



FEMINIST MAJORITY FOUNDATION

Working for Women's Equality

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Chairman Chuck Grassley
Committee on the Judiciary
United States Senate

Ranking Member Dianne Feinstein
Committee on the Judiciary
United States Senate

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the Feminist Majority Foundation, a national organization dedicated to women's equality, reproductive health, and non-violence, we write to oppose the nomination of Amy Coney Barrett to serve as a United States Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit.

Any nominee to the federal bench must show both the ability and willingness to be open-minded and impartial while carrying out the duty to uphold the law and the Constitution. Unfortunately, Barrett's writings suggest that she may be unwilling to set aside her personal religious beliefs if she were confirmed as a Circuit Judge.

In particular, the Feminist Majority Foundation has deep concerns about whether, as a judge, Barrett could set aside her personal beliefs concerning abortion—which she has described as “always immoral”¹—in order to decide fairly and impartially cases concerning the constitutional right to access legal abortion as well as other cases involving women's reproductive health and rights.

This concern is particularly salient given that in a 1998 law review article entitled “Catholic Judges in Capital Cases,” Barrett and a co-author argued that in certain situations, including when acting as appellate judges, Catholic federal judges must recuse themselves from capital cases if their faith prevents them from enforcing the death penalty.² In this way, applying Barrett's analysis, these judges can “adhere to their church's teaching on moral matters” and avoid “cooperation with evil.”³ Importantly, however, Barrett did not argue that these same judges should recuse themselves in cases involving abortion, even though Barrett makes clear the Catholic Church's “prohibition against abortion . . . [is] absolute,” whereas the prohibition against capital punishment is not.⁴

¹ Amy Coney Barrett & John H. Garvey, *Catholic Judges in Capital Cases*, 81 Marq L. Rev. 303, 316 (1997-1998).

² *Id.* at 343.

³ *See id.* at 303, 317-20, 341-43.

⁴ *Id.* at 307.

This failure to recommend recusal in cases involving abortion is concerning since Barrett appears to be advocating that in cases where judges face a faith-based conflict, they should not have to adhere to their judicial oath to uphold the laws and the Constitution. Of particular concern, is Barrett’s response to the positions taken by two prominent Catholic public servants, former Governor Mario Cuomo and Supreme Court Justice William Brennan. In defending his position on legal abortion in New York, Governor Cuomo stated, and Barrett quotes:

[T]he Catholic who holds political office in a pluralistic democracy . . . bears special responsibility. . . . Catholic public officials take an oath to preserve the Constitution that guarantees this freedom [to hold different religious beliefs]. . . . [T]o assure our freedom we must allow others the same freedom, even if occasionally it produces conduct . . . which we would hold to be sinful.

Barrett then quotes Justice Brennan, who stated during his confirmation hearing in response to a question regarding possible conflicts between matters of faith and matters of law:

Senator, [I took my] oath just as unreservedly as I know you did. . . . And . . . there isn’t any obligation of our faith superior to that. [In my service on the Court] what shall control me is the oath that I took to support the Constitution and laws of the United States and [I shall] so act upon the cases that come before me for decision that it is that oath and that alone which governs.

In response to these statements about the duty of a public servant, in a pluralistic society, to uphold the law instead of using one’s power to impose one’s own religious worldview, Barrett writes: ***“We do not defend this position as the proper response for a Catholic judge to take with respect to abortion or the death penalty.”***⁵

We know that Barrett believes that the proper response for Catholic judges “faithful to the teaching of their church” is recusal in capital cases,⁶ but in cases involving abortion, Barrett’s position is purposefully left murky. She cites another scholar’s argument that in cases where a judge must follow laws supporting the right to abortion, judges should recuse themselves; but Barrett does not specifically endorse that view.⁷

Given Barrett’s stated views on abortion, her membership from 2010 to 2016 in the group University of Notre Dame University Faculty for Life⁸—a group “committed to the legal and societal recognition of the value of all human life,” defined as beginning at conception⁹—and

⁵ *Id.* at 347 (emphasis added).

⁶ *Id.* at 305.

⁷ *Id.* at 343, n159 (quoting Michael Stokes Paulson, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J. L. & Rel. 33, 79 (1990)).

⁸ Sen. Comm. on the Judiciary, 115th Cong., Amy Coney Barrett: Questionnaire for Judicial Nominees 6, [https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ(PUBLIC).pdf).

⁹ *ND UFL Constitution*, University of Notre Dame, University Faculty for Life, <http://ufl.nd.edu/about-ufl/constitution/> (last visited Sept. 1, 2017).

her expressed commitment to the Catholic faith, as she understands it,¹⁰ the question of how Barrett will resolve personal conflicts with her duty to the law is of paramount importance. That she has dodged this issue with respect to abortion is especially troubling given Barrett's own admission that "Republicans are heavily invested in getting judges who will overturn *Roe*."¹¹ If she is confirmed as an appellate judge, Barrett would not necessarily be in a position to overturn *Roe*, but she would certainly be in a position to undermine its recognition, repeatedly affirmed by the Supreme Court, of a right to privacy that extends to the right to make personal healthcare decisions about abortion.

Adding to our concern is Barrett's treatment of *Roe v. Wade* and the right to privacy. In a 2013 speech, Barrett claimed, somewhat sensationally, that the "framework of *Roe* essentially permitted abortion on demand, and *Roe* recognizes no state interest in the life of a fetus."¹² She also raised the question of whether the Supreme Court had "the capacity to decide that women have the right to obtain an abortion" or whether this question should have been left to the states or to Congress.¹³

The suggestion that the Supreme Court would not have the capacity to address the contours of the constitutional right to privacy—a right which includes but is not limited to the right to abortion—is deeply troubling, as is the suggestion that women's fundamental rights should not be protected by the federal courts but should be left to the whims of public opinion. The federal courts, including our circuit courts of appeal, are an important avenue for individuals to seek protection of their constitutional rights. No federal judge should avoid protection of those rights whether because of personal bias or political expediency.

Our concerns about Barrett's commitment to women's right to reproductive freedom are not limited to *Roe*. We also find concerning that Barrett signed a statement authored by the Becket Fund that called the religious accommodation to the Affordable Care Act's contraceptive coverage requirement "a grave violation of religious freedom [that] cannot stand."¹⁴ It is unclear whether Barrett signed the statement as a law professor, based on the legal merits of the accommodation, or as a person of faith. Yet, given Barrett's assertion that faithful Catholic judges must "conform their own behavior to the Church's standard,"¹⁵ we have concerns about whether Barrett can fulfill her duties with respect to any cases that touch upon this ongoing controversy, or to any cases involving the right to access birth control more generally.

¹⁰ Letter from Catholic Women to Synod Fathers (Oct. 1, 2015), available at <https://eppc.org/synodletter/>.

¹¹ Christian Myers, *Law Professor Reflects on Landmark Case*, *The Observer* (Jan. 21, 2013), <http://ndsmcobserver.com/2013/01/law-professor-reflects-on-landmark-case/> (quoting Amy Coney Barrett).

¹² *Id.*

¹³ *Id.*

¹⁴ *Cardinal Dolan Joins Protest Over "Unacceptable" Attack on Religious Liberty*, *National Catholic Register* (Feb. 27, 2012) (includes a reprint of the full text of the Becket Fund statement with the list of signatories), <http://www.ncregister.com/daily-news/archbishops-kurtz-and-chaput-sign-petition-for-religious-liberty>.

¹⁵ Barrett & Garvey, *supra* note 1, at 350.

Given Barrett's troubling ambiguity about whether the law or one's personal religious beliefs should control in cases presenting a perceived conflict between the two, the Feminist Majority Foundation is also concerned about Barrett's ability to fairly apply the law in cases involving sex discrimination, LGBTQ rights, and marriage equality. These concerns stem from an October 2015 letter, signed by Barrett, from Catholic women to Synod leaders, stating:

We give witness that the Church's teachings—on the dignity of the human person and the value of human life from conception to natural death; on the meaning of human sexuality, the significance of sexual difference and the complementarity of men and women; on openness to life and the gift of motherhood; and on marriage and family founded on the indissoluble commitment of a man and a woman—provide a sure guide to the Christian life, promote women's flourishing, and serve to protect the poor and most vulnerable among us.¹⁶

These beliefs undeniably contradict our federal laws banning sex discrimination as well as our constitutionally recognized rights to abortion, birth control, and marriage equality. As there is no clear indication that, if confirmed, Barrett would be able and willing to separate these personal beliefs from her duty to uphold the nation's Constitution and laws, we must urge you to oppose this nomination.

In a pluralistic society, we must remain steadfast in our commitment to ensure that no public servant is able to impose his or her personal religious beliefs onto the People. Everyone, including this nominee, must remain free to practice his or her own religion, or practice none at all, and that means that no one can be allowed to use their position of power to impose their religious worldview on others. The judiciary acts as an important check in this respect.

Amy Coney Barrett has no experience as a judge and has very limited experience as a litigator. We judge her nomination, therefore, based on her academic writings and other statements. Our review of the available materials raise serious concerns that if she were confirmed as a Circuit Judge, Barrett may be unwilling to set aside her personal religious beliefs in deciding cases concerning abortion and birth control, sex discrimination, and LGBTQ rights, issues of paramount importance to millions of women and LGBTQ individuals in this country. As a result, we urge you to oppose the nomination of Amy Coney Barrett to the U.S. Court of Appeals for the Seventh Circuit.

Sincerely,



Eleanor Smeal
President



Gaylynn Burroughs
Director of Policy & Research

¹⁶ Letter from Catholic Women, *supra* note 10.