

October 22, 2020

RE: Lambda Legal Opposes the Nomination of Judge Barrett to the Supreme Court

Dear Senator:

Lambda Legal, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and people living with HIV, opposes the nomination of Judge Amy Coney Barrett to be an Associate Justice of the United States Supreme Court. Lambda Legal is the oldest and largest national legal organization dedicated to representing this community through impact litigation, policy advocacy, and public education. Having reviewed Judge Barrett's publicly available record, her testimony before the Senate Judiciary Committee, and other materials that the nominee failed to disclose but were brought to light by other sources, we have concluded that her views on civil rights issues are fundamentally at odds with basic guarantees of equality, liberty, justice and dignity under the law for all people, including LGBT people and everyone living with HIV.

Justice Ruth Bader Ginsburg made history as both an advocate and a Justice, showing the error of barriers not only for women but also for LGBT people, people living with HIV, and other historically disadvantaged groups. Throughout her entire legal career, including her 27 years on the Supreme Court, Justice Ginsburg was committed to the principle of equal justice under law, and spoke with a clear and strong voice against discrimination in all aspects of public life, from the workplace to the marketplace to the voting booth. Justice Ginsburg treated everyone with dignity and put the Constitution first.

The decision of the Senate Judiciary Committee to move forward with a nomination to replace Justice Ginsburg when the presidential election is already underway is indefensible, and jeopardizes the integrity of the Court. The reasoning provided in 2016 for not moving forward with Judge Garland's Supreme Court nomination many months before the election was that voters should be given the opportunity to select their President and Senators before considering a Supreme Court nominee. That reasoning should apply with even greater force now in light of the fact that the nation has been voting for weeks, with over 40 million Americans having already cast their ballot.¹

The Supreme Court can only be effective if it has the respect and confidence of the American people. If the process of appointing justices causes the Court to be seen as just another political branch—unbalanced and wielding disproportionate power—it will be neither respected nor trusted. The move from the 2016 demand that voters have an opportunity to decide who should choose the nominee to fill a vacancy during a presidential year, to the current effort to push through Judge Barrett's nomination at breathtaking speed, is transparent in its contorted, ends-oriented reasoning. The shifting justifications

¹ See Brittany Renee Mayes and Kate Rabinowitz, *The U.S. Has Already Hit 89% of Total 2016 Early Voting*, THE WASHINGTON POST (Oct. 22, 2020), available at <https://www.washingtonpost.com/graphics/2020/elections/early-voting-numbers-so-far/>.

provided for moving forward now are simply not credible,² and a decision to do so will cause an indelible stain on what has been known as the “world’s greatest deliberative body.”

Moreover, using Judge Barrett’s own language, a nomination of this type is improper because “it is not a lateral move.”³ Judge Barrett would not replace a justice with a similar judicial philosophy, such as Justice Thomas, for example. She has been nominated to replace Justice Ginsburg, an assiduous guardian of civil rights and equal opportunity. Judge Barrett’s record and personal statements demonstrate that her philosophy is the polar opposite of Justice Ginsburg’s.

Furthermore, as Judge Barrett herself explained in 2016, a nomination should not move forward, let alone on this ultra-accelerated timetable, when the proposed replacement “could dramatically flip the balance of power of the Court.” Confirmation of Judge Barrett in the current circumstances would do precisely what she recommended against four years ago; it would substantially shift the “balance of power” on the Supreme Court by entrenching a supermajority of Justices who favor certain religious rights over equality norms in ways likely to imperil the civil and human rights of generations of Americans.

The number of cases affecting the American public which have been decided by close, harshly divided votes shows how polarized the Supreme Court has become. This only reinforces the likely influence of whoever fills this seat and why the American people should be allowed to express their views about who should be entrusted with making this nomination.

The unusual circumstances of the current moment reinforce further still the impropriety of this nominee because Judge Barrett has refused to commit to recusing herself should a case contesting the results of the election come before the Court,⁴ and evaded basic questions regarding voter intimidation and the peaceful transfer of power after an election.⁵ It is no exaggeration to say that the legitimacy of our entire democratic enterprise will be jeopardized if this nomination is rushed through in a manner that intentionally deprives the American people of the decision about who should choose the nominee. And it has been particularly reckless for the Senate to rush ahead with public hearings on this nomination when there is significant risk of contagion not only for the members of the Senate, but also for the staff and employees of the Capitol.

² See Aaron Blake, *How the GOP is trying to justify its Supreme Court reversal*, THE WASHINGTON POST (Sept. 21, 2020) available at <https://www.washingtonpost.com/politics/2020/09/21/how-gop-is-trying-justify-its-supreme-court-reversal/> (identifying the occasions in 2016 in which Republican Senators argued that a vacancy should not be filled until there is a new President, and discussing their new justifications for their change in position).

³ Interview with Amy Coney Barrett, *Growing Fight Over Replacing Scalia, GOP Vows to Block Obama’s Pick for Replacement*, CBSN NEWS (Feb. 2016) (“We are talking about Justice Scalia, the staunchest conservative on the court and we’re talking about him being replaced by someone who could dramatically flip the balance the power of the court. It’s not a lateral move.”) available at https://www.youtube.com/watch?v=AQcsR-hPkLg&feature=emb_logo.

⁴ See Andrew Desidero and Marianne Levine, *In Senate questionnaire, Barrett won’t pledge to recuse herself from 2020 election cases*, POLITICO (Sept. 29, 2020) available at <https://www.politico.com/news/2020/09/29/amy-coney-barrett-recuse-election-cases-423248>.

⁵ See Jeremy Stahl, *Amy Coney Barrett Doesn’t Want to Say Whether a President Should Commit to a Peaceful Transfer of Power*, SLATE (Oct. 13, 2020) available at <https://slate.com/news-and-politics/2020/10/amy-coney-barrett-cory-booker-peaceful-transfer-of-power.html>.

Focusing on the LGBT community specifically, the stakes could not be higher. Many of the recently secured protections enabling LGBT people to participate as equal members of our society hang in the balance. As recent opinions make plain, the right of LGBT people to equal treatment in public life remains contested by some members of the Court.⁶ Some have explained their rulings denying our equal dignity and freedom as shaped by solicitude for widespread religious views.⁷ This problematic situation sharpens our focus on the judicial philosophy of any nominee for the high court.

Like all Americans, LGBT people should be entitled to have confidence that any person confirmed to the Supreme Court will respect their identities and families, and will affirm their right to equal protection of the laws. Unfortunately, however, Judge Barrett’s record makes such confidence impossible. Her own writings and statements over many years confirm her inability or unwillingness to fulfill this highest obligation of every judge, most especially the Justices of our Supreme Court.

While we have serious concerns about many aspects of Judge Barrett’s record and philosophy, we wish to call your attention to several issues of particular concern:

- Judge Barrett’s personal statements about transgender people.
- Judge Barrett’s personal statements about marriage equality and personal liberty.
- Judge Barrett’s hostility toward health care access and preexisting conditions protections under the Affordable Care Act.
- Judge Barrett’s hostile judicial approach.
- Judge Barrett’s lack of commitment to racial equity.
- Judge Barrett’s hostility towards reproductive freedom.
- Judge Barrett’s presentation of numerous lectures for a training program funded by the Alliance Defending Freedom (ADF).

Personal Statements about Transgender People: In a lecture discussing issues that could soon come before the Supreme Court, then-Professor Barrett expressed the legally unsound and troubling view that transgender people are not protected by Title IX’s prohibition against sex discrimination. She asserted that this law does not protect transgender people because, in her words, “it is pretty clear that no one,

⁶ *Davis v. Ermold*, No. 19-926, 2020 WL 5881537, at *2 (U.S. Oct. 5, 2020) (Statement of Justices Thomas and Alito on denial of certiorari) (quoting prediction in Thomas’ *Obergefell* dissent that the decision would have “ruinous consequences for religious liberty”); *Bostock v. Clayton Cty., Georgia*, 590 U.S. ___, 140 S. Ct. 1731, 1756 (June 15, 2020) (Alito, J., dissenting) (disagreeing with the Court’s interpretation of Title VII’s sex discrimination prohibition as encompassing discrimination on the basis of sexual orientation and gender identity, insisting that Congress could only have intended sex to mean “the genetic and anatomical characteristics that men and women have at the time of birth”); *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 584 U.S. ___, 1748, 138 S. Ct. 1719, 1748 (2018) (Thomas, J., dissenting) (warning that “in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to ‘stamp out every vestige of dissent’ and ‘vilify Americans who are unwilling to assent to the new orthodoxy.’”); *Obergefell v. Hodges*, 576 U.S. 644, 735, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting) (“The Court’s decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built.”).

⁷ *Id.*

including the Congress that enacted [Title IX], would have dreamed of that result at that time.”⁸ Presumably she would take the same position concerning the other federal laws similarly prohibiting sex discrimination, such as Title VII, the Fair Housing Act, and others.

Judge Barrett’s approach has been soundly rejected by jurists spanning the political spectrum, perhaps most authoritatively twenty years ago by her mentor, Justice Scalia, for a unanimous Supreme Court,⁹ and most recently reaffirmed by Justice Gorsuch for a six-member majority.¹⁰ Rather than applying the statute as written, Judge Barrett mistakenly prefers to substitute her speculation about what members of Congress might have intended to proscribe (informed by her own views of what the law should be). Such an approach justifies insertion of exceptions or modifications that lawmakers did not include. Doing so not only threatens to create confusion and unpredictability by stripping laws of their plain meaning; when that stripping artificially narrows nondiscrimination laws, it also deprives vulnerable people of legal protections to which they should be entitled, and which can safeguard their livelihoods,¹¹ housing,¹² ability to stay in school,¹³ physical safety,¹⁴ and other covered interests.

Equally if not more disturbing is how Judge Barrett has characterized transgender people. For example, she has opined that “[p]eople 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*.” (emphasis added).¹⁵ This type of misgendering of transgender people, particularly of transgender youth, callously disregards the legitimacy of their identity. Furthermore, this rhetoric invokes defamatory falsehoods suggesting not only that transgender girls are not truly girls, but that they somehow pose a threat to cisgender girls.¹⁶ This deliberately inflammatory language ignores the settled scientific understanding that transgender identity is real, that denying and denigrating the identity of

⁸ Jacksonville University Public Policy Institute, *The Future of the Supreme Court*, Hesburgh Lecture (Nov. 3, 2016), available at <https://www.youtube.com/watch?v=7yjTEdZ81II&feature=youtu.be>.

⁹ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (holding that Title VII’s sex discrimination ban covers same-sex sexual harassment despite the likelihood that members of Congress would not have anticipated that result when passing the statute in 1964). Writing for a unanimous Court, Justice Scalia explained that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which we are governed.”

¹⁰ *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1747 (2020). Writing for the six justice majority, Justice Gorsuch wrote, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual on the basis of sex.” He added, “when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII.”

¹¹ *Bostock, supra*, 140 S. Ct. at 1731 (holding employer violated Title VII’s sex discrimination ban by firing Aimee Stephens – a long-term, successful employee – when she revealed her transgender status and intention to express her female gender identity).

¹² *Smith v. Avanti*, 249 F. Supp. 3d 1194 (D. Colo. 2017) (housing discrimination in violation of Fair Housing Act).

¹³ *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, No. 18-13592, 2020 WL 4561817 (11th Cir. Aug. 7, 2020) (male high school student wrongfully denied access to proper restroom facilities because he is transgender).

¹⁴ *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997) (young man subjected to extreme sexual harassment by coworkers culminating in physical danger due to his perceived gender nonconformity).

¹⁵ See *supra* note 6.

¹⁶ “Cisgender” refers to persons who are not transgender.

transgender people causes psychological harm (especially to vulnerable young people), and that doing so wrongfully empowers those who wish to deny transgender people access to public life.

Judge Barrett has also revealed her view that personal religious or moral beliefs about transgender people should be allowed to override others' need for medically necessary care.¹⁷ This approach represents a radical reconfiguring of the First Amendment's protection of religious liberty from a shield for individual freedom to believe into a sword with which people can act upon those beliefs to the serious detriment of others.¹⁸

Judge Barrett's ardent but misguided views about transgender people deserve particular scrutiny due to the number of issues likely to come before the Supreme Court soon, including Title IX's protections for transgender students,¹⁹ the Trump administration's ban on military service by transgender people,²⁰ and numerous rule changes adversely affecting the ability of transgender people to work,²¹ stay in school,²² receive medically necessary care,²³ and fully participate in public life.

Hostility Towards Marriage Equality and Personal Liberty: We are seriously concerned about how Judge Barrett would reconcile her publicly championed views about marriage with her obligation to administer equal justice to all litigants who come before her. For example, Judge Barrett joined a letter declaring that "marriage and family [are] founded on the indissoluble commitment of a man and a woman."²⁴ Judge Barrett's advocacy for the position that only the marriages of heterosexual couples are

¹⁷ See *supra* note 6.

¹⁸ In the presentation, Judge Barrett warns that another case interpreting Title IX that could go to the Supreme Court is a challenge to the 2016 U.S. Department of Health and Human Services Final Rule clarifying that transgender people are protected against discrimination on the basis of sex under the Affordable Care Act's nondiscrimination provision (Section 1557).

¹⁹ See *Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430 (4th Cir. Aug. 26, 2020); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, No. 18-13592, 2020 WL 4561817 (11th Cir. Aug. 7, 2020).

²⁰ See *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019).

²¹ See Noticed of Proposed Rulemaking, *Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination*, (Dec. 30, 2019) available at <https://www.federalregister.gov/documents/2019/12/30/2019-27258/nondiscrimination-obligations-of-federal-contractors-and-subcontractors-procedures-to-resolve>.

²² See Final Rule, *Direct Grant Programs, State-Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program*, available at <https://www.federalregister.gov/documents/2020/09/23/2020-20152/direct-grant-programs-state-administered-formula-grant-programs-non-discrimination-on-the-basis-of>.

²³ See Final Rule, *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority* (June 19, 2020) available at <https://www.federalregister.gov/documents/2020/06/19/2020-11758/nondiscrimination-in-health-and-health-education-programs-or-activities-delegation-of-authority>; Final Rule, *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, (May 21, 2019) available at <https://www.federalregister.gov/documents/2019/05/21/2019-09667/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority>.

²⁴ See *Letter to Synod Fathers from Catholic Women* (Oct. 1, 2015), available at <https://eppc.org/synodletter/>.

legitimate negates the reality and legal equality of same-sex couples, and the fact that almost one million married same-sex couples rely on the protections of marriage to safeguard each other, their children, and their families as a whole.²⁵

Judge Barrett’s approach to questions of constitutionally protected personal liberty are not only inconsistent with, but would seek to roll back, landmark decisions that have been essential to the ability of LGBT people to live authentically, to protect their families, and to make deeply personal decisions without fear of government interference. By way of example, then-Professor Barrett gave a presentation in 2016 in which she promoted a dissenting view in *Obergefell v. Hodges* that marriage should not be viewed as a fundamental right and instead should be left to be decided on a state-by-state basis.²⁶ Her view that an equal freedom to marry for same-sex couples is illegitimate because it was vindicated by the courts reflects a misunderstanding and deep disdain for a core responsibility of our courts to enforce constitutional guarantees on behalf of minority groups who cannot rely on political processes to treat them equally.

Judge Barrett takes the position that fundamental constitutional rights should only be recognized if they are firmly rooted in American history and traditions. But this interpretation of the Constitution fails to acknowledge that much of American history and traditions are firmly rooted in discrimination, and that defining rights narrowly by who has enjoyed them in the past is the wrong level of generalization.²⁷ Judge Barrett’s philosophy repeats the error the Supreme Court repudiated nearly twenty years ago regarding same-sex couples,²⁸ and more than half a century ago regarding interracial couples.²⁹ Judge Barrett’s approach, conversely, would deny equal liberty, dignity and autonomy to LGBT people, women, racial minorities, and anyone else denied those rights historically. It is a reactionary approach that betrays the Constitution’s dual promises of liberty and equality for all.

These are not hypothetical concerns. As Judge Barrett has acknowledged publicly, there are cases that will likely come before the Supreme Court soon that will present issues affecting the fundamental liberties of LGBT people. These may include challenges to state laws that undermine the equality of same-sex married couples in ways that would lead to what Justice Ginsburg memorably termed “skim milk marriages.”³⁰ In this context, Judge Barrett’s unwillingness in particular to confirm definitively that *Obergefell* is settled law jeopardizes the legal security of LGBT people.³¹ For this reason, we are

²⁵ See Adan P. Romero, *1.1 Million LGBT Adults Are Married to Someone of the Same Sex at the Two-Year Anniversary of Obergefell v. Hodges*, The Williams Institute UCLA School of Law, (June 23, 2017), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Obergefell-2-Year-Marriages-Jun-2017.pdf>.

²⁶ See *supra* note 6.

²⁷ *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (Kennedy, J.) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”).

²⁸ *Id.*

²⁹ *Loving v. Virginia*, 388 U.S. 1 (1967) (Warren, CJ, for a unanimous Court).

³⁰ Supreme Court of the United States, *United States v. Windsor*; Oral Argument Audio and Transcript (Mar. 27, 2013), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/12-307_c18e.pdf.

³¹ Nomination of Amy Coney Barrett to the U.S. Court of Appeals for the Seventh Circuit, Questions for the Record Submitted September 13, 2017—Questions from Senator Whitehouse at 5, available at

gravely concerned that Judge Barrett’s narrow and backward-looking approach would do deep and lasting damage to LGBT people’s lives, and to other communities for whom “history” and “tradition” provide no protection against deprivations of liberty.

Hostility Toward Health Care Access and Preexisting Conditions Protections Under the ACA:

Access to health care is an issue of profound importance to LGBT people and people living with HIV. The Affordable Care Act (ACA) has expanded health care coverage for over 20 million people and has saved and improved untold numbers of lives.³² In addition, over 130 million people in the U.S. (including millions of Coronavirus survivors) suffer from preexisting conditions.³³ Prior to passage of the ACA, transgender people and people living with HIV were routinely refused health insurance based on preexisting conditions. Even when insurers were willing to provide coverage in general, they often excluded coverage for those conditions. Indeed, the ACA’s protections have never been more essential than now, during the global Coronavirus pandemic. Over one million people globally and over 210,000 people in the United States have already succumbed to COVID-19; over 7 million have tested positive in the U.S. and many continue to suffer negative health care consequences.³⁴ Those numbers continue to climb alarmingly across the country, and the pandemic has affected every aspect of American life.³⁵

Despite the success of the Affordable Care Act in making coverage available for millions and despite the fact that our country is suffering through the worst health crisis in a century, the U.S. Supreme Court will hear oral arguments about the constitutionality of the ACA just one week after the election.³⁶ The lawsuit has been a carefully orchestrated effort between the Trump Justice Department and hostile states to achieve a result through the courts that they have repeatedly failed to accomplish legislatively—i.e., repeal the ACA.³⁷

<https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Whitehouse%20QFRs.pdf>. (Note that Judge Barrett was asked to explain whether she considers *Obergefell* to be settled law according to standard constitutional analysis or her own theory of “superprecedents,” a subject discussed below on page 8, and she declined to do so.)

³² See Center on Budget and Policy Priorities, *Chart Book: Accomplishments of Affordable Care Act* (Mar. 19, 2019) available at <https://www.cbpp.org/research/health/chart-book-accomplishments-of-affordable-care-act#:~:text=Thanks%20to%20the%20Affordable%20Care,people%20have%20gained%20health%20coverage>.

³³ See *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act*, Health and Human Services (Jan. 5, 2017) available at <https://aspe.hhs.gov/system/files/pdf/255396/Pre-ExistingConditions.pdf>.

³⁴ See Johns Hopkins Coronavirus Resource Center, COVID-19 Dashboard by the Center for Systems Science and Engineering, available at <https://coronavirus.jhu.edu/map.html>.

³⁵ Christina Maxouris and Jason Hanna, *At least 24 states are not reporting more new Covid-19 cases than they did a week ago*, CNN (Oct, 3, 2020) available at <https://www.cnn.com/2020/10/03/health/us-coronavirus-saturday/index.html>.

³⁶ https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2020.pdf.

³⁷ See *Texas v. U.S.*, Brief for the Defendants (May 1, 2019) available at <https://www.documentcloud.org/documents/5985995-DOJ-Brief-Texas-v-US.html> (The DOJ initially agreed the mandate could be severed from the ACA, but then changed positions and now argues the entire ACA is illegal).

The Trump administration has indicated that part of their “litmus test” for federal judicial nominees is willingness to strike down the Affordable Care Act.³⁸ Unfortunately, there is no question that Judge Barrett has passed this test and thus poses a grave danger to the health care of millions of Americans. In a 2017 article, she aggressively criticized *NFIB v. Sebelius*, the Supreme Court ruling upholding the ACA’s constitutionality. She accused Chief Justice Roberts of having “pushed the Affordable Care Act beyond its plausible meaning to save the statute” and asserted that the decision is at odds with textualism due to “creatively interpreting ostensibly clear statutory text.”³⁹

In other words, Judge Barrett is already emphatically on record with her view that the ACA is illegitimate. Given her scholarship and that she now has been nominated by a president who consistently publicizes his determination to see this law eliminated, no one can seriously question her commitment to that result, despite the law’s status as one of the most important, life-saving pieces of social welfare legislation passed in generations.

The real-world consequence of this administration’s relentless campaign to strike down the ACA could not be more dire. It would deprive over 20 million people of their essential health insurance in the midst of the pandemic, would jeopardize the health of the estimated 52 million people with preexisting conditions, and would immeasurably hinder efforts to bring an end to this public health crisis.⁴⁰

Elimination of the ACA would be especially dire for LGBT people and people living with HIV because these populations are more than twice as likely to be uninsured as the general population. In addition, judicial repeal of the ACA would unwind the progress that has been made in significantly decreasing uninsured and underinsured rates for people living with HIV following the passage of the ACA.⁴¹

It is beyond question that Judge Barrett’s supporters, including President Trump, know they can count on her to remain consistent in her academically fringe view that the ACA is unconstitutional. Given her public positions and the partisan nature of the debates about the fate of this law, any claims to believe she would have an open mind if elevated cannot be credited. The healthcare of millions of Americans is at stake. Their votes about who should select the jurist likely to tip the balance on this question should be received, counted, and respected.

³⁸ See <https://twitter.com/realDonaldTrump/status/614472830969880576>.

³⁹ U.S. Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation Issue Brief, *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act* (Jan. 5, 2017) available at https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2330&context=law_faculty_scholarship.

⁴⁰ See Gary Claxton *et al.*, *Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA* (Dec. 12, 2016) KAISER FAMILY FOUNDATION, available at <https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca/> (according to this 2016 analysis, approximately 52 million Americans under the age of 65 could find their health insurance at risk because of a wide range of preexisting conditions).

⁴¹ See Kellen Baker *et al.*, *The Senate Health Care Bill would Be Devastating for LGBTQ People*, CENTER FOR AMERICAN PROGRESS (July 6, 2017) available at <https://www.americanprogress.org/issues/lgbt/news/2017/07/06/435452/senate-health-care-bill-devastating-lgbtq-people/>.

A Judicial Approach Hostile to Civil Rights: In a 2017 article, then-Professor Barrett attempted to remediate the absurd results that flow from “originalism,” a judicial theory that purports to follow the Constitution’s original meaning.⁴² She acknowledged that faithfully applying “originalism” leads to undesirable results such as “the invalidation of paper money, and the reversal of *Brown v. Board of Education*.” She offered reassurance, however that these things would never come to pass due to procedural barriers and the existence of so-called “superprecedents,” which she describes as U.S. Supreme Court decisions “that no serious person would propose to undo even if they are wrong.”⁴³ Yet, when asked in 2017 whether she would describe any of the landmark LGBT rights decisions as “superprecedent,” Professor Barrett declined to answer, demurring that she had “not undertaken an independent analysis of whether any particular case qualifies as a superprecedent.”⁴⁴

This non-response is simply inadequate given the stakes for all Americans in the ongoing debate over what precedents are to be considered settled. Prior to taking the bench, Judge Barrett was a legal scholar who devoted hundreds of pages to writing about *stare decisis*, the legal doctrine of respecting that which already has been decided. Her work includes an extended examination of how “originalist” justices and legislators can “correct” the “constitutional errors” created by “non-originalist precedents.”

This approach signals great openness to revisiting and reversing Supreme Court decisions that are deemed insufficiently faithful to modern day speculations about what the Founders had in mind. Judge Barrett’s past refusal to confirm that she considers the pillars of LGBT rights jurisprudence at least settled if not “superprecedents” would be alarming in any circumstances, and especially now, with the Trump administration and certain states actively working to roll back LGBT rights. In sum, Judge Barrett’s “originalist” approach and refusal to confirm that she considers landmark constitutional protections for marriage equality, reproductive freedom, and racial justice to be firmly settled “superprecedents” shows how much our modern-era constitutional structure, and the rights upon which the American public has come to depend, are jeopardized by her approach.

Lack of Commitment to Racial Equity: We are also deeply troubled by Judge Barrett’s apparent lack of commitment to racial equity. In one especially troubling case, Judge Barrett denied rehearing of a decision in favor of a company that had segregated its employees by race.⁴⁵ She took this position despite the explanation given by the dissent that the policy had violated the core teaching of *Brown v. Board of Education*, that “separate is inherently unequal, because deliberate racial segregation by its very nature has an adverse effect on the people subjected to it.”⁴⁶ Judge Barrett’s complicit acceptance of racial segregation in a contemporary workplace is deeply disturbing and demonstrates a profound misunderstanding or minimization both of the harms of such a policy and the overriding responsibility of federal judges to enforce the statutory and constitutional bans on such racialized abuses of power.

⁴² Amy C. Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. Penn. J. of Const. L. (2017).

⁴³ *Id.*

⁴⁴ Nomination of Amy Coney Barrett to the U.S. Court of Appeals for the Seventh Circuit, Questions for the Record Submitted September 13, 2017—Questions from Senator Whitehouse at 5, available at <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Whitehouse%20QFRs.pdf>.

⁴⁵ *United States Equal Employment Opportunity Comm’n v. AutoZone, Inc.*, 875 F.3d 860 (7th Cir. 2017).

⁴⁶ *Id.*

Unfortunately, this is not the only example of Judge Barrett’s insensitivity around issues of race discrimination. In another opinion denying the appeal of a Black worker who was the subject of racial slurs,⁴⁷ Judge Barrett held that the use of the n-word against the employee did not create a hostile work environment because the racial slur did not change the employee’s subjective experience of the workplace. As LGBTQ people know far too well, words matter,⁴⁸ and therefore Judge Barrett’s failure to fully acknowledge the toxicity of this slur on Black Americans is deeply concerning to us, and should be to every member of the Senate. As courts and psychologists have repeatedly pointed out, the use of the slur inevitably leads to psychological distress. Judge Barrett’s minimization of the impact of such language is in stark contrast to the reality of the employee and Seventh Circuit case law precedent.⁴⁹

Taken together, these cases demonstrate that Judge Barrett is not a nominee who can be trusted to safeguard the hard-fought but incomplete gains that have been made to address our nation’s deep and painful legacy of racial discrimination.

Hostility Towards Reproductive Freedom: Judge Barrett’s personal statements and judicial record also demonstrate that she would be unable to serve as a fair and impartial adjudicator in cases concerning reproductive freedoms, such as the freedom to decide not to continue a pregnancy, to use contraceptives, or to seek infertility care. For example, Judge Barrett signed onto a full-page newspaper ad in 2006 demanding an end to legal abortion.⁵⁰ Following a pattern set by many Trump administration nominees, Judge Barrett then failed to disclose this information on her Senate Judiciary Committee questionnaire.⁵¹ This failure to disclose responsive information in a timely manner shows that the nominee herself is not a reliable source of the material the Committee has determined to be important when assessing any federal judicial nominee. It is yet another reason why it is improper to rush ahead with a hearing.

Notably, Professor Barrett also has expressed her hostility towards contraceptive insurance by joining a letter in 2012 referring to the ACA’s birth control insurance coverage as “Unacceptable.”⁵² Her position on that issue is far outside the mainstream. Indeed, that position reflects not only her personal view that

⁴⁷ *Smith v. Illinois Dep’t of Transportation*, 936 F.3d 554 (7th Cir. 2019).

⁴⁸ Judge Barrett’s use of the phrase “sexual preference” rather than “sexual orientation” when discussing members of our community was deeply troubling to us for similar reasons. Although Judge Barrett corrected herself when pressed by a member of the Committee, her language reveals her deeply-held belief that LGBTQ identity is a “preference,” which is both inaccurate and demeaning to LGBTQ people.

⁴⁹ *See Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (“Perhaps no single act can more quickly ‘alter the conditions of employment and create an abusive working environment,’ than the use of an unambiguously racial epithet such as “nigger” by a supervisor in the presence of his subordinates.” (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986)).

⁵⁰ Adam Liptak, *Amy Coney Barrett, Trump’s Supreme Court Pick, Signed Anti-Abortion Ad*, NEW YORK TIMES (Oct. 2, 2020) available at <https://www.nytimes.com/2020/10/01/us/amy-coney-barrett-abortion.html>.

⁵¹ The failure to disclose controversial material is part of a disturbing pattern by nominees put forth by this administration. *See, e.g.*, Lambda Legal, *Trump’s Judicial Assault on LGBT Protections, Special Report*, (FN 17) available at <https://www.lambdalegal.org/sites/default/files/publications/downloads/trump-judicial-nominees-report-2019.pdf>.

⁵² *Unacceptable* (April 11, 2017) available at <https://s3.amazonaws.com/becketpdf/Unacceptable-4-11.pdf>.

human life should be protected from the moment an egg is fertilized, but also that our legal system should support that view despite the equally sincere religious and moral beliefs of those who disagree and whose lives would be directly affected. Moreover, were her views about reproductive health care to gain the force of law nationally, many thousands of couples – both gay and straight alike – who have depended on infertility medicine to become parents would lose that opportunity.

Presentation of Lectures For ADF’s Training Program: Over a series of years, Professor Barrett presented five lectures for a law student training program whose stated purpose is to establish a “distinctly religious worldview in every area of the law.” The students then work with “likeminded attorneys” in pursuit of a “vision for how God can use them as judges, law professors, and practicing attorneys to help keep the door open for the spread of the Gospel in America.”⁵³

The program is funded by the Alliance Defending Freedom (ADF), an organization dedicated, among other goals, to recriminalizing same-sex relationships, to preventing marriage equality, and now to expanding religious rights to refuse services to same-sex couples, both married and unmarried, and to exclude transgender people from public life.⁵⁴ ADF’s overseas advocacy defends harsh criminal penalties for same-sex intimacy and supports forced sterilization of transgender people. In the United States, ADF is among the largest, best known, and most extreme of the many anti-LGBT legal organizations.⁵⁵ Judge Barrett’s decision to affiliate herself with this organization demonstrates a marked lack of respect and concern for the countless LGBT people who are denied services, shunned, and otherwise harmed due to the advocacy of organizations like ADF. It is impossible to believe that she would be able to administer fair and impartial justice to members of a group she has so disdained.

What raises even more questions about Judge Barrett’s transparency and judgment is her initial claim during the 2017 hearing on her nomination to the Court of Appeals that she had not fully understood that the training course in which she participated year after year was an ADF program. Given ADF’s size and dominant stature in the field, and her work as a high-profile scholar researching and teaching about the same issues, this strains credulity. Note that ADF was counsel for the baker in the *Masterpiece Cakeshop* case, which started in 2012 and continued until the Supreme Court’s decision in 2018. ADF’s vigorous communications staff, together with attentive media, made the case a household name and put ADF and its goals in a national spotlight. Later, when pressed about her affiliation with ADF in a

⁵³ See Return of Organization Exempt from Income Tax, Form 990, Alliance Defense Fund, (25-26), available at http://990s.foundationcenter.org/990_pdf_archive/541/541660459/541660459_200206_990.pdf#page=25 ; See United States Senate Committee on the Judiciary Questionnaire for Nominee to the Supreme Court, available at [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).

⁵⁴ See, e.g., Southern Poverty Law Center, *Why is Alliance Defending Freedom a Hate Group?* (Apr. 10, 2020) available at <https://www.splcenter.org/news/2020/04/10/why-alliance-defending-freedom-hate-group>; Southern Poverty Law Center, *Alliance Defending Freedom*, <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>.

⁵⁵ See Jessica Glenza, *The multimillion-dollar Christian group attacking LGBTQ+ rights*, THE GUARDIAN (Feb. 12, 2020) available at <https://www.theguardian.com/world/2020/feb/20/alliance-defending-freedom-multimillion-dollar-conservative-christian-group-attacking-lgbtq-rights>.

question for the record, Professor Barrett did not claim lack of familiarity and instead minimized the organization’s long-standing record of anti-LGBT zealotry as simply a matter of “public controversy.”⁵⁶

This dissembling and defense of an organization dedicated to stripping others of their basic rights, and to securing expansive special rights for a favored religious ideology, displays a shocking lack of concern for the reputation and integrity of the federal judiciary.

Judge Barrett’s testimony regarding her record on LGBTQ issues only exacerbated our concern. When asked by Senator Leahy about her work over a five year period for a training program run by ADF, an organization Senator Leahy correctly characterized as seeking to criminalize people LGBTQ people in the U.S. and around the world, Judge Barrett described her experience teaching for ADF as “a wonderful one.”⁵⁷ Barrett’s ongoing refusal to be dismayed or even acknowledge ADF’s long history of working to undermine LGBTQ protections is deeply disturbing. Also troubling was Judge Barrett’s refusal during the hearing to acknowledge that *Obergefell v. Hodges* was correctly decided, even though she was willing to concede that *Loving v. Virginia* was correctly decided.⁵⁸ Both decisions were grounded in the same constitutional guarantees for liberty and equality, and therefore, Judge Barrett’s refusal to acknowledge that *Obergefell* was correctly decided confirms our view that she is willing to reconsider the constitutional protections relied upon by LGBTQ families. The stakes for our community could not be higher, and nothing that transpired during these rushed proceedings has done anything to allay our deep concerns about this nominee.

* * *

LGBT Americans, people living with HIV, and other at-risk communities rely upon the Constitution’s guarantees of equality, liberty, dignity and justice for their ability to participate fully in society and to make their own major life decisions. Like all Americans, they are entitled to know whether nominees to the Supreme Court would honor the precedents and the judicial methodologies that have included them, at long last, in those guarantees.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information during the confirmation process. You can reach us through Sharon McGowan, Chief Strategy Officer and Legal Director for Lambda Legal, at smcgowan@lambdalegal.org, or Sasha Buchert, Senior Attorney, at sbuchert@lambdalegal.org.

Very truly yours,

Lambda Legal

⁵⁶ Nomination of Amy Coney Barrett to the U.S. Court of Appeals for the Seventh Circuit, Questions for the Record Submitted September 13, 2017—Questions from Senator Whitehouse at 5, *available at* <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Whitehouse%20QFRs.pdf>.

⁵⁷ Nomination of the Honorable Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States (Day 2) (Oct.13, 2020), *available at* <https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-amy-coney-barrett-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-2> (Questioning from Senator Leahy).

⁵⁸ *Id.* (Questioning from Senator Blumenthal).