



## Why Amy Coney Barrett Should Be Confirmed to the Supreme Court

### SUMMARY:

For the past 50 years, the Supreme Court has increasingly stepped outside of its limited role in our constitutional order, issuing growing numbers of activist and policy-driven rulings which have no constitutional warrant but which have allowed the Court to amass great power for itself at the expense of the people. By now, in many areas (including many of concern to Family Research Council), the Court has almost become an unchallengeable, unreviewable super-legislature. For this reason, it is all the more important to appoint Supreme Court justices holding an originalist philosophy, who can return our judiciary to a proper understanding of the Constitution's powers.

Judge Amy Coney Barrett holds such a philosophy. If power is returned to the people through Supreme Court rulings based on the Constitution's plain meaning in accord with its limited role for the judiciary – to which Judge Barrett adheres – we will not only return to a proper, originalist application of our Constitution, but we may even succeed in reducing the contentious nature of the nominations process itself over the long-term.

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### Introduction

During his 2016 presidential campaign, President Trump produced a list of 21 potential nominees for Justice Scalia's vacant seat on the Supreme Court and promised to pick a nominee from that list. After being elected, he nominated Judge Neil Gorsuch, who was subsequently confirmed to the Supreme Court. In his short time on the Court, Justice Gorsuch has quickly developed an excellent record in ruling as an originalist and has articulated strong legal defenses of religious liberty. However, a disappointing ruling in *Bostock v. Clayton County* has exposed the need to ensure other justices will remain resolute textualists and originalists, un-swayed by the pressures and social opinions of today.

Since replacing Justice Scalia, President Trump appointed Justice Brett Kavanaugh after Justice Anthony Kennedy retired in July of 2018. When Justice Ruth Bader Ginsburg passed away in September of this year, President Trump announced his intent to nominate another female jurist to replace the late Justice Ginsburg. On September 26, 2020, President Trump nominated Judge Amy Coney Barrett for this seat. A mother of seven and a former law clerk for Justice Scalia, Judge Barrett is an excellent candidate for the Supreme Court.<sup>1</sup>

This analysis generally discusses the type of justices who we want to sit on our highest court, and then explains why Judge Barrett is ultimately qualified for that role and should be confirmed.

## I. General Principles: What to Look for in a Supreme Court Justice

Since the founding of this Republic over 240 years ago, it has been understood that first and foremost governments are put in place to secure the inalienable rights bestowed upon us by God, our Creator. These rights cannot be taken away from any American by any level of government. Our Constitution was adopted to preserve these rights and to institute a just government that will also provide those benefits enumerated in the Preamble to the Constitution.

The primacy of law-making by our elected representatives and the adherence to the rule of law by the executive branch form the keystone of our governmental framework. Over the past 200 years, the power of the judiciary has grown to the point that it now threatens the separation of powers between the branches. The power of the legislative branch to make our laws has been challenged most directly by the courts. We must now confront a crisis of governance created by our judiciary and, more specifically, by the Supreme Court, which has seized powers it was never intended to possess. In the period since the New Deal era, the Supreme Court has become an almost unchallengeable, unreviewable super-legislature. The Founding Fathers did not risk their lives, their fortunes, and their sacred honor so that someday we would be ruled over by an oligarchic, self-aggrandizing body of lawyers.

In no area is this more prominent than in the Court's self-invented "right to abortion," which has been dictated as "law" for all 50 states by the Court for the past 45 years.<sup>2</sup> In perhaps no other area do we see a greater price paid for judges giving in to the temptation to cease judging and start making policy. Tens of millions of unborn babies have been killed in that time.<sup>3</sup>

Similarly, and more recently, a slim 5-4 majority mandated same-sex marriage in all 50 states, even though over 30 states had explicitly rejected this concept since the late 1990s.<sup>4</sup> In this way, the federal courts were hijacked to impose same-sex marriage on America.

Assaults on religious freedom have followed both decisions, especially in the past 10 years as federal and state governments attempted to compel the provision of abortifacient contraceptives and tacit recognition of same-sex marriage by small business owners and nonprofit organizations.

Supreme Court decisions in recent years have protected the right of religious conscience in regard to abortion<sup>5</sup> and same-sex marriage.<sup>6</sup> Yet those decisions hang by a thread.<sup>7</sup> We must have a justice who will protect religious freedom, and who will firmly and resolutely respect the Constitution's original plain meaning and limited role of the judiciary. The stakes are too high for anything else.

The late Justice Antonin Scalia was one who was ever cognizant of the danger of such an activist Court. When the Court imposed same-sex marriage on the nation in *Obergefell v. Hodges*, Justice Scalia wrote in dissent:

"I write separately to call attention to this Court's threat to American democracy ... Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court ... This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."<sup>8</sup>

Justice Scalia himself would agree that outstanding judicial nominees should recognize limits to the judicial power created by Article III of the Constitution. Such nominees for all federal judicial positions,

including the U.S. Supreme Court, should only include those who respect the judiciary’s proper place within the Constitution’s governmental framework—one that recognizes the irreducible role of the States (federalism) and the irreducible role of the Congress and the President (separation of powers).

When interpreting the Constitution, members of the judiciary must look first to the text of the Constitution, and their decisions must conform to the Constitution’s original meaning as understood at the time the constitutional provision’s language was adopted. Similarly, judges interpreting statutes and regulations must look to the text of those provisions and assess them in light of their meaning at the time they were enacted or adopted.

The legitimacy of our government lies in the fact that it expresses the will of the American people through their elected representatives. Judicial activism undermines the sovereignty of the American people, the rule of law, and a proper understanding of the Constitution. This is true whether it occurs through an inappropriate reliance on foreign law, the Court’s projections of “popular opinion,” or some other means by which the Court imposes its policy preferences in its rulings.

Since the late 19th century, Congress has ceded ever-growing quantities of legislative authority to executive branch administrative agencies. Such governmental entities were never envisaged by the Framers, and it is only with their continued existence that our vast administrative state would even be possible. These agencies now produce unfathomable quantities of costly rules that typically have the force of law on par with statutes enacted by Congress. Regulations can only be known by the regulated in some hypothetical sense, and enforcement actions are often arbitrary and excessive. In short, the constitutional rights of Americans have been gutted by the regulatory state as the courts have enunciated elaborate doctrines of “deference” that place bureaucratic judgments and actions beyond the reach of judicial review and any reasonable definition of justice.

With respect to the administrative agencies, the best judicial candidates will be those who seek to reduce the excessive levels of deference that federal courts have granted federal agencies in interpreting the statutes that pertain to them, especially provisions related to the jurisdiction or scope of the agency’s power. Having no judicial check on bureaucratic self-assessments of their own legislative and regulatory jurisdiction provides a dangerous invitation for ever-expanding and unconstitutional governmental expansion. What bureaucracy will limit its own power? To ask the question is to answer it.

Having briefly laid out a set of principles to guide an originalist assessment of judicial candidates, we will now examine the cases and issues of concern to Family Research Council (FRC) that will arise or are likely to arise at the Supreme Court in the near future—the outcome of which will clearly be affected by Judge Barrett’s judicial philosophy.

## **II. Judge Barrett’s Judicial Philosophy and Record Reflects Positively on Issues of Concern to FRC**

### Abortion

Abortion-related issues have come before the Court a number of times in recent years and will continue to do so. Several years ago, the Court in *Whole Woman’s Health v. Hellerstedt* ruled 5-3 that a Texas law required abortionists to have hospital admitting privileges, and improved safety standards for women seeking abortion, was somehow an unconstitutional violation of the “right” to abortion.<sup>9</sup> The Court affirmed its disregard for the safety of women in an effort to protect the abortion “right” in *June Medical Services v. Russo*.<sup>10</sup>

Judge Barrett is likely to be a faithful originalist and not fall into the activist “abortion distortion” reading of this area of law, as the *Hellerstedt* Court did when it relied on *Planned Parenthood v. Casey* to claim that Texas state law imposed an undue burden on women seeking abortions.<sup>11</sup> Judge Barrett will likely allow states much more leeway to regulate abortion given her originalist understanding of the Constitution and principles of federalism.

Her record on the 7th Circuit indicates as much. In *Planned Parenthood v. Commissioner*, the U.S. Court of Appeals for the 7th Circuit held as unconstitutional an Indiana law preventing (1) abortions based on the unborn child’s sex, race, or disability and (2) dictating the manner in which aborted fetal remains may be disposed.<sup>12</sup> When the 7th Circuit denied en banc review in this case, Judge Barrett joined the dissent, which characterized the Indiana statute as aiming to prevent eugenics from being advanced through abortion.<sup>13</sup> As the dissent noted, “[n]one of the Court’s abortion decisions hold that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children.”<sup>14</sup>

In *Planned Parenthood v. Box*, the en banc 7th Circuit declined to reconsider an earlier decision that blocked an Indiana parental-notification law. Judge Barrett joined the dissent, which stated: “Given the existing unsettled status of pre-enforcement challenges in the abortion context, I believe this issue should be decided by our full court. Preventing a state statute from taking effect is a judicial act of extraordinary gravity in our federal structure.”<sup>15</sup>

### Free Speech – Pro-Life Issues

In a 5-4 vote, the Court held in *NIFLA v. Becerra* that California’s attempt to force pro-life pregnancy care centers to speak pro-abortion messages against their convictions violated the First Amendment’s protection against compelled speech.<sup>16</sup> While this was a major victory for pro-life advocates and free speech supporters alike, it should alarm all freedom-loving Americans that it was a 5-4 vote. The wrong justice could tip this balance against liberty in similar future decisions, and we need an originalist like Judge Barrett on the Court to ensure this does not happen.

*NIFLA* was a major victory for pro-life groups and First Amendment rights, and it has already positively impacted three other similar cases regarding pro-life activism and free speech. A few days after deciding *NIFLA*, the Court instructed lower courts to reconsider their anti-free speech rulings in *Livingwell Medical Clinic, Inc. v. Becerra*,<sup>17</sup> *Mountain Right to Life, Inc. v. Becerra*,<sup>18</sup> and *A Woman’s Friend Pregnancy Resource Clinic v. Becerra*<sup>19</sup> in light of the recent opinion in *NIFLA*.

This immediate and positive impact of the pro-free speech ruling in *NIFLA* shows how crucial it is to have Supreme Court justices who respect the text of the Constitution. Yet the fact that they did so in a 5-4 vote does not allow us to rest too easy and reminds us of the importance of having an originalist like Judge Barrett on the Court.

Other cases, like *Newman v. National Abortion Federation*, a case the Court declined to take up, will likely continue to arise and possibly be heard by the Court. Here, pro-life activists recorded undercover videos at the National Abortion Federation’s (NAF) annual meetings.<sup>20</sup> NAF received an injunction barring the activists from publishing the videos on the grounds that the people filming had violated nondisclosure agreements that were enforceable as contracts.<sup>21</sup> The Supreme Court declined to hear the case and overturn this ruling.<sup>22</sup> Cases like this are important for both free speech and pro-life activism, and a jurist like Judge Barrett would help guarantee that future cases in this vein are decided in accordance with constitutional rights.

In *Price v. City of Chicago*, Judge Barrett clearly showed that she would appropriately follow precedent as a lower court judge. This case involved a First Amendment lawsuit by pro-life sidewalk counselors to stop enforcement of a ‘bubble zone’ ordinance. The opinion, which Judge Barrett signed onto, properly acknowledged that there was Supreme Court precedent, *Hill v. Colorado*, which was directly on point and binding on the 7th Circuit.<sup>23</sup> However, the opinion also significantly criticized *Hill* and pointed to two other Supreme Court cases that undercut *Hill* but did not overturn it. In *Price*, the 7th Circuit concluded: “The road the plaintiffs urge is not open to us in our hierarchical system. Chicago’s bubble-zone ordinance is materially identical to – indeed, is narrower than – the law upheld in *Hill*. While the Supreme Court has deeply unsettled *Hill*, it has not overruled the decision. So, it remains binding on us. The plaintiffs must seek relief in the High Court.”<sup>24</sup>

### Religious Freedom – HHS Mandate

Several years ago, in *Zubik v. Burwell*, the Court faced claims by religious nonprofits that the Religious Freedom Restoration Act (RFRA) entitled them to an exemption from being forced to violate their consciences by participating in the Obama administration’s HHS contraceptive mandate.<sup>25</sup>

Although President Trump’s HHS issued new regulations governing this matter, they were challenged in court by several states. The mandate concerns dozens of organizations like the Little Sisters of the Poor who are fighting for conscience protections with RFRA and First Amendment claims,<sup>26</sup> to say nothing of the for-profit entities affected by the Court’s 5-4 ruling in *Burwell v. Hobby Lobby*.<sup>27</sup> Between these sets of cases, there have been at least 100 entities involved in the litigation,<sup>28</sup> aside from the incalculable number of others affected by the Court’s rulings. The Little Sisters of the Poor won an important victory in June 2020,<sup>29</sup> but some uncertainty on this issue remains. It is thus important to have justices with a proper understanding of religious freedom statutes and constitutional protections like Judge Barrett as these issues continue to arise.

### Religious Freedom – Marriage, Family, and Human Sexuality

In a 5-4 vote, the Court ruled in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* in favor of Christian small business owner Jack Phillips, who didn’t want to be forced to create a custom same-sex wedding cake against his conscience. Though Phillips received relief after years of fighting for his religious freedom, the decision was largely limited to the specific facts of the case; the Court ruled for Phillips based on the Commission’s overt hostility to his religious beliefs – which it claimed violated the free exercise protections of the First Amendment.<sup>30</sup> Despite the positive result in this case, judges and commissioners who are more subtle with their biases will likely still find a way to rule against religious liberty, and the brewing conflicts between religious freedom and government-mandated same-sex marriage are by no means resolved.

Right now, there are multiple other small business owners who have been penalized by different states for refusing to use their talents to further same-sex weddings.<sup>31</sup> Just days after issuing the ruling in *Masterpiece*, the Court overturned a lower court decision against florist Barronelle Stutzman in *Ingersoll v. Arlene’s Flowers*, instructing the lower court to reconsider the case in light of *Masterpiece*.<sup>32</sup> Like Phillips, Stutzman had declined to create floral arrangements for a same-sex wedding, despite happily serving these customers anything else. The Washington Attorney General had sued her for discrimination, and the Washington Supreme Court ultimately decided that she must pay burdensome penalties.<sup>33</sup> Thankfully, the Supreme Court reversed this decision.

This is another step in the right direction for religious freedom, but other cases continue to arise. The case of *Klein v. Oregon Bureau of Labor and Industries*, featuring bakers Aaron and Melissa Klein – more Christian small business owners who were sued after they refused to use their culinary talents to create a cake for a same-sex wedding – made its way to the Supreme Court in 2018 and the Court remanded it to the lower court in light of the *Masterpiece* decision.<sup>34</sup>

Other cases deal with the religious freedom of small business owners on the issue of faith and sexuality more broadly. In *EEOC v. R.G. & G.R. Harris Funeral Homes*, the Sixth Circuit Court of Appeals rejected the RFRA claim of a funeral home owner who wanted to run his business in accordance with his faith and not be forced to alter the workplace at the behest of an employee who wanted to live out a transgendered lifestyle.<sup>35</sup> This case went before the Supreme Court consolidated with *Bostock v. Clayton County* and was decided in June 2020. Unfortunately, with a surprising 6-3 decision, the Court rewrote the text of Title VII of the Civil Rights Act of 1964 to say that its prohibition on discrimination based on sex includes “sexual orientation” and “gender identity.” This result has significant ramifications for federal employment law, and is likely to spark other religious liberty issues in the years ahead. As pointed out in the dissenting opinions, there are also implications for free speech and women’s rights (Title VII is connected to Title XI, which guarantees equality for female athletes).

There was already litigation regarding the definition of “sex” in Title IX before *Bostock* was decided. In various places throughout the United States, male athletes had been allowed to participate in female sports because they identified as female. Female athletes have filed suit. This issue could eventually come before the Supreme Court, and we need someone like Judge Barrett on the Court who will decide the cases before them and not inject their policy preferences into the law.

In *Fulton v. City of Philadelphia*, a district judge rejected a Christian adoption provider’s religious freedom claim, holding that it must abide by a city nondiscrimination policy even if that means violating its faith tenets or closing.<sup>36</sup> The U.S. Court of Appeals for the 3rd Circuit affirmed the district court ruling,<sup>37</sup> and now the case is set to be heard by the Supreme Court on November 4, 2020. It will have significant ramifications for religious liberty and the roughly 400,000 children in the foster care system who need every available agency working on their behalf.

The First Amendment and religious freedom statutes like RFRA should protect these small business owners, but lower courts who are ignorant or hostile to religious freedom have often ruled against them. It is therefore imperative to appoint someone to the Supreme Court who understands statutory and constitutional protections for religious liberty when the issue arises again. A constitutional originalist and textualist like Barrett will follow the plain meaning of the First Amendment and the text of statutes to ensure that religious freedom is protected in these increasingly anti-religious times.

Judge Barrett has clearly stated that regardless of one’s policy preference, a statute such as Title VII, or Title IX, cannot be reinterpreted to mean something the drafters of the statute would have never imagined.<sup>38</sup> We need justices like her on the Supreme Court.

### Religious Freedom – Religion in the Public Square

In *Trinity Lutheran Church v. Comer*, the Court ruled that government exclusion of an otherwise-qualified church from a public grant program solely because it was a religious organization violated First Amendment free exercise protections against discrimination against religious organizations in the public square.<sup>39</sup> This is an important ruling for religious freedom and is already benefiting other religious organizations in their cases against this type of arbitrary discrimination. Like *NIFLA*, this ruling

demonstrates the important impact of Supreme Court decisions on the role of religion in the public square.

In *Espinoza v. Montana Department of Revenue*, the Montana Department of Revenue refused to follow a state law allowing people to deduct certain donations to scholarship programs from their taxes because some of the benefits of the program went to religious schools. The Supreme Court ruled 5-4 against the Montana Department of Revenue and deemed the unequal treatment of religious schools to be unconstitutional.<sup>40</sup> While this ruling is encouraging, it was still decided by a one-vote margin, highlighting the need for more originalists like Judge Barrett to be confirmed to the Supreme Court.

The Court has also dealt with many cases over the years regarding religious monuments in the public square and will likely continue to do so. In *American Legion v. American Humanist Association*, a large, cross-shaped memorial to World War I veterans visible to the public was challenged by the American Humanist Association because it allegedly violated the Establishment Clause.<sup>41</sup> Even though an originalist understanding of the Establishment Clause would permit such monuments to stand, the Supreme Court has not always ruled that they are constitutional. As the Court faces similar cases, it will become even more important to have a staunch originalist like Judge Barrett on the bench.

Even after the Supreme Court upheld the constitutionality of public prayer before local government bodies in *Town of Greece v. Galloway*,<sup>42</sup> that issue has continued to percolate in the courts, with appeals courts splitting on the constitutionality of the practice in *Bormuth v. County of Jackson*<sup>43</sup> and *Rowan County v. Lund*.<sup>44</sup> Cases challenging public prayer are not going away, and it will be important to have a justice who understands how to properly interpret the Establishment Clause and uphold such prayer under an originalist reading of the Constitution.

#### Transgender Issues – Executive Branch Authority to Regulate the Military

In *Doe 1 v. Trump*, a federal judge held that a transgender member of the military was likely to succeed on an equal protection claim against President Trump’s order that most transgender individuals leave the military.<sup>45</sup> On appeal of this case, the D.C. Circuit refused to allow an administrative stay of the lower court’s decision.<sup>46</sup> These cases demonstrate the power imbalance that results when judges take it upon themselves to issue politically-motivated rulings and make policy, especially in areas where they should be least able to do so (the Constitution leaves broad power to the executive branch on matters concerning the military), and when they again read new “rights” into the Constitution. These cases were ultimately resolved, and the policy prioritizing military readiness, lethality, and unit cohesion was allowed to go into effect. However, cases regarding religious freedom and/or social engineering in the military will likely continue to arise.

An originalist like Judge Barrett will not affirm this sort of judicial activism, or this distortion of the Constitution’s separation of powers. For these reasons, it will be important to have someone with her judicial philosophy on the bench if this case or others like it go before the Court.

#### Other Constitutional Rights

Judge Barrett will be a faithful originalist on the Second Amendment, as well. In *Kanter v. Barr*, Judge Barrett argued in her dissent for an adherence to the original meaning of the Second Amendment.<sup>47</sup> Concerning whether felons convicted for non-violent crimes should be stripped of their Second Amendment right, Judge Barrett stated, “[a]bsent evidence that [non-violent felons] would pose a risk to the public safety if [they] possessed a gun, the governments cannot permanently deprive [them] of

[their] right to keep and bear arms.”<sup>48</sup> This further demonstrates her commitment to applying the Constitution as it is written and following precedent.

### **III. The Many Supreme Court Cases Decided by One Vote Show the Importance of Having a Justice with an Originalist Philosophy Like Judge Barrett**

The cases below (many of which are quite recent) dealt with wide-ranging issues, and their close 5-4 votes (and the 4-4 decisions from the time period after Justice Scalia’s death) remind us of the importance of having someone on the Court who adheres to an originalist interpretation of the Constitution. Judge Barrett holds such a philosophy and will decide such cases according to that philosophy.

#### 4-4 Cases:

- *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016): A 4-4 decision left in place a lower court ruling holding that requiring non-union members to pay shop fees did not violate the First Amendment.
- *United States v. Texas*, 579 U.S. \_\_\_ (2016): A 4-4 decision left in place a lower court ruling which had put the Obama administration’s Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) immigration program on hold because the challengers to the program would likely succeed on their claims that it was unlawful.

#### 5-4 Cases:

- *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020): A 5-4 majority upheld a state law allowing people to deduct certain donations to scholarship programs from their taxes because some of the benefits of the program went to religious schools, deeming Montana’s unequal treatment of religious schools to be unconstitutional.
- *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020): A 5-4 majority struck down a Louisiana admitting privileges requirement law for abortionists performing abortions, holding that the law imposed an undue burden on the constitutional “right” to abortion.
- *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018): A 5-4 majority upheld free speech and free expression for pro-life pregnancy care centers to not be forced to proclaim messages against their beliefs.
- *Trump v. Hawaii*, 138 S. Ct. 2392 (2018): A 5-4 majority held that the president has the authority under the Immigration and Nationality Act to regulate immigration as it pertains to national security, and that this does not violate the Establishment Clause.
- *Janus v. AFSCME*, 138 S. Ct. 2448 (2018): A 5-4 majority held that public employees could not be forced to subsidize unions which they didn’t want to join, as it was a First Amendment compelled speech violation to force them to support groups proclaiming messages and engaging in activities they objected to.
- *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016): A 4-3 majority upheld a public university admissions program which considered race as a factor in admissions as lawful under the Equal Protection Clause (Justice Scalia had passed away and Justice Kagan recused herself).
- *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015): A 5-4 majority imposed same-sex marriage on the nation over the objections of an overwhelming majority of states whose citizens had voted for man-woman marriage in state referenda.

- *NFIB v. Sebelius*, 132 S. Ct. 2566 (2014): A 5-4 majority upheld the Obamacare individual mandate forcing everyone to purchase a government-approved health insurance plan as a constitutional exercise of Congress’s taxing power.
- *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014): A 5-4 majority protected the freedom of government bodies to choose to have a time of prayer before public meetings as long as it permitted expressions from all faiths equally.
- *United States v. Windsor*, 133 S. Ct. 2675 (2013): A 5-4 majority ruled that Congress could not define “marriage” in federal laws to mean man-woman marriage.
- *District of Columbia v. Heller*, 554 U.S. 570 (2010): A 5-4 majority ruled that the Second Amendment protects an individual’s right to possess a firearm unconnected with service in a militia.
- *Citizens United v. FEC*, 558 U.S. 310 (2010): A 5-4 majority restored the First Amendment protection of political speech, allowing non-profit corporations and others to come together with their donors and supporters to educate the American people.
- *Gonzales v. Carhart*, 550 U.S. 124 (2007): A 5-4 majority upheld a federal law restricting the use of the horrific partial-birth abortion technique.
- *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002): A 5-4 majority held that parents could use public funds (in the form of vouchers distributed to needy families) to choose to send their children to religiously affiliated schools.
- *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000): A 5-4 majority ruled that the First Amendment’s freedom of association protects the Boy Scouts from being forced to admit scout leaders who identify as homosexual under state laws barring discrimination on the basis of sexual orientation.
- *Rosenberger v. UVA*, 515 U.S. 819 (1995): A 5-4 majority upheld the right of religious student groups to receive university funding on an equal basis with other student groups.
- *Lee v. Weisman*, 505 U.S. 577 (1992): A 5-4 majority ruled that schools cannot sponsor a member of the clergy to conduct even non-denominational prayers at a graduation.
- *Rust v. Sullivan*, 500 U.S. 173 (1991): A 5-4 majority upheld Reagan administration regulations providing that federal tax dollars could go to family planning but not to abortion counseling, referral, or advocacy.

#### **IV. Other Considerations in Favor of Judge Barrett’s Confirmation**

As shown above, Judge Barrett has a solid history of applying and advocating originalist principles on issues important to social conservatives. Her trail of opinions and dissents demonstrates her commitment to faithfully apply the Constitution and statutes as written, and to oppose judicial activism. Judge Barrett is on record with her constitutional views. Moreover, Judge Barrett credits Justice Scalia as a model judge who “follows the law where it goes and doesn’t decide simply on the basis of partisan preference.”<sup>49</sup>

Her personal life and integrity only add to the case for her confirmation. Her personal story directly contradicts the narrative we sometimes hear: that women must sacrifice their children on the altar of their success. Judge Barrett has a beautiful and diverse family. Not only does she have two wonderful adopted children from Haiti, but she also has a delightful Down syndrome son whom the other kids profess as their favorite sibling.<sup>50</sup> This mom of seven has been a highly successful and prolific professor and judge all while taking care of her children alongside her husband, Jesse. Both her judicial record and personal life testify to Judge Barrett’s commitment to the dignity of all people.

It is argued that some justices described as conservative originalists have ceded to political and cultural pressure on certain matters of social public policy and ultimately allowed that pressure, not the law, to dictate the opinion of certain cases. Judge Barrett will not be such a judge.

She has unashamedly professed her views publicly, many of which are derived from her faith. She recognizes and affirms “the meaning of human sexuality, the significance of sexual difference.”<sup>51</sup> She understands and affirms the scientific and biological meaning of “sex.” She affirms natural marriage, saying, “marriage and family [are] founded on the indissoluble commitment of a man and a woman.”<sup>52</sup> She has stood strong for religious liberty, saying the previous administration’s attempted “accommodation” for religious entities to the mandate for employers to provide insurance coverage for abortion-inducing drugs “fails to remove the assault on religious liberty and the rights of conscience which gave rise to the controversy.” Further, the letter she signed on this topic properly acknowledges the constitutional scope of religious liberty, stating, “[t]he administration still fails to understand that institutions that employ and serve others of different or no faith are still engaged in a religious mission and, as such, enjoy the protections of the First Amendment.”<sup>53</sup>

Judge Barrett is also profoundly pro-life, as evidenced not only by her judicial record, but by her time as a professor and her personal life as a mother of seven. She has affirmed “the dignity of the human person and the value of human life from conception to natural death.”<sup>54</sup> She has proclaimed abortion to be “always immoral”<sup>55</sup> and was a member of “Faculty for Life” at Notre Dame, which “is open to any faculty, administration, or staff member at the University of Notre Dame who respects the sacred value of human life from its inception to natural death . . . and is committed to the legal and societal recognition of the value of all human life.”<sup>56</sup> Judge Barrett’s originalist views will likely preclude her from even treating abortion as a constitutional right at all. She has emphasized that the abortion “right” was created through judicial fiat.<sup>57</sup>

Her public statements and personal life, along with her committed originalist judicial philosophy, demonstrates she will be a strong advocate against political or cultural pressure by pro-abortion or LGBT activists, or anyone else. The strength of her personal convictions will be an asset as she faithfully fulfills the calling of a judge to impartially decide the cases before her, without outside pressure.

## **Conclusion**

Much of why current judicial nomination battles are so contentious is that activist Supreme Court justices and other federal judges have taken issues out of the hands of the people by ruling on a myriad of constitutional “rights” over the years. Every time a state constitutional amendment is struck down because one more federal judge claims it violates some constitutional “right,” the voters become more powerless in their own country, and increasingly disenfranchised. If power is returned to the people through Supreme Court rulings based on the Constitution’s plain meaning in accord with its limited role for the judiciary – to which Judge Barrett adheres – we will not only return to a proper, originalist application of our Constitution, but we may even succeed in reducing the contentious nature of the nominations process itself over the long-term. Judge Barrett’s confirmation is one step in this direction. We strongly urge her confirmation.

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- <sup>1</sup> “Hesburgh Lecture 2016: Professor Amy Barrett at the JU Public Policy Institute,” Jacksonville University, December 5, 2016, accessed October 8, 2020, <https://www.youtube.com/watch?v=7yjTEdZ81II>.
- <sup>2</sup> *Roe v. Wade*, 410 U.S. 113 (1973), <https://caselaw.findlaw.com/us-supreme-court/410/113.html>; *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), <https://caselaw.findlaw.com/us-supreme-court/505/833.html>.
- <sup>3</sup> “Current Abortion Statistics,” U.S. Conference of Catholic Bishops, accessed October 9, 2020, <https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/current-abortion-statistics>.
- <sup>4</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), [https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf).
- <sup>5</sup> *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014), [http://www.supremecourt.gov/opinions/13pdf/13-354\\_olp1.pdf](http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf).
- <sup>6</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S.Ct. 1719 (2018), [https://www.supremecourt.gov/opinions/17pdf/16-111\\_j4el.pdf](https://www.supremecourt.gov/opinions/17pdf/16-111_j4el.pdf).
- <sup>7</sup> While *Masterpiece* was decided with seven justices supporting the Court’s holding, fewer justices supported the underlying religious liberty claim.
- <sup>8</sup> *Obergefell*, 135 S. Ct. at 2626-27 (2015) (Scalia, J., dissenting), [https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf).
- <sup>9</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), [https://www.supremecourt.gov/opinions/15pdf/15-274diff\\_97bf.pdf](https://www.supremecourt.gov/opinions/15pdf/15-274diff_97bf.pdf).
- <sup>10</sup> *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020), [https://www.supremecourt.gov/opinions/19pdf/18-1323\\_c07d.pdf](https://www.supremecourt.gov/opinions/19pdf/18-1323_c07d.pdf).
- <sup>11</sup> Travis Weber, “‘Abortion Distortion’ at work in *Whole Woman’s Health v. Hellerstedt*,” FRC Blog, June 28, 2016, accessed August 14, 2018, <http://www.frcblog.com/2016/06/abortion-distortion-work-whole-womans-health-v-hellerstedt/>.
- <sup>12</sup> *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r of Ind. State Dept. of Health*, 917 F.3d 532 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing en banc), <https://casetext.com/case/planned-parenthood-indiana-v-commr-of-the-ind-state-dept-of-health-2>. Judge Easterbrook was joined by Judges Sykes, Barrett, and Brennan.
- <sup>13</sup> *Ibid.*
- <sup>14</sup> *Ibid.*
- <sup>15</sup> *Planned Parenthood of Ind. and Ky., Inc. v. Box*, 949 F.3d 997 (7th Cir. 2019) (Kanne, J., dissenting from the denial of rehearing en banc), <https://www.courthousenews.com/wp-content/uploads/2019/11/Abortion.pdf>. Judge Kanne was joined by Judges Flaum, Barrett, Brennan, and Scudder. [Planned Parenthood of Ind. & Ky. v. Box, 949 F.3d 997, 999 \(7th Cir. 2019\)](https://www.courthousenews.com/wp-content/uploads/2019/11/Abortion.pdf)
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