<sup>20</sup>

This question is not purely academic: if confirmed, Barrett could be presented with related questions this Term when the Court considers *Fulton v. City of Philadelphia*.<sup>21</sup> The outcome of this case will determine whether a federally-funded child welfare agency that is religiously affiliated must continue to comply with generally applicable nondiscrimination laws (and certify LGBTQ couples as possible foster parents). This ruling could have a sweeping impact on the lives of LGBTQ people and other vulnerable populations that rely on nondiscrimination protections every day in public life. If the Supreme Court undermines nondiscrimination laws in *Fulton*, it could erode the efficacy of nondiscrimination protections that LGBTQ people enjoy across a wide spectrum of issue areas, including veterans' services, public accommodations, economic security programs, and housing. Such a result would set a devastating precedent and create a significant roadblock on the path to full equality.

Finally, it is troubling that Barrett delivered several paid lectures for the Blackstone Legal Fellowship, a program under the Alliance Defending Freedom (ADF), a vehemently anti-LGBTQ legal organization working to undermine equality under the guise of "defending religious liberty." ADF is also formally designated as a hate group by the Southern Poverty Law Center. While Barrett previously claimed she was "not aware" of ADF's discriminatory efforts,<sup>22</sup> given her otherwise in-depth views about religious exemptions, this seems rather incredible.

### HEALTHCARE

Even as our nation continues to face the ongoing peril of COVID-19 this winter, opponents of the Affordable Care Act (ACA) continue to levy threat after threat aimed at dismantling this landmark statute. At stake for LGBTQ people and millions of other Americans are the essential protections provided by the ACA. In the coming Term, the Supreme Court will hear yet another case that could decide the fate of this law. Specifically, in *California v. Texas*, the Court will consider whether the minimum-coverage provision of the ACA is unconstitutional and, if so, whether the entire ACA is invalid and unenforceable anywhere (or if just a portion of the Act should be struck down).<sup>23</sup>

This case alone could have a sweeping impact, since the ACA's protections for LGBTQ people have been life-

18 Compare *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (D.S.C., July 28, 1996) with *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 5 (1968) (per curiam). See also *Masterpiece Cakeshop*, 138 S. Ct. at 1727 ("it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.") (citing *Piggie Park*).

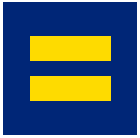
19 See John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 305–06 (1998).

20 Adam Liptak, Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right, N.Y. Times (Sept. 28, 2020), <https://www.nytimes.com/2020/09/27/us/amy-coney-barrett-views-abortion-health-care.html>.

21 140 S.Ct. 1104 (2020) (mem. granting cert.).

22 Emma Brown and Jon Swaine, *Amy Coney Barrett, Supreme Court nominee, spoke at a program founded to inspire a "distinctly Christian worldview in every area of law,"* Wash. Post (Sept. 27, 2020), <https://www.washingtonpost.com/politics/coney-barrett-christian-law-fellowship-blackstone/2020/09/27/?hpid=hp-top-news-story%3Ahomepage%2Fstory&hpid=hp-top-news-story%3Ahomepage%2Fstory&hpid=hp-top-news-story%3Ahomepage%2Fstory>.

23 See generally *California v. Texas*, SCOTUS Blog (last visited Oct. 6, 2020), <https://www.scotusblog.com/case-files/cases/california-v-texas/>.



changing. Large segments of the LGBTQ community are disproportionately under-insured,<sup>24</sup> and the ACA not only made affordable healthcare more accessible, it also ensured that individuals with pre-existing conditions cannot be denied coverage. Furthermore, the ACA contains critical provisions forbidding discrimination in healthcare based on gender identity and stereotyping. Importantly, less than a week after the Court's decision in *Bostock*, the Trump-Pence Administration's Department of Health and Human Services published a final rule designed to eliminate nondiscrimination protections for LGBTQ people under the ACA.<sup>25</sup> This rollback is currently the subject of federal litigation and may well go up on appeal to the Supreme Court.

The threats to the ACA are all too real, especially with the possible addition of Barrett to the Court. President Trump has stated time and again that he will only nominate judges who are hostile to the ACA,<sup>26</sup> and Barrett surely meets this dangerous threshold. She has expressly criticized Chief Justice John Roberts for his decision to uphold Congress's authority to enact large portions of the ACA. According to Barrett, "Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute."<sup>27</sup> She also wrote favorably of the dissent in *King v. Burwell*, where a majority of the Court affirmed Congress's intent to provide tax credits for millions of families.<sup>28</sup> All told, at a time when the Supreme Court is once again considering a major challenge to the ACA, Barrett's confirmation could imperil the health of millions of people, including so many in the LGBTQ community who rely on it, both during and after the current public health crisis.

### REPRODUCTIVE RIGHTS

The ability to exercise reproductive rights is critically important to all Americans, including the LGBTQ community. Every day, millions of people make personal and private decisions that implicate these fundamental rights, including using contraception, terminating a pregnancy, and starting a family through In Vitro Fertilization (IVF).

Barrett has not demonstrated any appreciation for the legal or practical import of these basic rights. In fact, she has been a consistent and vocal opponent of *Roe v. Wade*, specifically categorizing it as an "erroneous decision."<sup>29</sup> She has argued that *Roe* dramatically shifted the public policy debate around abortion, creating so-called "abortion on demand."<sup>30</sup> She has further argued that *Roe* was harmful because it failed to recognize a "state interest in the life of a fetus."<sup>31</sup> While on the Seventh Circuit, Barrett has voted to restrict access to abortion and has supported burdens on individuals seeking this care.<sup>32</sup>

Barrett's negative views on reproductive rights may also be exacerbated by her expansive stance on religious exemptions, as described above. For instance, in 2012, Barrett signed onto a letter criticizing the ACA's requirement that employers provide contraceptive coverage as part of their employer-sponsored health insurance plans.<sup>33</sup> Of particular concern, the letter argued that the contraceptive coverage requirement was "a grave violation of religious freedom."<sup>34</sup> Even though fair pricing for contraception (provided by statute) does not implicate the constitutional right to an abortion, Barrett's legal philosophy seems inhospitable to such statutory protections nonetheless.

24 Gary J. Gates, *In U.S., LGBT More Likely Than Non-LGBT to Be Uninsured*, Gallup (Aug. 26, 2014), <https://news.gallup.com/poll/175445/lgbt-likely-non-lgbt-uninsured.aspx>.

25 HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs, U.S. Dept. of Health and Human Services (June 12, 2020), <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html>.

26 "My judicial appointments will do the right thing unlike Bush's appointee John Roberts on ObamaCare." Donald J. Trump (@realDonaldTrump), Twitter (June 26, 2015, 12:38 PM), <https://twitter.com/realDonaldTrump/status/614472830969880576>.

27 Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 Const. Comment 61, 80 (2017) (book review), [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/1318](https://scholarship.law.nd.edu/law_faculty_scholarship/1318).

28 *Id.* at 84.

29 Barrett, *Stare Decisis and Due Process*, *supra* note 9, at 1029.

30 Christian Myers, *Law professor reflects on landmark case*, The Observer (Jan. 21, 2013), <https://ndsmcobserver.com/2013/01/law-professor-reflects-on-landmark-case/>.

31 *Id.*

32 See, e.g., *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r of the Ind. State Dept. of Health*, 917 F.3d 532, 536 (7th Cir., June 25, 2018) (Easterbrook, J., dissenting) (dissent joined by Judge Barrett about the constitutionality of an Indiana law that prohibited abortions under certain circumstances and limited and regulated related practices).

33 See Unacceptable, The Becket Fund (Feb. 27, 2012), <http://www.becketlaw.org/media/unacceptable/>.

34 *Id.*



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Additionally, in 2006, Barrett signed a two-page ad by a group called St. Joseph County Right to Life that lambasted *Roe v. Wade* “an exercise of raw judicial power” and urged overturning its “barbaric legacy.”<sup>35</sup> Barrett’s affiliation with the group is also noteworthy because the organization also opposed IVF and even support criminalizing those who discard frozen embryos as part of the IVF process.<sup>36</sup> Taking such a radical position on medical services like IVF is deeply problematic, among other reasons, for LGBTQ couples who seek to start a family with the help of a fertility specialist.

### CIVIL RIGHTS

Bedrock statutes like the Civil Rights Act of 1964 are vital to the LGBTQ community, both because of how they apply directly to combat discrimination against LGBTQ persons and also because they guard against intersecting forms of discrimination, for example, on the basis of race or sex. This was vividly apparent last term in *Bostock*, which recognized Title VII’s prohibition of sex discrimination necessarily applied to LGBTQ employees. The logic of *Bostock* has already begun to resonate under other civil rights laws with the same or similar language.

In her brief time on the bench, Barrett has also proven herself to be unfriendly to fundamental civil rights cases involving racial discrimination. In *EEOC v. AutoZone*, Barrett voted to refuse to rehear a disconcerting decision that had upheld a practice of “separate-but-equal” in the workplace.<sup>37</sup> Specifically, *AutoZone* involved an employee who had been transferred from one store to another on the basis of race, because his employer had a policy of maintaining separate Black and Brown stores in Black and Brown neighborhoods, respectively.<sup>38</sup> The EEOC brought suit under the Civil Rights Act, but a three-judge panel rejected the suit on the basis that there was no harm by being transferred on the basis of race.<sup>39</sup> Another judge on the Seventh Circuit called to rehear the case as a full court (*en banc*), but Judge Barrett and several other judges voted down the request. Chief Judge Wood dissented, explicitly comparing the decision to the policy of “separate but equal” that had been unanimously struck down by the Supreme Court in *Brown v. Board of Education*.<sup>40</sup> Judge Wood’s dissent was joined by several other judges, including one who had been appointed by Presidents Reagan and George H.W. Bush. Judge Barrett’s vote, the other way, swung the decision to be a 5-3 majority against rehearing, so the panel decision remains in place, and this practice of “separate but equal” in the workplace remains legal for approximately 25 million people who live in the Seventh Circuit.

Additionally, Judge Barrett directly authored the decision in *Smith v. Illinois Department of Transportation*.<sup>41</sup> That case involved a supervisor who hurled the N-word at an employee and a subsequent suit by the employee under Title VII of the Civil Rights Act of 1965. Judge Barrett held that the racial epithet was insufficient to make out a hostile work environment claim because the employee did not introduce evidence it changed his subjective experience.<sup>42</sup> By contrast, other circuits have recognized the unique history and harm of using the N-word in the workplace.<sup>43</sup> Together, in *AutoZone* and *Smith*, Judge Barrett’s positions advance a heightened burden upon the victims of racial discrimination to prove that they were actually harmed — and an implied disbelief that the economic and dignitary harm they suffered is real.

35 Adam Liptak, *Amy Coney Barrett, Trump’s Supreme Court Pick, Signed Anti-Abortion Ad*, N.Y. Times (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/amy-coney-barrett-abortion.html>.

36 See, e.g., 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>; Jacey Fortin, *Citing fears about IVF, Tammy Duckworth urges Senate not to confirm Judge Barrett*, N.Y. Times (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/us/elections/tammy-duckworth-coney-barrett-ivf.html>; “Dear Colleague” Letter from Senator Tammy Duckworth, U.S. Senate, to Fellow Senators Regarding the Nomination of Amy Coney Barrett (Oct. 2, 2020), <https://www.documentcloud.org/documents/7221409-20-10-02-Senator-Duckworth-Dear-Colleague-SCOTUS.html>. See also Stephanie Kirchgaessner, *Revealed: Amy Coney Barrett supported group that said life begins at fertilization*, The Guardian (Oct. 1, 2020) (“We support the criminalization of the doctors who perform abortions. At this point we are not supportive of criminalizing the women,” Jackie Appleman, the group’s executive director, said in an interview with the Guardian. “We would be supportive of criminalizing the discarding of frozen embryos or selective reduction through the IVF process.”).

37 *EEOC v. AutoZone, Inc.*, 860 F.3d 564, 565 (7th Cir. 2017), *rehearing and rehearing en banc denied*, 875 F.3d 860 (7th Cir. 2017).

38 *AutoZone, Inc.*, 860 F.3d at 565.

39 *Id.* at 568 (“the July 2012 transfer was purely lateral, like the others before it, and entailed no reduction in pay, benefits, or job responsibilities”).

40 *AutoZone*, 875 F.3d at 861 (Wood, C.J., dissenting).

41 936 F.3d 554 (7th Cir., Aug. 21, 2019).

42 *Id.* at 561.

43 See, e.g., *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013) (per curiam); *id.* at 580 (Kavanaugh, J., concurring) (“in my view, being called the n-word by a supervisor—as Ayissi-Etoh alleges happened to him—suffices by itself to establish a racially hostile work environment.”)





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## CONCLUSION

Judge Barrett, by her own terms, seeks to embody and advance Justice Scalia's philosophy. In her record as a judge and a law professor, we can already see this beginning to shine through on matters of profound significance to the LGBTQ community: roadblocks to obtain an equal and safe education; the growing use of religious exemptions to issue a license to discriminate; threats to affordable health care and access to reproductive care; unsettling the bedrock of civil rights protections; and. But ultimately, we can see even more clearly where Justice Scalia's legal philosophy would lead because his dissents are fresh in our minds: backwards into a world that criminalized and scorned LGBT persons and openly mocked the mere claim of marriage equality, which is now settled law. Judge Barrett poses a direct threat to the constitutional rights of LGBTQ community and all Americans, and she should not be confirmed for a pivotal vote on the highest court in the land, especially under such extraordinary and troubling circumstances.