



Statement of Kristen Clarke
President and Executive Director
Lawyers' Committee for Civil Rights Under Law

Thank you, Chairman Graham, Ranking Member Feinstein, and Members of the Senate Judiciary Committee. I am proud to have the opportunity to testify on behalf of the Lawyers' Committee for Civil Rights Under Law. We are one of the nation's historic, non-partisan civil rights organizations with the unique mission of mobilizing lawyers across the country to provide critical pro bono support to advance our work. Founded in 1963 at the request of former President John F. Kennedy, we work to protect and defend the civil rights of Black people and other communities of color across our nation.

We have appeared before the Supreme Court on numerous occasions throughout the years in civil rights and constitutional cases. Currently, we have several cases in the Supreme Court pipeline that are critical to our work, our mission and to the vulnerable communities that we serve – these are cases involving the protections of the Voting Rights Act, cases challenging race-conscious admissions efforts in the higher education context, a case concerning the 2020 Census and pressing matters involving ballot access during the pandemic. We understand how critical it is for justices to bring to bear an open mind, independence and a willingness to advance the law to ensure that vulnerable communities are not excluded from the goals embodied in our constitution and our federal civil rights laws.

The Supreme Court is an institution that occupies a central place in American democracy and figures prominently in efforts to advance equal justice under the law. Historically, Black people and communities of color have looked to the Court to vindicate their constitutional and civil rights. The Lawyers' Committee has reviewed the civil rights record underlying Judge Amy Coney Barrett, as we have consistently done for Supreme Court nominees over the last several decades. In evaluating nominees to the Court, the Lawyers' Committee for Civil Rights Under Law ("Lawyers Committee") has employed a rigorous standard with two distinct components: (1) exceptional competence to serve on the Court, and (2) a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws. After reviewing the currently available record of Judge Barrett, we have concluded that there is sufficient cause to oppose Judge Barrett's confirmation.

We do not believe that her record reflects a strong commitment to upholding the Constitution or to fairly interpreting and apply civil rights laws. I have attached the Lawyers' Committee's October 12, 2020 report to this testimony and ask to have it included as part of my testimony.

The Lawyers' Committee requires a demonstrated respect for the importance of protecting civil rights based on authored opinions, statements, and articles. Judge Barrett's record raises serious

concerns regarding her ability to respect precedents addressing areas of core importance to our civil rights mission such as voting rights, criminal justice issues, employment discrimination, reproductive rights, all of which disproportionately affect Black people and other communities of color. Of perhaps greatest importance is Judge Barrett’s judicial philosophy of strict textualism and originalism, together with her views on *stare decisis*, that threaten the individual rights that have been established by the Supreme Court for decades.

We explain why this is so. In the originalists’ view, constitutional values are frozen at the time the constitutional text was ratified, the originalist theory often gives no voice or consideration to many of the important constitutional issues facing our country today—such as the rights of those subject to racism in the criminal justice system or the rights of those who continue to face unrelenting levels of voter suppression today— that were simply not contemplated at the time the Constitution was adopted, when the expectations of equality were far different than in our present day.

This philosophy will also have a devastating impact on issues surrounding voting rights. The Lawyers’ Committee has a long history of fighting to ensure that Black people enjoy equal access to the franchise and we have filed over 2 dozen voting rights lawsuits since the start of the pandemic. We are working to address crucial issues including unconstitutional and discriminatory barriers to the ballot faced by voters during the pandemic, and efforts to ensure a complete and accurate census so that reapportionment can be conducted in a fair and just manner. In addition, the Court will soon hear a case arising out of Arizona that implicates the Voting Rights Act. Many of these issues would not have arisen at the time the Constitution was adopted.

Today, we know that voters of color across our country continue to be subjected to voting discrimination. It was troubling to hear Judge Barrett’s unwillingness to acknowledge that voter intimidation is unlawful during Tuesday’s hearing. Voter intimidation is unlawful conduct that violates Section 11(b) of the Voting Rights Act and other federal criminal laws. Our nation deserves a justice who can acknowledge foundational principles that ensure that all citizens will enjoy equal access to our democracy.

Apart from voting rights, other issues are at risk with a Justice who takes a “hard” approach to originalism. For example, “separate but equal” was long recognized as constitutionally acceptable until nearly two centuries after the Constitution was adopted when this doctrine was rejected by a more enlightened court. The same is true for the right to be free from discrimination in jobs and housing and the right to privacy – including contraception and abortion. We do not want to risk going backwards to a time when earlier generations did not share the values that the majority of Americans now rely on as the foundation of a just and fair society.

Originalists look to the world as it existed in 1787. But we live in the 21st century. An originalist will read the Equal Protection Clause, the Due Process Clause, and the Bill of Rights based on the views, to the extent they can be ascertained, of the society at the time these clauses were adopted. There is no doubt that in many areas fundamental to our current understanding of liberty and equality that the views of these earlier societies were much narrower than our own. Without an expansive reading of the Constitution, *Brown v. Board of Education*, *Griswold v. Connecticut*, *Roe v. Wade*, *Obergefell v. Hodges*, and many other landmark rulings, would have reached a different

result. Justice Ruth Bader Ginsburg, whose seat Judge Barrett has been nominated to fill, understood this and applied an evolving rather than static reading of the Constitution in her decisions, most notably in *United States v. Virginia*, 518 U.S. 515, 558 (1996) (explaining that “[a] prime part of the history of our Constitution...is the story of the extension of constitutional rights and protections to people once ignored or excluded.”). In contrast, Judge Barrett rejects the idea that evolving social values are relevant.¹

Of equal concern are her views on the well-established doctrine of *stare decisis*. The doctrine, one of judicial restraint and deference to long-standing precedent, is historically an important consideration for the Court in analyzing constitutional and statutory claims. Her willingness to consider overturning key precedents that she personally believes were wrongly decided pose the same threat as her expressed views on originalism and textualism and also risk moving the country backwards for decades to come.

In a 2013 article she stated that “[s]tare decisis is not a hard-and-fast rule in the court’s constitutional cases, [and] there is little reason to think reversals” would do the Court’s reputation great damage.” She wrote that she “tend[ed] 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 is clearly in conflict with it.”

A good example of the risks resulting from her originalist philosophy combined with her views on *stare decisis*, is *Brown v. Board of Education*, perhaps the most important decision protecting racial equality ever decided.² It is doubtful that the Congress that adopted the Fourteenth Amendment’s Equal Protection Clause in 1868 had a contemporaneous concept of equal protection that would prohibit segregated schools. A strict application of originalism would lead a Supreme Court Justice today to reject the core holding of *Brown* and even vote to overrule it.

I turn now to Judge Barrett’s judicial record. During her short tenure as a judge on the Seventh Circuit she has issued or joined a number of opinions that are of concern to the Lawyers’ Committee.

WORKERS’ AND CIVIL RIGHTS

In the area of workers’ rights, Judge Barrett has demonstrated an inclination to side with the employer rather than the employee and to interpret narrowly the protection of the federal discrimination statutes.

¹ See Amy Coney Barrett, *Congressional Originalism*, 19 J. OF CONST. L. 1, 5 (Oct. 2016) [hereinafter, Barrett, “Constitutional Originalism.”] (“A nonoriginalist may take the text’s historical meaning as a relevant data point in interpreting the demands of the Constitution, but other considerations, like social justice or contemporary values, might overcome it. For an originalist, by contrast, the historical meaning of the text is a hard constraint.” (citations omitted).

² See, e.g., Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC, Aug. 24, 2012 (“It is a singular embarrassment for textual originalists that the most esteemed judicial opinion in American history, *Brown v. Board of Education*, is nonoriginalist.”)

In *EEOC v. AutoZone*, 875 F.3d 860 (7th Cir. 2017), Judge Barrett, along with four other judges on the Seventh Circuit Court of Appeals,⁵ refused the federal government’s request for an *en banc* review in a case in which AutoZone intentionally segregated employees for placement into different facilities on the basis of race, thereby allowing the district court opinion in the employer’s favor to stand. Plaintiff, an African-American male, alleged that AutoZone transferred him to a new location in an effort to create “Hispanic” and “African-American” stores in Chicago depending on the location and the demographics of the communities predominantly served. AutoZone’s practice of employee segregation by race deprived people who did not belong to a designated racial group of employment opportunities in their preferred geographic location. *Id.*

In a strong dissent from the denial of *en banc* review, Judges Diane Wood, Ilana Rovner, and David Hamilton wrote that, under “the panel’s reasoning, a separate-but-equal arrangement is permissible under Title VII as long as the ‘separate’ facilities really are ‘equal’” *Id.* at 861. Because that view was “contrary to the position that the Supreme Court has taken in analogous equal protection cases as far back as *Brown v. Board of Education*, 347 U.S. 483 (1954),” AutoZone’s practice was “easily” an adverse employment action that limited job opportunities and therefore cognizable under Title VII. *Id.* at 862. It is deeply troubling that Judge Barrett did not appreciate that the employer’s action was an obvious violation of Title VII.

In *Smith v. Illinois Department of Transportation*, 936 F.3d 534 (7th Cir. 2019), Judge Barrett authored a panel decision holding that a Black traffic patrol driver failed to make the case that he was fired in retaliation for his complaints of racial bias by his coworkers. Judge Barrett wrote that a jury could reasonably conclude that his unsafe driving and poor job performance led to his dismissal.

In upholding a trial court's grant of summary judgment in favor of the Illinois DOT, Judge Barrett said the worker failed to tie his firing to his allegations of bias. In nixing Smith's claim that he was subjected to a hostile work environment based on his race, Judge Barrett also concluded that he failed to connect the harassment he says he experienced—such as profanities hurled at him by co-workers—to his race, which is a category protected by Title VII.

"While the epithets may have made for a crude or unpleasant workplace, 'Title VII imposes no ‘general civility code,’” Judge Barrett wrote, quoting a 2013 Supreme Court ruling in *Vance v. Ball State University*, 570 U.S. 421 (2013), which held that only employees with the authority to hire, fire or promote others are deemed to be supervisors whose actions impose vicarious liability on employers under Title VII.

"Because Smith introduced no evidence that his supervisors swore at him because he was black, the profanity that he describes does not establish a hostile work environment under Title VII," Judge Barrett added. 936 F.3d at 561. "The n-word is an egregious racial epithet," Judge Barrett wrote. "That said, Smith can't win simply by proving that the word was uttered. He must also demonstrate that [a colleague's] use of this word altered the conditions of his employment and created a hostile or abusive working environment. And he must make this showing 'from both a

⁵ The judges joining with Judge Barrett were Judges Easterbrook, Sykes, Flaum and Kanne. The opinion was authored by Judge Sykes, a Trump appointee.

subjective and an objective point of view.' He introduced no evidence that [the colleague's] use of the n-word changed his subjective experience of the workplace." *Id.*

This decision demonstrates Judge Barrett's lack of understanding and of empathy as to what a racial slur means to an African-American worker. For her to conclude that this did not create a hostile work environment from his perspective is simply incomprehensible.

CRIMINAL JUSTICE

I would like to now turn to Judge Barrett's record on criminal justice issues. Criminal justice concerns remain at the forefront for many Black people and communities of color across our country. We know that critical matters confronting the impact of racism across our justice system will continue to come before the Court.

In *Estate of Biegert v. Molitor*, 968 F.3d 693 (7th Cir. 2020), Judge Barrett authored a decision for a unanimous panel, which also included Judges Diane Sykes and Frank Easterbrook, that is relevant to the current national discourse on law enforcement's use of deadly force. The issue in *Bieger*, was whether police officers used excessive force in responding to an emergency call from a mother reporting her concerns over her son's attempted suicide. In a scuffle at the scene, the son was shot after he had armed himself with a kitchen knife and began stabbing one of the responding officers. Writing for the Court, Judge Barrett "evaluat[ed] the reasonableness of the officers' actions with the understanding the situation they faced was tense, uncertain and rapidly evolving and required them to make split second judgments about how much force to apply to counter the danger [] posed." *Id.* at 701. The Court found that the officers did not initially resort to lethal force but rather increased their use of force as the physical resistance rose. The officers "might have made mistakes and those mistakes may have even provoked [] violent resistance," but that did not mean their conduct violated the Fourth Amendment because the officers did not create a dangerous situation that might have led to the need to use deadly force. *Id.* at 698. By noting that the officers' mistakes may, in fact, have provoked the victim's violent resistance, Judge Barrett effectively acknowledged that the Court was protecting the mistaken actions of the police even when those actions led to the killing of a troubled young man.

In one of her articles, Judge Barrett called the *Miranda* doctrine, which can result in the exclusion of evidence if a confession is made in the absence of a warning of the right to remain silent, an example of "the court's choice to over-enforce a constitutional norm" that goes beyond constitutional meaning and that the *Miranda* warnings "inevitably excludes from evidence even some confessions freely given." *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 170 (2010). This raises grave questions about how she will handle the rights of the accused that come before the Court at a time when we know that racism and bias continue to infect virtually every stage of our criminal justice system.

REPRODUCTIVE RIGHTS

By every indication, Judge Barrett would likely look to restrict reproductive rights and ultimately dismantle *Roe v. Wade*. Her public statements on the issue, judicial decisions, strict originalist approach to constitutional analysis, and negative view of *stare decisis* all point towards the conclusion that she would not recognize *Roe's* federal fundamental right to privacy if appointed

to the High Court. We note that many of the cases that seek to undermine *Roe v. Wade* are cases in which we see a disproportionate impact on low-income women of color.

In 2006, Judge Barrett signed her name to a local newspaper advertisement placed by the St. Joseph County Right to Life Group, of which Barrett and her husband were members, which declared that “it’s time to put an end to the barbaric legacy of *Roe v. Wade* and restore laws that protect the lives of unborn children.”⁶ Notably, this advertisement was not disclosed to the Senate during her 2017 confirmation hearing or in her initial disclosure in connection with her Supreme Court nomination. She belatedly disclosed it last week in a supplemental disclosure. A second advertisement that she signed opposing *Roe* has now surfaced and this one has still not been disclosed to the Senate.

Judge Barrett’s judicial decisions give further credence to the generally held assumption that she would aim to curtail, if not completely dismantle *Roe*. Judge Barrett has squarely confronted the issue of abortion as a judge twice—both times in dealing with requests for review of a panel decision by the full Seventh Circuit Court of Appeals.

In a First Amendment case involving abortion, *Price v. City of Chicago*, 915 F.3d 1107 (7th Cir. 2019), Judge Barrett joined Judge Sykes’ opinion upholding Chicago’s ordinance preventing anti-abortion protesters from getting within a prescribed distance of those seeking abortion care at clinics. The Chicago ordinance was closely modeled after a Colorado law that was upheld by the Supreme Court in 2000 in *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480 (2000). Despite upholding the ordinance, the decision made clear that the Supreme Court’s decision in *Hill v. Colorado* compelled the result and that therefore “the road plaintiffs urge is not open to us in our hierarchical system.” *Price*, 915 F.3d at 1119. Judge Sykes, joined by Judge Barrett, appeared to invite the Supreme Court to overturn *Hill*, writing that because the *Hill* decision “remains binding on us the plaintiffs must seek relief in the High Court.” *Id.*

SECOND AMENDMENT

Judge Barrett’s Second Amendment jurisprudence reflects an originalist viewpoint that makes her more likely to expand individuals’ rights to obtain and use guns than to uphold reasonable restrictions on the purchase and use of guns.

In *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), the Court of Appeals upheld the mail fraud conviction of the owner of an orthopedic footwear company, who argued that the federal and state laws that prohibit people convicted of felonies from having guns violated his Second Amendment right to bear arms. The majority held that the government had shown that the prohibition was reasonably related to the government’s goal of keeping guns away from people convicted of serious crimes.

Judge Barrett dissented and authored a lengthy historical recitation of gun laws involving felons and the mentally infirm. At the time of the country’s founding, she wrote, founding-era legislatures took gun rights away from people who were believed to be dangerous in order to protect public safety. The laws at issue, however, were too broad in her view because they banned people like

⁶ Colby Itkowitz, *Barrett signed ad in 2006 decrying ‘barbaric legacy’ of Roe v. Wade, advocating overturning the law*, WASH. POST (Oct. 1, 2020), https://www.washingtonpost.com/politics/courts_law/amy-coney-barrett-roe-v-wade/2020/10/01/530072aa-0412-11eb-b7ed-141dd88560ea_story.html.

the plaintiff from having a gun without any evidence that he posed a risk or was dangerous. Barrett stressed that the Second Amendment “confers an individual right, intimately connected with the natural right of self-defense and not limited to civic participation.” *Id.* at 463.

The majority opinion—authored by two judges appointed by President Reagan—emphasized that Barrett’s position was in conflict with that of every appellate court that had addressed the issue. *See, e.g., Melinda v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019); *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014); *United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012).

IMMIGRATION

In the area of immigration law, Judge Barrett’s decisions suggest she favors the wide discretion of the Executive Branch over the individual rights and liberties of immigrants.

Most prominently, Judge Barrett would have upheld the Trump Administration’s “public charge” rule, penalizing and denying immigrants permanent resident status for exercising their right to use Congressionally available federal benefits.

Separately, in *Cook Cnty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020), Judge Barrett dissented from Judge Diane Wood’s majority decision leaving in place a preliminary injunction entered by the trial court, blocking the Trump Administration’s rule preventing immigrants who the Executive Branch deemed likely to receive public assistance in any amount, at any point in the future, from entering the country or adjusting their immigration status. The rule—requiring aliens seeking to extend their nonimmigrant status or change their status to show that they have not received public benefits for more than 12 months within a 36-month period—purported to implement the “public-charge” provision in the Immigration and Nationality Act. Judge Wood, writing for the majority, found that it “does violence to the English language and the statutory context” to say that “public charge” covers a person who receives “only *de minimus* benefits for a *de minimus* period of time.” *Id.* at 229. The rule penalized immigrants holding green cards when Congress explicitly permitted those immigrants access to such benefits.

In her lengthy dissent Judge Barrett faulted the majority for narrowly defining a public charge as referring “exclusively to primary and permanent dependence” on the state. After recounting the history of the term “public charge,” she found that “public charge” referred to a lack of self-sufficiency that officials had broad discretion to estimate. *Id.* at 242.

In *Yafai v. Pompeo*, 912 F.3d 1018 (7th Cir. 2019), Barrett again sided with the government over individual immigrant rights. There, writing for a three-judge panel, she upheld the denial of a Yemeni woman’s visa application on the ground that she had sought to smuggle two children into the United States. The woman had told the embassy that the children she was accused of smuggling had died in a drowning accident and provided documentation. The consular official cited no evidence to support the smuggling accusations. Over a vigorous dissent by Judge Kenneth Ripple (a Reagan appointee), Barrett’s opinion concluded that even without supporting evidence, as long as the consular official cites a statute or regulation as the basis of the denial, the decision could not be reviewed by the court.

CONCLUSION

The nomination of Justice Barrett arises at one of the most tumultuous times in our nation's history. This year alone has seen the country struggling in the face of a global pandemic and economic crisis, coupled with nationwide protests about unconstitutional policing practices and racial injustice. At this very moment, we are in the middle of a presidential election and well over 10 million American's votes have already been cast. Our nation deserves a nomination process with integrity and one that respects the will of the people.

For all of the reasons described in this statement, the Lawyers' Committee for Civil Rights Under Law strongly opposes the nomination of Judge Barrett to the Supreme Court. We believe that she will move our country backward to a time when not all Americans enjoyed the civil rights they now enjoy. Black people and people of color, as well as all other marginalized groups, should not once again suffer the indignity of second-class citizenship. Our nation deserves a Justice who is committed to protecting the hard-earned rights of all Americans, particularly Black people and other historically disenfranchised communities.