



October 12, 2020

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
U.S. Senate
290 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
U.S. Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Graham and Ranking Member Feinstein:

Thank you for this opportunity to submit our report and questions for the hearings on the nomination of Judge Amy Coney Barrett to the U.S. Supreme Court.

Introduction

Throughout its 84-year history of advocating for religious liberty and church-state separation, the Baptist Joint Committee for Religious Liberty (BJC) has promoted principles of free exercise and no establishment before Congress and the courts. BJC has participated as a friend-of-the court, submitting briefs in most of the major church-state cases before the U.S. Supreme Court since 1947. In addition, BJC educates the public about the unique role and responsibility of the Court in upholding our country's first freedom. That role is highlighted during each nomination and confirmation of any new member of the Court. While BJC does not support or oppose particular nominations, we review a nominee's church-state records in context of current standards and trends in the law and public debates.

President Donald J. Trump announced his nomination of Judge Amy Coney Barrett to the U.S. Supreme Court one week after the death of Justice Ruth Bader Ginsburg. The nomination comes at a time of a major shift in church-state law. During the past few terms, the Court has decided a number of cases that show an increasing deference to religious claimants without a concurrent concern for protecting other important government interests, such as keeping the government from advancing religion. In November, the Court will hear another significant case about the relationship between government interests and a claim of free exercise of religion (*Fulton v. Philadelphia*).

In general, this nomination is likely to have a significant impact on the Court because of the sharp distinctions between Judge Barrett and Justice Ginsburg, whose place she would take, and because of the timing and contentious environment in which the nomination is made. Because her record as a judge in church-state matters is slim, it is important that you question Judge Barrett on her judicial philosophy when it comes to key constitutional protections for religious freedom. At the conclusion of this report, we have included questions for your consideration and use.

The Supreme Court and Religion

The U.S. Constitution’s Article VI provides: “but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” It is the sole mention of religion in the original text of the U.S. Constitution. By ensuring that one’s religious tradition would serve neither as a qualification nor a disqualification for public office, James Madison and the other Founders departed from the common Colonial and European models and took the first step toward protecting faith freedom for all. Baptists and other religious dissenters fought for greater protections of no establishment and free exercise, which ultimately became the first freedoms protected in the First Amendment.

The role of a justice should not involve making religious decisions. Speculation about the influence of a justice’s religion on his or her decisions is rarely helpful. That does not mean that religion is entirely off-limits in the course of a nominee’s hearings. Religious affiliation is often included in the biographical profile of a nominee, both as a matter of background and as a factor that may contribute to diversity on the Court.

In the case of Judge Barrett, who has spent the majority of her career at religiously affiliated Notre Dame Law School, religion has been and may continue to be a topic of discussion in some circles. Media reports claim she is a favorite among “religious conservatives,” and the issue received a fair amount of attention during the September 6, 2017, Senate confirmation hearings for her nomination to the 7th U.S. Circuit Court of Appeals. Senators from both parties asked questions that related to religion, and significant reporting was devoted to the issue. Of particular importance was Senator Chuck Grassley’s question about when a judge can put their religious views above the law. Judge Barrett replied: “It is never appropriate for a judge to impose that judge’s personal convictions whether they derive from faith or anywhere else on the law.”¹ That question is fair and should be asked again for a very important reason: lower courts are bound by Supreme Court precedents, which future justices may reconsider and overrule.

As a respected faculty member at a religious institution, Judge Barrett was asked on occasion to speak about the role of one’s personal faith in professional pursuits. One such speech was the commencement address in 2006 for Notre Dame Law School. In charging the graduates to be a different kind of lawyer, she noted “that you will always keep in mind that your legal career is but a means to an end, and as Father Jenkins told you this morning, that end is building the kingdom of God.”² Rather than advocating an overthrow of our democratic political process in favor of a theocracy, she reminded the graduates to keep their professional career in a proper perspective. Other professions might have used the term “work-life balance.” She advised the graduates to: “Pray about your career choices before you make them;” “give away 10 percent of what you earn to the church, charitable causes, and to friends and acquaintances who need it;” and “choose a parish or church that has an active community life and

¹<https://www.c-span.org/video/?433501-1/amy-coney-barrett-testifies-seventh-circuit-confirmation-hearing-2017>.

² https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1013&context=commencement_programs.

commit yourself deeply to the relationships you find there.”³ Her challenge to the graduates to be people of prayer who are generous with their financial resources and grounded in the local community is not much different from graduation speeches that commonly occur at religious institutions across the country. Nor does this advice differ significantly from statements by Democratic and Republican politicians when addressing religious audiences or describing how their personal faith inspired their political careers.

Judge Barrett’s Record in Church-State Cases and Public Debates

Since 2017 as a U.S. Circuit Court Judge for the 7th Circuit, Judge Barrett has been involved in approximately 600 cases, only nine of which involve claims related to religion and religious liberty. Of those nine, we found no opinions written by Judge Barrett, either for the majority, in concurrence with the majority opinion, or in dissent. Six of the nine cases arose from claims brought by prisoners of various faiths under the First Amendment and/or the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), some of which were resolved in favor of the prisoner, some against. Another of the nine involved a scientist’s unsuccessful claim that the government’s funding of science education is an unconstitutional establishment of religion in light of his discoveries debunking the field of mainstream physics. All seven cases resulted in unsigned, unanimous, unremarkable orders from the 3-judge panel of which Barrett was a member. They provide little to no insight into how she might approach difficult religious liberty controversies if confirmed.⁴

The other two religious liberty cases in which she participated, however, are relevant to current church-state disputes and recent developments. Since the Covid-19 outbreak, courts have heard a number of disputes about the application of public health orders on religious gatherings. Generally, courts have affirmed the right of officials to limit indoor worship to protect public health and safety to the same extent and under the same regulations that similar secular activities are restricted. Arguments remain, however, concerning which secular activities are similar to worship.

In *Illinois Republican Party, et al., v. Pritzker*,⁵ decided September 3, 2020, Judge Barrett joined a decision upholding a public health order that exempted religious gatherings from a 50-person cap on gatherings designed to limit the spread of the coronavirus. The appeals court rejected the Illinois Republican Party’s argument that treating religious gatherings better than secular ones violates the Free Speech guarantees of the First Amendment. “Free exercise of religion enjoys express constitutional protection,” the panel explained, “and the Governor was entitled to carve out some room for religion,

³ *Id.*

⁴ In addition, President Trump has [publicly promised](#) to appoint justices that would hold the Affordable Care Act unconstitutional, and his administration is arguing that in a case that will be heard by the Court this term. Judge Barrett has criticized Chief Justice John Roberts’s opinion upholding the Act. Of particular concern for religious liberty in the ACA is Judge Barrett’s approach to the contraceptive mandate. In her individual capacity as a professor, Judge Barrett signed an April 11, 2012, [letter](#) that sharply criticized the Obama administration and its effort to accommodate religious objections to the contraceptive mandate.

⁵ 973 F.3d 760 (7th Cir. 2020).

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even while he declined to do so for other activities.”⁶ The decision was issued at an early stage in the litigation, without the full benefit of a hearing on the merits. Nonetheless, it is troubling. It privileges religious speech at odds with Supreme Court cases that hold that religious speech must be treated equally with comparable nonreligious speech.

In a 2018 employment case, *Grussgott v. Milwaukee Jewish Day School*,⁷ Judge Barrett joined an opinion that took a deferential stance toward religious institutions in hiring. The court ruled that a teacher’s claim for wrongful termination under the Americans with Disabilities Act was barred by the ministerial exception because she taught and practiced prayer and other Jewish rituals with her students. The case was decided before the U.S. Supreme Court’s recent pair of cases clarifying the scope of the ministerial exception, *Our Lady of Guadalupe School v. Morrissey-Berru*⁸ and *St. James School v. Biel*.⁹ While the outcome in *Grussgott* is consistent with the Supreme Court’s recent decision, the opinion Judge Barrett joined suggested an even broader basis for religious institutions to avoid the application of employee protections.

Judge Barrett in the Mold of Justice Antonin Scalia

Another aspect of Judge Barrett’s record that may indicate what kind of justice she will be is her fidelity to her mentor, U.S. Supreme Court Justice Antonin Scalia, for whom she clerked. She has indicated that she would try to emulate him (“his judicial philosophy is mine too”¹⁰). Justice Scalia, wrote the notorious decision in *Employment Division v. Smith*¹¹ in 1990, which is widely seen as undercutting the free exercise of religion. The *Smith* decision was the impetus for the bipartisan passage of the Religious Freedom Restoration Act of 1993. It is unclear whether Judge Barrett approves of *Smith*, but that is not the only concern for religious liberty.

Justice Scalia’s decisions reject the kind of government neutrality BJC believes the Establishment Clause demands. Despite the plain text of the First Amendment and a historical record that indicates otherwise, Justice Scalia maintained that the First Amendment allows government to favor religion over irreligion so long as it doesn’t explicitly prefer one religion over another. Justice Scalia supported government-sponsored religious displays and official prayers at local government meetings. Justice Ginsburg, whose seat Judge Barrett would fill, did not. If Judge Barrett interprets the Religion Clauses like her mentor did, her elevation to the Court is likely to further the Court’s trend of giving short shrift to the Establishment Clause and altering the balance provided in the Religion Clauses that was a keen concern of Justice Ginsburg.

⁶ *Id.*

⁷ 882 F.3d 655 (7th Cir. 2018) (per curiam).

⁸ 140 S. Ct. 2049 (2020).

⁹ *Id.*

¹⁰ <https://www.c-span.org/video/?476190-1/president-trump-nominates-amy-coney-barrett-supreme-court>.

¹¹ 494 U.S. 872.

Judge Barrett's Scholarship

Other clues about Judge Barrett's thinking on matters of religious liberty may come from her work as a scholar and teacher at Notre Dame Law School beginning in 2002. Not unlike many students who choose to study at religiously-affiliated institutions, Judge Barrett has remarked that she chose Notre Dame because it would be a place that would demand the best of her intellect while also being concerned with her development as a whole person. And, as a professor there, she was well-regarded by students and peers alike. In addition to teaching in the areas of federal courts, constitutional law, and statutory interpretation, she has written many articles published in leading journals.¹²

One law review article that she co-wrote with John Garvey, now president of Catholic University of America, received much attention at Judge Barrett's confirmation hearing three years ago. *Catholic Judges in Capital Cases* explored the intersection of Catholic beliefs against the death penalty and a trial judge's role in capital cases. In articulating that some trial judges who are Catholic may need to recuse from some or all aspects of a death penalty case, Barrett and Garvey conclude: "Judges cannot—nor should they try to—align our legal system with the Church's moral teaching whenever the two diverge."¹³ At the confirmation hearing three years ago, Judge Barrett reiterated her support for the core of the article.¹⁴ She also acknowledged the judicial rules of recusal and noted that as a law clerk for Justice Scalia she worked on many capital cases. While the law review article focused on a discrete question, it raises questions for all judicial nominees about whether any belief—religious or secular—is so closely held that the personal belief must be imposed upon the law and direct its outcome.

Judge Barrett has written several articles about the doctrine of *stare decisis*, one of the most recent of which grew out of a symposium on the jurisprudence of Justice Scalia. *Originalism and Stare Decisis* analyzes Justice Scalia's approach to *stare decisis*.¹⁵ Though the article doesn't provide an analysis of Justice Scalia's religious liberty decisions, Judge Barrett mentions with seeming approval Justice Scalia's dissent in *Lee v. Weisman*.¹⁶ In that case, the Court held official prayers at public school graduations were an unconstitutional violation of the fundamental principle that the government does not compose prayers nor require conformity with a religious practice. She also noted Justice Scalia's concurrence in *Hein v. Freedom From Religion Foundation*¹⁷ in which he stated that he would have further limited taxpayers' ability to sue for Establishment Clause violations by overruling *Flast v. Cohen*.¹⁸

¹² <https://law.nd.edu/directory/amy-barrett/>.

¹³ John Garvey and Amy Coney, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 350 (1998).

¹⁴ <https://www.c-span.org/video/?433501-1/amy-coney-barrett-testifies-seventh-circuit-confirmation-hearing-2017>.

¹⁵ Amy Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921 (2017).

¹⁶ 505 U.S. 577 (1992).

¹⁷ 551 U.S. 587 (2007).

¹⁸ 392 U.S. 83 (1968).

Conclusion

While Judge Amy Coney Barrett has the kind of education and professional credentials that would qualify her for service on the Court, her practical and judicial experience is limited. Based upon our review of her record, it seems likely that her appointment would further threaten the Establishment Clause and the crucial role it plays in ensuring faith freedom for all. We urge the Committee to vigorously question her about her judicial philosophy and her approach to the Constitution's guarantee of religious liberty for all.

Suggested questions for Judge Amy Coney Barrett

Religious liberty is protected in three distinct ways in the U.S. Constitution: no religious test, no establishment and free exercise. We have recently seen a trend of Supreme Court decisions expanding Free Exercise doctrine with little regard for the Establishment Clause. As an originalist, do you think it is possible to expand Free Exercise jurisprudence without a faithful accounting of the Establishment Clause or vice versa?

What is your understanding of the original intent of the Establishment Clause?

Do you agree with Justice Clarence Thomas that the Establishment Clause was not incorporated against the states with the 14th Amendment?

In describing your judicial philosophy, you have described originalists as needing to do the hard work of researching and discerning the original meaning of a text. If the Establishment Clause applies to the states, would an originalist be looking at the time of the Founding or of the 14th Amendment to discover the original meaning of the application of the Establishment Clause to the states?

You have indicated that your judicial philosophy is the same as Justice Scalia's. Do you agree with his dissents in cases such as *Lee v. Weisman* and *Santa Fe v. Doe* that would allow government-sponsored prayer in public schools? Do you believe, if given the opportunity, that those precedents should be revisited?

Best,



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cc: All Members of the Senate's Committee on the Judiciary