

ALLIANCE FOR JUSTICE REPORT

# Nomination of Amy Coney Barrett

*Supreme Court of the United States*



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After a trailblazing career as both a lawyer and a jurist, on September 18, 2020, Supreme Court Justice Ruth Bader Ginsburg passed away. Justice Ginsburg left a historic legacy. Because of her unrelentless fight to uphold our nation's highest ideals and ensure equal rights for everyone, our nation is more just. On September 26, 2020, President Trump nominated Amy Coney Barrett to fill her seat.

No Supreme Court justice in history has ever been confirmed later than [July](#) of an election year. Indeed, in 2016, Senate Republicans [refused](#) to even give Merrick Garland a hearing when Justice Scalia died nine months before election day, asserting that the American people should decide who should select his replacement.

Yet, just over an hour after Ginsburg's death was announced, Senator McConnell issued a [statement](#) stating that Trump's chosen nominee would "receive a vote on the floor." Despite the fact that [tens of thousands](#) of people had already cast their vote for the next president, Republican Senators quickly expressed support for moving forward, with a sham expedited process, to confirm the White House's nominee to the Court—even without knowing who that nominee would be.

After months of failing to address the health, economic, and racial justice crises rocking the nation, Republicans made clear that their real priority is advancing their ideological agenda through the courts at any cost rather than representing the will of the American people.

The fact is, anyone President Trump would nominate has no place on the Court. The Senate "process" — just weeks before the election — is illegitimate and [unsupported](#) by a majority of Americans.

The stakes for the American people cannot be overstated. Every person on the President's short-list has a troubling record of undermining critical civil rights and protections. Each one of them has shown their commitment to eliminating access to quality health care for millions, overturning *Roe v. Wade*, and siding with the wealthy and powerful over everyday Americans and corporations over workers and consumers. And most shockingly, Trump has already [argued](#) his nominee needs to be confirmed in time to rule in the event of a disputed election, placing the independence of the Court in further jeopardy.

But, of all the potential nominees, Amy Coney Barrett stands out somehow as particularly dangerous.

At the outset, Barrett meets two troubling litmus tests:

- Trump has explicitly stated he will nominate judges who are hostile to the Affordable Care Act (ACA). Trump [said](#) “my judicial appointments will do the right thing unlike Bush’s appointee John Roberts on ObamaCare.” Barrett, who criticized Chief Justice Roberts for not invalidating the law, meets that test. The Supreme Court will hear a [challenge](#) to the ACA just one week after the election. If confirmed, she literally threatens the health of [millions](#) of people.
- Trump has said that he will only put justices on the Supreme Court who will [overturn](#) *Roe v. Wade* claiming that [overturning Roe](#) “will happen automatically . . . because I am putting pro-life justices on the court.” Barrett has been vocal in her criticism of *Roe*. She has also said that judges are not bound by *stare decisis*, the doctrine that requires judges to follow well-settled law. Her decisions on the Seventh Circuit have already demonstrated a commitment to erode reproductive rights.

Further, on the Seventh Circuit, Barrett has consistently ruled in favor of the wealthy and powerful over the rights of all. A [new analysis](#) from government watchdog Accountable.US found Judge Barrett sided with corporations over people 76% of the time during her brief tenure on the 7th Circuit Court of Appeals. Indeed, one thing is clear: if Congress has enacted a law to protect the American people, Barrett will find a way to eviscerate its protections.

For example, Barrett [weakened](#) Title VII of the Civil Rights Act – siding against a Black worker whose employer established a “separate-but-equal” policy of segregating their employees by race. She [ruled](#) to gut protections for older workers. She [overturned](#) precedent to inhibit the ability of the Federal Trade Commission (FTC) to protect consumers. She [weakened](#) Title IX protections, making it easier for students who are held accountable for sexual assault to sue their schools for sex discrimination. And, contrary to every court that had looked at the issue, she would have [prevented](#) Congress from keeping weapons out of the hands of convicted felons.

Finally, Barrett repeatedly eroded protections for a constitutional criminal justice system and regularly attacked the rights of immigrants.

Barrett’s views, as evidenced in the cases highlighted in this report, are so extreme that she is challenged by other Republican appointed judges. Her views in many cases are contrary to the overwhelming weight of authority, and often unanimous authority, of other circuit courts. As Mark Joseph Stern [noted](#), she has a “particularly cruel vision of the law.” Her opinions have inflicted real pain and suffering to workers, women, consumers, individuals in the criminal justice system, and immigrants.

One week after the election, in the midst of a pandemic, the Supreme Court will [consider](#) whether to take away health care from [millions](#) of Americans, including those with preexisting conditions. Donald Trump and Republicans — including Republican appointed judges on the Supreme Court — continue to attack our democracy, green light voter suppression, and undermine the legitimacy of our elections themselves. Conservatives are relentless in their attacks on equal rights for persons of color, women, and LGBTQ Americans. The wealthy and powerful have used the courts to attack protections for workers, consumers, and clean air and water.

[Justices Neil Gorsuch and Brett Kavanaugh](#), and scores of Trump's [lower courts judges](#), have already eroded critical rights and legal protections. We know from experience the harm that Trump's next jurist will cause. After extensively reviewing her record, Alliance for Justice has no doubt that Amy Coney Barrett, if confirmed, would be a leader in turning back the clock for decades to come on the rights and protections that millions of Americans rely on.

AFJ strongly opposes nomination of Amy Coney Barrett and vigorously urges the Senate to reject her confirmation. The health, and indeed the very lives of millions of Americans truly hang in the balance.

*This report may be updated. Typically, we issue these detailed reports after the nominee has submitted their paperwork to the Senate, so it is possible there are some speeches and other materials not yet available. That said, this is a comprehensive overview of Barrett's jurisprudence and views to date.*

## BIOGRAPHY

### ***Personal Background***

Amy Coney Barrett [received](#) her B.A. from Rhodes College and her J.D. from Notre Dame Law School, graduating in 1997. She then clerked for Judge Laurence Silberman on the D.C. Circuit and for Supreme Court Justice Antonin Scalia. In her speech accepting her nomination to the Supreme Court, Barrett said of Scalia that “his judicial philosophy is mine.” While on the bench, Justice Scalia consistently ruled against health care, civil rights, voting rights, equality for women and LGBTQ Americans, consumers, workers, and the rights of everyday people.

She spent two years in private practice with Miller, Cassidy, Larroca & Lewin and its successor, Baker Botts L.L.P. Among other cases, she represented George W. Bush in *Bush v. Gore*, and represented the National Council of Resistance of Iran (NCRI), which at the time was designated as a foreign terrorist organization, in [National Council of Resistance of Iran v. Department of State](#). She later joined the faculty at the George Washington University School of Law as a John M. Olin Fellow and was a professor at Notre Dame from 2002 to 2017.

In a 2016 [interview](#), Barrett defended the Republican refusal to act on President Obama's nominee to the Supreme Court, Merrick Garland. While she conceded that there have been numerous election-year confirmations, she [said](#), "I don't think it establishes a rule for either side." Barrett said the election-year nomination of Anthony Kennedy was different from that of Garland, and "the reality is that we live in a different time . . . as we all know confirmation hearings have gotten far more contentious, and so I just don't think we live in the same kind of time." She also [said](#), referring to whether Obama should be able to appoint a Supreme Court justice in an election year, it was not appropriate to replace a conservative judge with one who would "dramatically flip the balance of power."

Barrett was a member of the [Federalist Society](#). She was also a member of the University of Notre Dame's Faculty for Life group from 2010 to November 2016.

On May 8, 2017, President Trump [nominated](#) Barrett to the Seventh Circuit Court of Appeals for the seat held by Judge John Tindler, who took senior status from the court on February 18, 2015. Prior to Barrett's nomination, President Obama had [nominated](#) Myra Selby to fill the same seat. Selby is a former Indiana Supreme Court Justice who was the first woman and first Black person to serve on the Indiana Supreme Court, and the first Black partner in a major Indianapolis law firm. Senator Coats did not return his blue slip, and Selby did not even receive a hearing. Selby would have been the first Black person on the Seventh Circuit from Indiana had the Senate acted on her nomination.

During her confirmation [hearing](#), Barrett admitted to accepting an honorarium from Alliance Defending Freedom, an organization [that](#) expresses anti-choice and anti-LGBTQ views. She later challenged that organization's classification as a hate group as "a matter of public controversy."

On October 31, 2017, Barrett was confirmed by a [55-43](#) vote in the Senate.

Since that time, Trump [added](#) Barrett to his short-list of potential nominees to the Supreme Court. Following the [retirement announcement](#) of Justice Anthony Kennedy, Trump [reportedly](#) interviewed Barrett for the seat that ultimately went to Kavanaugh. At the time, ultra-conservatives [pushed](#) hard for her nomination. As Ramesh Ponnuru [wrote](#), "It will be nice to have one woman in the majority when the Supreme Court finally overturns *Roe v. Wade*."

## **Judicial Philosophy**

Before becoming a judge, Barrett had a long record of criticizing *stare decisis*, the fundamental judicial principle of faithfully applying settled law to current cases. Her disdain for *stare decisis* indicates that she would be willing to overturn critical precedents. This would threaten access to health care, including reproductive care, for millions of people, erode LGBTQ rights,

Congressional protections for immigrants, workers, consumers, and the environment, and deny fair justice to those in the criminal justice system.

In one article, Barrett challenged *stare decisis* by [stating](#) that a judge need not adhere to precedent that she personally believes is wrongly decided, writing:

I tend 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 clearly in conflict with it.

Barrett has even [suggested](#) that *stare decisis* violates the Due Process Clause. She argued that “rigid application” of *stare decisis* “unconstitutionally deprives a litigant of the right to a hearing on the merits of her claim.”

Barrett [argues](#) that “soft *stare decisis*” is a more desirable alternative. She notes that, “[s]oft *stare decisis* helps the Court navigate controversial areas by leaving space for re-argument despite the default setting of continuity.” In arguing against the robust application of *stare decisis*, Barrett stated that, although *stare decisis* plays a role in enabling people to conform their conduct to the law, “[r]eliance interests count, but they count far less when precedent clearly exceeds a court’s interpretive authority than they do when precedent, though perhaps not the ideal choice, was nonetheless within the court’s discretion.” In practice, this view would allow judges to simply ignore precedent and apply their own preferences.

Barrett’s views on *stare decisis* would have drastic implications if she is confirmed to the Supreme Court. Most obvious among these is her clear willingness to overturn *Roe v. Wade*. In an article titled [Stare Decisis and Due Process](#), Barrett wrote that courts and commentators “have thought about the kinds of reliance interests that justify keeping an erroneous decision on the books.” In footnotes she repeatedly cited *Planned Parenthood v. Casey* (which upheld *Roe*’s fundamental holding) as an example of the Supreme Court failing to overturn an “erroneous decision.”

More evidence of Barrett’s views can be found in her [discussion](#) of “superprecedents,” or cases that have gained such widespread support in society that they should not be revisited. She lists only seven cases: *Marbury v. Madison*, *Martin v. Hunter’s Lessee*, *Helvering v. Davis*, the *Legal Tender Cases*, *Mapp v. Ohio*, *Brown v. Board of Education*, and the *Civil Rights Cases*. Notably, *Roe* is not included in Barrett’s list of “superprecedents,” despite the fact that it was decided over forty years ago, the Supreme Court has repeatedly upheld its fundamental holding, and countless people’s lives have been shaped by its critical protections.

When Barret was asked during her confirmation proceedings in 2017 why she didn’t include *Roe v. Wade* on this list, she deflected, [responding](#): “I used the definition employed by the scholars whose arguments I was addressing.” However, in another [article](#) published two months earlier, Barrett expressly cited the substantive due process right to an abortion as an example of a ruling

that was not, in her eyes, a super precedent and could therefore be overruled. Specifically, in defending Justice Scalia's vote to overrule precedents, including *Roe* and *Miranda*, Barrett wrote "the precedents that Justice Scalia voted to overrule were not in the category that constitutional scholars call 'super precedent' – cases so deeply embedded that their overruling is off the table."

## ACCESS TO QUALITY HEALTH CARE

The Trump Administration is trying to use our federal courts to deprive millions of Americans — especially those with preexisting conditions — of health insurance coverage. Trump and his Justice Department have urged the courts to invalidate the entire ACA, including protections for people with preexisting conditions. Even in the midst of a worldwide health crisis, he made clear he wants the courts to "[terminate](#)" the law. According to one [study](#), issued before the pandemic increased the number of people with preexisting conditions, if the lawsuit is successful, 20 million people could lose health insurance; 135 million people with preexisting conditions — which include cancer, pregnancy, and diabetes — will lose protections; and 12 million seniors will pay more for prescription drugs.

Appointing judges who will declare the entire ACA unconstitutional is central to the President's goal. The 2016 Republican Party Platform [explicitly](#) said that Republican appointed judges will "reverse the long line of activist decisions — including *Roe*, *Obergefell*, and the Obamacare cases." Trump himself explicitly [stated](#) he was looking for nominees who are hostile to the Affordable Care Act. A trial court judge appointed by George W. Bush in Texas has already [declared](#) the entire ACA unconstitutional. Two Republican-appointed appellate judges, including one appointed by Trump, then kept the [lawsuit](#) alive. The Supreme Court has agreed to hear the case, and after the election, it will determine whether to take away health care from millions of people.

Amy Coney Barrett is also on record arguing courts should invalidate the law. In an [article](#), Barrett criticized Chief Justice John Roberts for his decision in [NFIB v. Sebelius](#), which upheld Congress's authority to enact large portions of the ACA:

Chief Justice Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute. He construed the penalty imposed on those without health insurance as a tax, which permitted him to sustain the statute as a valid exercise of the taxing power; had he treated the payment as the statute did—as a penalty—he would have had to invalidate the statute as lying beyond Congress's commerce power.

Barrett argued that Chief Justice Roberts's approach in *NFIB v. Sebelius* "expresse[d] a commitment to judicial restraint by creatively interpreting ostensibly clear statutory text" and that "its approach is at odds with the

statutory textualism to which most originalists subscribe.” In a [speech](#), she again remarked that, to avoid the constitutional question, the Court “very creatively interpreted the statute to be a tax.”

In [King v. Burwell](#), the Supreme Court, in a 6-3 decision, affirmed tax credits for millions of families. Nearly [nine million Americans](#) depend on these tax credits for coverage. Barrett criticized the decision, [stating](#), “I think the dissent has the better of the legal argument.” Elsewhere, she [wrote](#): “Justice Scalia, criticizing the majority’s construction of the Affordable Care Act in *NFIB v. Sebelius* and *King v. Burwell*, protested that the statute known as Obamacare should be renamed ‘SCOTUScare’ in honor of the Court’s willingness to ‘rewrite’ the statute in order to keep it afloat. For Justice Scalia and those who share his commitment to uphold text, the measure of a court is its fair-minded application of the rule of law, which means going where the law leads. By this measure, it is illegitimate for the Court to distort either the Constitution or a statute to achieve what it deems a preferable result.”

## REPRODUCTIVE RIGHTS

### ***Barrett Has Made Clear She Opposes Roe v. Wade***

Trump has made clear on numerous occasions that he will only put justices on the Supreme Court who pass his [litmus test](#) of overturning or gutting *Roe v. Wade*. Trump has said that [overturning Roe](#) “will happen automatically... because I am putting pro-life justices on the court.” Barrett’s presence on Trump’s short-list alone confirms that she will be the reliable vote to overturn or gut *Roe v. Wade*.

Barrett has been critical of *Roe*. In one article, it was reported that Barrett [stated](#) that the “framework of *Roe* essentially permitted abortion on demand, and *Roe* recognizes no state interest in the life of a fetus.” Another article [reported](#) on Barrett’s remarks as follows:

By creating through judicial fiat a framework of abortion on demand in a political environment that was already liberalizing abortion regulations state-by-state, she said, the court’s concurrent rulings in *Roe* and *Doe v. Bolton* “ignited a national controversy.”

Additionally, Barrett signed a 2006 [letter](#) — which she did not submit to the Senate in 2017 as required by Senate procedures - calling for the overturning of *Roe v. Wade*. Saint Joseph County Right To Life’s two-page newspaper ad stated that the signatories called for putting “an end to the barbaric legacy of *Roe v. Wade* and restor[ing] laws that protect the lives of unborn children.” The group has also [confirmed](#) that it opposes in vitro fertilization and supports the criminalization of doctors who perform abortions. Barrett also [spoke](#) at events hosted by two anti-choice groups in 2013, and then failed to disclose those speeches to the Senate as required.

## ***Barrett is the Longtime Favorite of Ultra-Conservative Anti-Choice Advocates***

Since she was announced as one of Trump’s “shortlist” candidates for nomination to the Supreme Court, conservative activists have vocally promoted Barrett as a candidate who would be a certain vote to overturn *Roe v. Wade* and dismantle health protections for women. Her nomination to the country’s highest court has received widespread support from pro-life advocacy groups, including [Americans United for Life](#), [March for Life](#), the [Susan B. Anthony List](#), [Concerned Women for America](#), and the [Family Research Council](#).

Marjorie Dannenfelser, president of the anti-choice Susan B. Anthony List, [called](#) Barrett’s confirmation to the Seventh Circuit “a victory for the pro-life movement.” The Susan B. Anthony List is singularly focused on restricting women’s health care and has consistently pushed the Trump Administration to appoint judges hostile to *Roe*.

Americans United for Life (AUL), another ultra-conservative anti-choice group, openly [endorsed](#) Barrett’s nomination when she made the short-list stating that “[w]e are confident that if appointed to the Supreme Court, Judge Barrett would prove herself a trusted caretaker of the Constitutional protections extended to every human person in America, including human lives in the womb.” The statement makes clear that AUL sees Barrett as a guaranteed vote to dismantle abortion rights.

In July 2020, Senator Josh Hawley (R-MO) [announced](#) that he “will vote only for those Supreme Court nominees who have explicitly acknowledged that *Roe v. Wade* was wrongly decided.” Before Barrett was selected to fill Justice Ginsburg’s seat, Hawley was asked if Barrett met his test. He [responded](#), “Amy Barrett, I think, clearly meets that threshold.”

## ***Barrett Has Voted to Gut Abortion Rights on the Seventh Circuit***

In [Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Dept. of Health](#), a panel on the Seventh Circuit found unconstitutional an Indiana law which would have stripped a woman of the ability to decide for herself whether or not to end a pregnancy. The law would have barred a woman from obtaining an abortion if she decided to end her pregnancy because of a concern that the fetus has a disability, including a life-threatening one, or because of the sex, race, national origin, or ancestry of the fetus.

In an opinion by Republican-appointed Judge William Bauer, the court held that the law violated the core holding of *Roe v. Wade*, which forbids a state from banning abortion prior to viability. As Judge Bauer wrote, the law “violate[s] well-established Supreme Court precedent holding that a woman may terminate her pregnancy prior to viability, and that the State may not prohibit a woman from exercising that right for any reason.” Quoting *Planned*

*Parenthood v. Casey*, Bauer wrote, “*Casey’s* holding that a woman has the right to terminate her pregnancy prior to viability is categorical: ‘a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.’” He added:

The non-discrimination provisions clearly violate this well-established Supreme Court precedent, and are therefore, unconstitutional. The provisions prohibit abortions prior to viability if the abortion is sought for a particular purpose. These provisions are far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State.

Concurring in part of the judgment, Reagan-appointed Judge Daniel Manion also found the non-discrimination provision unconstitutional: “I must agree that Supreme Court precedent compels us to invalidate [Indiana’s statute].”

The state did not ask for rehearing en banc of the panel’s ruling on that provision of the law. Yet, Barrett signed on to a [dissent](#) to the denial of a rehearing en banc by Judge Frank Easterbrook. Easterbrook wrote that he was “skeptical” that Supreme Court precedent prohibited the statute, even though the language of *Casey* is absolute – “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” This is a clear example of Barrett’s willingness to both ignore and erode the Court’s ironclad holding.

Also at issue in the case was part of Indiana’s law that requires clinics to bury or cremate the remains of a fetus. Here, again, a panel of the court found the law [unconstitutional](#). It ruled that the state did not have a valid interest in requiring fetal remains to be treated like other human remains because the Supreme Court has held that the fetus is not a person. Barrett also joined this portion of Easterbrook’s dissent to the denial of rehearing en banc.

Indiana appealed to the Supreme Court [one week](#) after Kavanaugh was sworn in. In a per curiam opinion, the Supreme Court [reversed](#) the Seventh Circuit’s holding on the burial or cremation provision. The Court stressed that Planned Parenthood had never suggested that the state’s law “creates an undue burden on a woman’s right to obtain an abortion.” Instead, the Court said, the only question was whether there was a rational basis for the law, which the Court found there was: “This Court has already acknowledged that a State has a ‘legitimate interest in proper disposal of fetal remains.’ The Seventh Circuit clearly erred in failing to recognize that interest as a permissible basis for Indiana’s disposition law.”

## ***Barrett Supports “Undue Burdens” on the Right to an Abortion***

In 2017, Indiana enacted a law that required parents be notified before an abortion for anyone under the age of 18. Previously, consistent with Supreme Court precedent, Indiana had provided for a confidential judicial bypass procedure for minors who seek an abortion without parental consent or notification. In addition to stripping away the right to privacy, the law would have blocked medical providers from informing teenage patients of their abortion options in other states.

Planned Parenthood sued to enjoin the law in [\*Planned Parenthood of Indiana and Kentucky v. Box\*](#) and a district court granted the injunction, which was affirmed by a three-judge panel of the Seventh Circuit. The panel noted that the law would create a “substantial risk of a practical veto over a mature yet unemancipated minor’s right to an abortion” and would “impose an undue burden” on women’s rights.

Indiana, nevertheless, petitioned for full Seventh Circuit review, which was denied. Barrett again [joined](#) a dissent that argued enjoining the law before it went into effect was “a judicial act of extraordinary gravity.” Even other conservatives on the court voted against the rehearing, including Reagan, George H.W. Bush, and Trump appointees.

## ***Barrett Has Also Fought Access to Contraception***

Barrett signed a [letter](#) authored by The Becket Fund, which has been labeled a hate group by the Southern Poverty Law Center (SPLC), criticizing the ACA’s requirement that employers provide contraceptive coverage as part of their employer-sponsored health insurance plans. The letter objected to the Obama Administration’s accommodation for religiously affiliated employers that allowed them to avoid having to inform their employees directly about contraceptive coverage.

The letter called the Obama Administration “morally obtuse” for suggesting “that this is a meaningful accommodation of religious liberty because the insurance company will be the one to inform the employee that she is entitled to the embryo-destroying ‘five day after pill’ pursuant to the insurance contract purchased by the religious employer.”

## ***Barrett Would Make it Easier to Block Access to an Abortion***

In [\*Price v. Chicago\*](#), a panel of the Seventh Circuit unanimously upheld Chicago’s ordinance preventing anti-abortion protesters from getting within a prescribed distance of those seeking abortion care at clinics. Specifically, abortion opponents sued to block Chicago’s “bubble zone ordinance,” which creates a buffer zone outside medical clinics and health care facilities. In the zones, no one can come within eight feet of other individuals, without their

consent. Protestors claimed that the zone violated their First Amendment rights.

A federal judge dismissed their suit, relying on the Supreme Court's decision in [Hill v. Colorado](#), which upheld a similar Colorado law.

In the opinion by Judge Diane Sykes, joined by Barrett, the Seventh Circuit [agreed](#) that *Hill* requires dismissing the case. Sykes and Barrett added, however, they believed *Hill* should be overruled and is "incompatible" with the Supreme Court's more recent jurisprudence. If confirmed to the Supreme Court, Barrett would not be forced to adhere to precedent as she was in this case.

## CIVIL RIGHTS

### ***Barrett Has Upheld Racial Discrimination***

In an era in which several Trump judicial nominees [refused](#) to confirm that the landmark *Brown v. Board of Education* case was correctly decided, Barrett's actions in the area of racial equity are notable.

In [EEOC v. AutoZone, Inc.](#), Barrett sided with AutoZone in a case involving Kevin Stuckey, a Black sales manager who worked for AutoZone from 2008 until 2012 when he was fired. Shortly before he was let go, Stuckey had been informed that he was being transferred to a different store location. Stuckey's manager told him that the reason he was being transferred away was because they wanted Hispanic employees working at his current store location because it served mostly Hispanic customers from the neighborhood and those customers might be more comfortable dealing with salespeople of their own race. In turn, Stuckey was informed that he would be moved to a store in a predominantly Black neighborhood. Stuckey was offended that he was being forced to work in another store because of his race. When he refused to switch, he was fired.

Stuckey filed charges alleging that AutoZone had violated the Civil Rights Act by racially segregating employees. After a panel of conservative judges on the Seventh Circuit [upheld](#) the legality of AutoZone's practice of racially segregating its employees, Barrett [voted](#) not to rehear the case. According to the dissent, her decision meant that AutoZone's "separate-but-equal" policy was legal despite "the dignitary harm Stuckey suffered by being the victim of overt racial segregation" and the policy's effect of depriving "people who did not belong to the designated racial group of employment opportunities at their preferred geographic location."

Chief Judge Diane Wood, one of three [dissenting](#) judges, noted that this decision meant that the company's "separate-but-equal arrangement" was

permissible despite Congress's intent in passing the Civil Rights Act of 1964 to eliminate such blatant racism. Judge Wood [began](#):

This case presents a straightforward question under Title VII of the Civil Rights Act of 1964: Does a business's policy of segregating employees and intentionally assigning members of different races to different stores "tend to deprive any individual of employment opportunities" on the basis of race? The panel answered this question "not necessarily." I cannot agree with that conclusion.

Judge Wood explained her view of the panel decision, which Barrett and a majority of the Seventh Circuit let stand, as follows: "this separate-but-equal arrangement is permissible under Title VII so long as the 'separate' facilities really are 'equal' . . . That conclusion, in my view, is contrary to the position that the Supreme Court has taken in analogous equal protection cases as far back as *Brown v. Board of Education*."

In [Harris v. YRC Worldwide, Inc.](#), Barrett sided against four Black truck drivers who alleged that their employer, YRC, assigned them to less-desirable urban routes instead of suburban routes, ignoring the seniority rules in their collective bargaining agreement. According to the complaint, YRC "assigned suburban routes to white drivers more frequently than it would have done if race had been ignored." They further alleged that they were subjected to a "racially hostile environment" at work. Among other things, they reported being called racial slurs by White drivers. Barrett joined a panel decision holding that the truck drivers did not meet the burden for pursuing a claim for employment discrimination under Title VII of the Civil Rights Act. In addition to rejecting the claims that they were assigned to less desirable routes because of their race, the panel held that "[t]hese statements, individually and collectively, do not amount to the sort of serious or pervasive comments that violate Title VII."

### ***Barrett Has Sought to Increase Protections For Men Who Commit Sexual Assault***

In [Doe v. Purdue University](#), Barrett authored a Seventh Circuit panel decision that made it easier for students who are held accountable for sexual assault to sue their schools for sex discrimination. Indeed, she suggested that a school's commitment to taking sexual misconduct seriously is evidence of sex discrimination against men.

In 2016, John Doe's girlfriend accused him of groping and digitally penetrating her while she slept. Purdue University initiated an investigation of the accusation and eventually found Doe responsible for the assault, and suspended him from the school for one year. Purdue reviewed their factual findings and decision several times upon Doe's appeal, each time affirming their original determination of responsibility. Doe then brought a lawsuit in federal court, alleging that Purdue had violated Title IX by finding him

responsible for sexual assault on the basis of his sex. Once again, Doe's claim was dismissed.

But Barrett overturned the lower court decision on the grounds that the Purdue University investigation and hearings may have been biased against Doe because he is a male. Barrett found this claim plausible, in part, on the grounds that a Purdue student group posted to its Facebook page an article titled, "Alcohol isn't the cause of campus sexual assault. Men are" and that, at the time Doe was accused, the Department of Education was investigating Purdue for failing to protect sexual assault victims.

Barrett eased and simplified the legal standard for male students to claim they are the victims of sex discrimination after they have been found responsible for committing sexual assault and disciplined by their schools. Barrett's decision allows men who have been disciplined for sexual assault or other forms of sexual harassment to bring a Title IX lawsuit by alleging facts that support a "plausible inference" that sex was a motivating factor in a school disciplining a student. Meanwhile, to bring a Title IX lawsuit, sexual assault survivors—the majority of whom are women and girls—are typically held to a much higher standard and required to allege facts showing that their schools treated them with "deliberate indifference"—that is, that the school was clearly unreasonable in its response to the harassment.

Moreover, Barrett suggested that the Department of Education's Obama era 2011 Title IX guidance, which set out schools' obligations to take sexual harassment seriously, supported a conclusion that a male student disciplined for sexual harassment was discriminated against on the basis of his sex. She accepted John Doe's argument that the guidance "reveal[ed] that Purdue had a financial motive for discriminating against males in sexual assault investigations." She wrote that because this guidance indicated that "a school's federal funding was at risk if it could not show that it was vigorously investigating and punishing sexual misconduct," the guidance added plausibility to John Doe's assertion that he had experienced sex discrimination. She reached this conclusion even though the unfair procedures that John Doe alleged occurred in Purdue's investigation were prohibited by the 2011 guidance.

Finally, she described the 2011 Title IX guidance's requirement that schools use a preponderance of the evidence standard in determining responsibility for harassment as a "lenient" standard for survivors, even though the preponderance standard is used in all civil rights proceedings and is the only standard of proof that treats both parties equally.

### ***Barrett Has Questioned the Court's Role in Protecting Rights for LGBTQ People***

In a [speech](#), Barrett questioned *Obergefell*, suggesting that courts shouldn't decide the issue of marriage equality, but rather leave it up to

the states – an argument widely used to give states a license to sanction discrimination. Moreover, she argues that transgender people (referring to transgender women as “physiological males who identify as female”) do not deserve protections from discrimination under federal law, claiming “it seems to strain the text of the statute” to say that federal law “demands it.”

### ***Barrett Has Upheld Age Discrimination***

In [Kleber v. CareFusion Corporation](#), Barrett joined three other Trump-appointees to rule against a 58-year-old man who was passed over for a job in favor of a 29-year-old with less experience.

Dale Kleber, a father of four and the sole bread-earner for his family, abruptly lost his job in July 2011. At 58 years old, he had extensive law firm and in-house counsel experience, however, he struggled to find a new job. As part of his job search, Kleber applied to a Senior Counsel position at CareFusion. The job listing stated that applicants must have no more than seven years of relevant experience. Kleber’s experience exceeded seven years and he was not interviewed for the position. Instead, CareFusion hired a 29-year-old with much less experience.

The Age Discrimination in Employment Act (ADEA) prohibits an employer from explicitly announcing their intention to discriminate, like posting “No one over 40 need apply.” It also protects against policies or practices that have “disparate impact.” A panel of the Seventh Circuit [ruled in Kleber’s favor](#), with Judge David Hamilton explaining that interpreting ADEA to protect job applicants from disparate impact discrimination “is more consistent with the purpose of the Act and nearly fifty years of case law interpreting the ADEA and similar language in other employment discrimination statutes.”

CareFusion appealed to the full Seventh Circuit, and Barrett joined a majority of the full court to overturn the panel decision, holding that the “disparate impact” provision *only* applies to current employees, and not job applicants. Thus, an employer is prohibited from doing something that’s unfair to older employees already working for the company, but it can have policies that have a disparate impact on older *prospective* employees.

To arrive at this conclusion, the opinion Barrett joined twisted the text of ADEA that specifically prohibits disparate impact discrimination. Section 4(a)(2) states that an employer can’t act in ways that would deprive “any individual of employment opportunities or otherwise adversely affect his status as an employee” because of their age. An obvious reading is that a job applicant is an “individual” who might be denied an “employment opportunity.” Barrett concluded, however, that to have a “status as an employee,” the individual must already *be* an employee, and thus the whole clause doesn’t apply to job applicants at all. By completely ignoring both the “or” and the “otherwise,”

Barrett gutted these vital protections for older workers looking for jobs.

Judge Hamilton authored a dissent, explaining how Barrett and the majority twisted the words of the statute, in a manner he called “baffling.” As an example, he offered a hypothetical in which Kleber was competing for the position alongside an internal candidate of the same age seeking a promotion. If CareFusion refused both of them an interview because they have too much experience, only the internal candidate could sue for discrimination.

“A central goal — arguably the most central goal — of the statute was to prevent age discrimination in hiring,” he wrote. “Neither the majority nor the defendant or its amici have offered a reason why Congress might have chosen to allow the inside applicant but not the outside applicant to assert a disparate-impact claim. I can’t either.”

AARP [decried the ruling](#). AARP Foundation Litigation senior attorney Laurie McCann described the decision as one that “takes us back to 1967, when age limits in job postings were commonplace,” noting that employers can simply replace “no one over 40 need apply” with “no more than seven years of experience” without legal consequences. NYU Law School Professor Samuel Estreicher [described](#) the *Kleber* ruling as “untethered textualism,” an interpretation of the law that completely ignores the purpose for which it was passed and instead “engage[s] in a highly abstract interpretive venture bearing little resemblance to what the legislators were trying to do.”

### ***Barrett Has Upheld Discrimination Against Children with Disabilities***

In [P.F. v. Taylor](#), Barrett joined a decision ruling that a Wisconsin open-enrollment program which allows school districts to deny applications from students with disabilities based on the “actual attributes of [their] handicap” was not discrimination based on disability. A student with ADHD applied and was accepted to attend school outside of his resident school district under the program; but when the nonresident district discovered he had an individualized education plan (IEP) they withdrew his acceptance and expelled him from the school on the grounds that it lacked the resources to meet his special needs.

The decision observed that the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act prohibit discrimination based on stereotypes, but held that differential treatment based on the “actual attributes” of a student’s disability is not prohibited discrimination. As such, the court found that a school district may deny education access on the basis of a student’s disability. As the Autistic Self-Advocacy Network pointed out, the “decision is [wholly contrary](#) to the purpose of disability discrimination laws, which mandate inclusion of people with disabilities – even when [they] have support needs.”

## ***Barrett has Questioned the Existence of Pay Discrimination Against Women***

During a speech at a Women's Empowerment Week Brunch at Notre Dame, Barrett [suggested](#) that women's own reluctance to seek higher pay, rather than discrimination or other systemic inequities, is the reason for the gender pay gap. After calling the systemic failure to provide equal pay for equal work a "difficult social problem," she argued that the reason she had been paid less than men in similar positions was because she had not been "more aggressive" in asking for raises. She described the resulting pay gap as "the consequence of not standing up for myself," implying that pay inequality is the fault of women, and not employer bias or discrimination.

## **WORKERS' RIGHTS**

In [Wallace v. GrubHub Holdings, Inc.](#), Barrett ruled against drivers claiming that GrubHub, in violation of established federal law, failed to pay them the overtime wages they were entitled to. Despite the fact that transportation workers engaged in "interstate commerce" are exempt from mandatory arbitration agreements, Barrett held the drivers were required to undergo a too often biased arbitration process for any claims.

Barrett found that the food delivery drivers would only qualify for the interstate commerce exemption from arbitration if their work took them across state lines. Every other circuit court that addressed the issue, including the Ninth Circuit in the recent [Rittman v. Amazon](#), interpreted the exemption as applying to workers taking part in intrastate commerce which is part of a larger national scheme. As the drivers' attorney [noted](#), "Certainly when Congress enacted the [Federal Arbitration Act], it never foresaw that it would be used to stop drivers for a major national delivery company from challenging their employer's systematic violation of wage laws."

Not surprisingly, Barrett's nomination has received the support of the [U.S. Chamber of Commerce](#), which advocates for the rights of big business at the expense of everyday Americans.

## **CONSUMER PROTECTIONS**

On the Seventh Circuit, Barrett has consistently ruled in favor of wealthy and powerful businesses over the rights of American consumers.

Nine different courts of appeals, including the Seventh Circuit, had uniformly agreed that the law empowers the Federal Trade Commission (FTC) to force

schemers to pay back the money they swindle. Yet, in [FTC v. Credit Bureau Center](#), Barrett and other Republican-appointed judges reversed that precedent and severely hampered the FTC's ability to pursue restitution, taking away the primary enforcement mechanism to prevent companies from lying to consumers and stealing their money. The loss of authority will [hurt](#) Americans who are victims of fraudulent advertising claims related to health insurance, including that they can help people [lose weight](#) and [combat disease](#).

The FTC is designed to protect consumers from fraud, which it does by not only putting a stop to fraudulent behavior, but also by making sure consumers can get their money back — to the tune of billions of dollars in restitution. A well-known recent example is the [\\$575 million settlement](#) with Equifax after its 2017 data breach.

In this particular case, a company called Credit Bureau Center had an affiliate post bogus ads on Craigslist that marketed desirable apartment rentals at affordable prices. To be considered for the rentals, consumers were instructed to obtain a “free credit report and score,” which hid the fact that they would also be signed up for a credit monitoring service for \$29.94/month. The scheme captured over \$6 million from unknowing consumers — over 500 of whom filed complaints with the FTC or other law enforcement agencies.

A lower court agreed with the FTC that the company should pay out \$5 million to the deceived consumers.

But a panel on Seventh Circuit ignored its own past respect for the FTC's authority and overruled the lower court's ruling granting restitution. It went as far as to say that the FTC's authority to block such schemes did not include the authority to get consumers their money back. Because it overturned a precedent, the entire circuit was invited to reconsider the decision. Amy Coney Barrett refused to revisit the case, allowing the bad ruling to stand.

For the better part of a century, courts have recognized that federal regulators like the FTC can seek restitution as part of their injunctive relief. In a 1946 case called [Porter v. Warner Holding Co.](#), the Supreme Court recognized, “[n]othing is more clearly a part of the subject matter of a suite for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.” In short, if you're caught stealing, of course you have to return what you stole.

Nevertheless, the panel overturned its own court's 30-year precedent, set in the 1989 case [FTC v. Amy Travel Service](#). Eight other circuit courts have similar precedents, but the Seventh Circuit dismissed the significance of this, writing, “Most circuits adopted their position by uncritically accepting our holding in *Amy Travel*.” The majority found that while the [Federal Trade Commission Act](#) mentions restitution, it doesn't mention restitution explicitly in the section (13b) about injunctions. This led the panel to conclude that the section is

designed only to mitigate future harm, not to correct for harm that has already happened.

Three of the judges on the Seventh Circuit dissented, arguing that the case should have been heard *en banc*. Writing on their behalf, Chief Judge Diane Wood explained, “To my knowledge, no court has ever tied the hands of a government agency in the way that the majority has done here, and the majority cites none.” The majority opinion, she added, “upends what the agency and Congress have understood to be the status quo for thirty years, and in doing so grants a needless measure of impunity to brazen scammers like the defendant in this case.”

To reach their anti-consumer conclusion, the panel relied on a 1996 Supreme Court case, [Meghrig v. KFC](#), that dealt with restitution between two private parties under an unrelated statute. As Chief Judge Diane Wood stated in dissent, “[n]othing in *Meghrig* . . . comes close to holding that a government agency acting pursuant to express authority to seek injunctive relief cannot ask for a mandatory injunction requiring turn-over of money.” The panel concluded, however, that the precedent must similarly limit the FTC’s ability to pursue restitution as well.

Wood also accused the majority of having “trivialized” the precedents in the other eight circuits: “They brush off this consensus with the accusation that these courts have done so unthinkingly. I find that charge quite unwarranted.”

The FTC, an independent agency, responded by [asking the Supreme Court](#) to consider the case, even though the Trump Administration [chose not to appeal](#) on its behalf. In the FTC’s petition, it notes how disastrous the Seventh Circuit’s precedent would be for its enforcement, highlighting that from 2016 to 2019, it personally returned approximately \$977 million to consumers. That’s in addition to billions more that companies had to return directly to consumers because of FTC enforcement against illegal scams. “The issue is critically important,” the FTC wrote. Without the ability to pursue restitution, the law would be reduced “to a stop sign and would effectively reward fraudsters for their illegal conduct.”

A group of 23 state attorneys general [filed a separate brief](#) urging the Supreme Court to reconsider the case on the FTC’s behalf. Illinois Attorney General Kwame Raoul, whose state would be impacted by the Seventh Circuit precedent, [explained that](#) “obtaining restitution is critical in enforcing consumer protections,” and allowing the precedent to stand would “ultimately benefit businesses that profit by misleading people.” On July 9, 2020, the Supreme Court [granted certiorari](#) and consolidated in it with a similar case from the Ninth Circuit.

Additionally, in [Dalton v. Teva North America](#), Barrett ruled against a woman who was forced to have a hysterectomy in order to remove a piece of her Intrauterine Device (IUD) that had broken off. In 2007, Cheryl Dalton had

her doctor implant her with an IUD, which is a commonly used form of birth control. When Dalton sought to have it removed in 2013, the doctors informed her that a piece had broken off and become stuck in her uterus. She was then told that she would have to undergo a hysterectomy in order to have it fully removed. A hysterectomy is a medical procedure to remove the uterus. In addition to ending menstruation, women who undergo hysterectomies are no longer able to become pregnant.

Following the procedure, Dalton brought a lawsuit against Teva Pharmaceuticals, which manufactures, markets, and distributes the IUD that Dalton had received. When the case was heard by the District Court, Teva argued that Indiana law requires expert testimony to show causation in products liability actions when an issue “is not within the understanding of a lay person.” In response, Dalton argued that the “causation issue was so straightforward that expert testimony was unnecessary.” She pointed out that it is within the understanding of a layperson that an IUD should not break into pieces while inside a patient. Nonetheless, the district court judge ruled in favor of Teva’s motion to dismiss on the grounds that Dalton had failed to prove causation because she had not had expert testimony.

When Dalton appealed the decision the Seventh Circuit, Barrett upheld the district court’s finding. She found a distinction between Dalton’s injury and a person who breaks their leg as a result of getting hit by a car. According to Barrett, the injury suffered by Dalton, which was clearly the result of a faulty IUD, was “far removed from situations in which a causation issue is so obvious that a plaintiff may forgo expert testimony.” As a result of Barrett’s ruling, Dalton was denied justice by the courts.

Similarly, in [Chronis v. United States](#), Barrett sided with the government against Anna Chronis, a patient who underwent a pap smear at a University of Illinois Mile Square Health Center. The procedure allegedly caused injury, pain, and bruising, and she sought to recover \$332 in expenses she incurred because of the injury.

To do so, Chronis took the following steps, all without a lawyer: (1) She repeatedly called the doctor that harmed her, who did not help and did not even return her calls; (2) she called the health center, but they would not help; (3) she filed a complaint with the health center’s grievance committee, requesting the \$332 in restitution. But they did not help; (4) she then sent a letter to the Centers for Medicare and Medicaid Services, requesting assistance in “receiving restitution,” and included 60 pages of documents which included that she was seeking \$332; but they referred her to the Illinois Department of Financial and Professional Regulation, which did not respond; and (5) she filed a pro se malpractice complaint in state court, but, because the health center receives federal funds, the United States substituted itself as the defendant and removed the case to federal court under the False Claims Act.

Despite her efforts, again all without a lawyer, a federal judge said she had not given the government proper notice and dismissed the case. Chronis appealed.

A panel of the Seventh Circuit, in an opinion by Barrett, affirmed. Barrett ruled that, despite making a claim for “restitution” and including over 60 pages of documents, Chronis’ efforts were somehow insufficient to put the federal agency on notice of her claim.

Judge Ilana Rover, a George H.W. Bush nominee, strongly dissented. She emphasized that under Seventh Circuit precedent, the court is supposed to give significant leeway to FTCA plaintiffs who do not have an attorney: “We have long applied a flexible standard and have made clear that deficiencies in an administrative claim are not fatal, provided the proper agency had the opportunity to settle the claim for money damages before the suit.”

In this case, it was clear that CMS had a chance to settle for monetary damages. As Judge Rovner wrote, “To state that a request for restitution along with talk of out-of-pocket loss, malpractice, and liability is not a money demand defies credulity.”

And in [\*Casillas v. Madison Ave. Associates Inc.\*](#), Barrett wrote a decision denying consumers the ability to enforce their rights under the Fair Debt Collection Practices Act, which protects against abusive debt collection practices. Barrett found that a debt collector’s failure to follow the law and alert Paula Casillas to the fact that she needed to tell the collection agency, *in writing*, that she intended to dispute her debt with them or forfeit the Act’s protection entirely amounted to “no harm, no foul.”

As the dissent explained, this omission places vulnerable consumers in an unenviable “Gotcha!” situation” where debt collectors may first flout the Act by failing to notify consumers about the actions they must take to activate its core protections; and then benefit from breaking that law by claiming that consumers forfeited those very protections by not taking action. Barrett’s ruling strips the Act of its core purpose to “eliminate abusive and unfair tactics from the debt-collection business.”

## IMMIGRATION

Barrett has regularly issued rulings hostile to immigrants seeking entry into the U.S., relief from deportation, and access to public benefits. In issuing these rulings, she has consistently abdicated her judicial duty to ensure on appeal that immigration determinations are made without arbitrary decision-making or harmful prejudice. As a result, she has denied justice to immigrants and cruelly subjected them to deportation, even when that deportation would put their lives at risk.

## ***Barrett Has Ruled to Restrict Benefits for Immigrants***

In [Cook County v. Wolf](#), Barrett argued in dissent that the Trump Administration's "public charge" rule was lawful and should be upheld. The rule would deny immigrants permanent residence if they received any form of public assistance, including Medicaid or food stamps, for more than 12 months in a three-year period, even though Congress has made these benefits available to them.

A district judge in Illinois had issued an injunction preventing enforcement of the rule, holding that it improperly considered an immigrant to be a "public charge" even when the immigrant had not met the requirements for such a designation under the controlling statute.

On appeal, the majority of a Seventh Circuit panel agreed, and found that the rule both (1) discriminated against people with disabilities who were in need of more frequent medical care and (2) conflicted with Congress's own affirmative authorization of benefits for immigrants by punishing immigrants who receive them. The majority also noted the "potentially dire public health consequences" of implementing an unlawful rule that would force immigrants seeking permanent residence to forego congressionally approved health benefits, including emergency care through Medicaid.

Barrett, however, dissented. In her dissent, Barrett was highly critical of the lower court, arguing it had abused its discretion by enjoining enforcement of the public charge rule. By attempting to allow the Trump Administration to broadly punish immigrants who obtain health care and other public services, Barrett again sought to undermine congressional protections for vulnerable populations.

## ***Barrett Has Ruled to Deny Entry into the United States***

In [Yafia v. Pompeo](#), Barrett authored an opinion holding that Mohsin Yafai's visa application was properly denied, even though the consular officer's conclusion that Yafai attempted to smuggle two children into the country lacked evidentiary support and was potentially based on the officer's ethnic stereotyping. Yafai's husband, an American citizen, provided evidence that the children, who drowned while the visa application was pending, were theirs—and not fraudulent, as concluded by the consular officer.

Other judges on the Seventh Circuit condemned Barrett's ruling. A Reagan-appointed judge, Kenneth Ripple, dissented from Barrett's opinion and noted the consular officer may have operated on a "stereotypical assumption" when concluding the woman was smuggling children. Rebuking Barrett's opinion, he wrote that "[w]e have the responsibility to ensure that such decisions, when born of laziness, prejudice or bureaucratic inertia, do not stand." When the

full Seventh Circuit [refused](#) to hear the case, Judge Wood wrote that Barrett's opinion constituted a "dangerous abdication of judicial responsibility" that would let immigration officials deny visas on the basis of "impermissible bias."

### ***Barrett Has Greenlighted Deportations***

In [Alvarenga-Flores v. Sessions](#), Barrett also wrote a 2-1 opinion affirming the Bureau of Immigration Appeals rejection of an El Salvadoran's request for protection from deportation under the Convention Against Torture. Alvarenga-Flores argued that if sent back to El Salvador he may be tortured or killed by gangs. The immigration judge who considered the case found the immigrant's case not credible based on, as the dissent noted, "trivial" inconsistencies in his description of what happened to him over a three-and-a-half-year period. Among other things, the dissent noted, was an inconsistency about the precise placement of passengers in a car.

Nevertheless, minor errors about small details of events that occurred years ago were sufficient for Barrett to defer to the immigration judge's determination. As a result, Alvarenga-Flores was subject to deportation.

In [Ramos v. Barr](#), Barrett cast the deciding vote permitting the deportation of a lawful resident who resided in the United States for 30 years, since he was just 10 years old. As the dissent noted, his deportation potentially violated the Equal Protection clause because it irrationally favored the children of naturalized citizens over the children of those who were born as U.S. citizens. As a result, Ramos was bizarrely subject to deportation precisely because his mother was born a U.S. citizen – had she been born a non-citizen, Ramos's deportation would have been illegal. Even though an immigration court has no jurisdiction to assess the merits of such a claim, necessitating a hearing on the issue before an Article III judge, Barrett nevertheless allowed the immigration court's decision to deport Ramos to stand.

In [Pomposo Lopez v. Barr](#), Barret joined an order finding that a mother and three children from Mexico were not eligible for asylum or withholding of removal, despite facing threats of physical violence back home. Pomposo Lopez fled Mexico with her children after being repeatedly threatened by men who were angry that her partner was cooperating with American law enforcement in the U.S. On one occasion, Pomposo Lopez was held at gunpoint as three men tried to kidnap her daughter. She also received threatening phone calls, including one that warned that her "children can get lost and be found later without organs." Despite these threats, the panel concluded that the case did not warrant asylum or a withholding of removal. According to the order, "a single, unsuccessful attempt to abduct [Pomposo Lopez's daughter] at gunpoint and a series of threatening phone messages, without any physical harm or further attempts to carry out the threats, do not describe grave harm to compel a finding of past persecution."

## GUN SAFETY

Barrett has received the support of groups that advocate for unfettered gun rights, including the [National Rifle Association](#) and [Gun Owners of America](#), in part because her rulings on the Seventh Circuit demonstrate that she'll be a fierce opponent of gun safety laws.

In [Kanter v. Barr](#), Barrett dissented from a Seventh Circuit decision upholding a federal law which restricts access to guns by felons convicted of serious crimes. Rickey Kanter was convicted of felony mail fraud for defrauding Medicare out of nearly \$400,000. Kanter pleaded guilty and was sentenced to a year in prison and two years supervised release and was ordered to reimburse Medicare over \$27 million in a civil settlement. Barrett argued that the government's interest in protecting the public from gun violence is insufficient to justify a categorical prohibition on felons right to possess firearms.

The two Reagan appointees in the majority pointed out that Barrett's position was in conflict with every appellate court that has ever addressed the issue. They further noted that restricting gun access for felons convicted of both violent and non-violent crimes serves the important governmental purpose of keeping guns out of the hands of those most likely to recidivate and commit violent crimes in the future. The majority cited statistical evidence, the Supreme Court, its own precedent, and other circuit courts to demonstrate the longstanding judicial acknowledgement that "most felons are nonviolent, but someone with a felony conviction on his record is more likely than a nonfelony to engage in illegal and violent gun use."

## CRIMINAL JUSTICE

### ***Barrett Has Ruled Against Fifth Amendment Due Process Rights***

In [Sims v. Hyatte](#), Barrett saw no problem with a prosecutor withholding from both the defendant and the jury the fact that the only eyewitness's testimony was hypnotically induced, even though under the Fifth Amendment's Due Process clause, criminal defendants are entitled to know of any evidence the government has that may be favorable to their case.

When Mark Sims was tried for attempted murder, he was not informed that the only eyewitness to the alleged crime, who identified Sims as the perpetrator at trial, had to be hypnotized before trial to enhance his testimony. Without hypnosis, the witness only stated that Sims "looked like" the perpetrator, but he was "not extremely sure" whether he actually was the perpetrator. Because the government withheld this information, Sims was unable to attack the testimony as unreliable and was sentenced to 35 years in prison.

Nearly two decades later, Sims learned that this evidence had been withheld. After being denied relief by the Indiana state court system, Sims filed a habeas corpus petition in federal court to challenge his imprisonment as unlawful.

Though the district court denied the petition, a Seventh Circuit panel granted a writ of habeas corpus on appeal, arguing that withholding evidence of the hypnotism violated clearly established federal law. In reaching this decision, the majority applied a 40-year old Supreme Court precedent stating that when there is a “reasonable probability” that withheld evidence could have changed the result of the trial if it were disclosed, then a new trial is required. Given the inherent unreliability of hypnosis testimony, the majority concluded that “reasonable judges cannot be confident that, if the jury had known [of the hypnosis,]” it would not have changed the result of the trial.

Nevertheless, Barrett dissented and would have denied Sims’s habeas corpus petition. She argued that there was no reasonable probability that disclosing the hypnosis could have changed the trial outcome because the witness had consistently identified Sims even prior to the hypnosis. As the majority pointed out, this was simply not true – in reality, the witness had equivocated, and hypnosis had been required to establish a confident identification. Barrett’s dissent ignores this in an apparent attempt to re-shape the actual facts of the case to suit her preferred outcome and ensure Sims’s continued imprisonment, despite the clear uncertainty about his guilt.

### ***Barrett Has Ruled Against the Sixth Amendment Right to Counsel***

On the Seventh Circuit, in [Schmidt v. Foster](#), Barrett dissented from a decision that held that a state trial judge had denied a man his Sixth Amendment right to counsel after the judge ordered the defendant’s lawyer to not participate in a pre-trial hearing while the man was questioned by the judge. In the case, Schmidt admitted that he shot his wife seven times, killing her in their driveway. He argued, though, that he had been provoked, which would make his crime second-degree rather than first-degree homicide.

The trial judge reviewed his defense at a pretrial hearing, at which Schmidt’s attorney was not allowed to speak. The judge rejected the defense and Schmidt was convicted of first-degree homicide and sentenced to life in prison.

A panel of the Seventh Circuit determined that this “unprecedented” closed session was a denial of the man’s rights, that a “silenced lawyer” is practically the same as an “absent lawyer” and was “not compatible with the American judicial system.”

Barrett dissented. She emphasized that the standard for federal habeas relief “is intentionally difficult.” She held that the state court’s decision rejecting Schmidt’s Sixth Amendment claim was not “contrary to” or “an unreasonable

application” of clearly established federal law because the Supreme Court had never addressed a claim that a defendant has a right to counsel in a pretrial hearing like the one at issue in the case. She said “perhaps the right to counsel should extend to a hearing like the one the judge conducted in Schmidt’s case” but federal habeas law “precludes us from disturbing a state court’s judgment on the ground that a state court decided an open question differently than we would – or, for that matter, differently than we think the [Supreme] Court would.”

The panel’s ruling was [reversed](#) by the full Seventh Circuit sitting en banc. The new majority criticized the trial judge but ruled that, since there was no clearly established Supreme Court precedent on the matter, habeas corpus was inappropriate. Moreover, the majority held that there was not enough deprivation of counsel to be unconstitutional. It noted, for example, that there was a recess during which Schmidt could have consulted his lawyer.

Writing for the dissent, Judge David Hamilton criticized the majority. He wrote that the majority had introduced the notion that there must be “complete” denial of counsel. As Hamilton noted:

If the judge had simply said that he wanted to hear what the accused had to say without any counsel even present, I could not have imagined, at least before this case, that any court in the United States would find such interrogation acceptable without a valid waiver of counsel by Schmidt himself. The only difference here is that Schmidt’s lawyer was physically present in the room, but the judge might as well have gagged him: he ordered the lawyer not to “participate” in this critical stage of the prosecution. I don’t see a constitutional difference between an absent lawyer and a silenced lawyer.

Also relevant is [Reynolds v. Hepp](#). There, Barrett cast the deciding vote to rule against a plaintiff who brought a lawsuit against his lawyer after he failed to pursue an appeal on the plaintiff’s behalf due to a conflict of interest.

Specifically, Cornell Reynolds filed an appeal and was appointed a public defender. His public defender filed a post-conviction motion for a new trial on the grounds that his trial attorney was ineffective because he failed to raise an alibi defense. That motion was denied, and the public defender appealed to the Wisconsin Court of Appeals. The case was remanded to the trial court, and the trial court rejected his motion for a new trial. Reynolds again appealed. At that time, Reynolds’s public defender was told by the Wisconsin State Public Defender’s Office that he was spending too much time on that one case and he would no longer be paid for work on Reynolds’s case. Since the public defender was no longer being paid, he did not investigate an equal protection challenge as a possible new argument on appeal, and Reynolds lost on appeal.

Reynolds filed a petition for habeas corpus on the grounds that Wisconsin's failure to pay his public defender caused the attorney to stop any further investigations and leads. He argued that Wisconsin created a conflict of interest, which deprived him of his right to counsel.

The Seventh Circuit majority, including Barrett, found that Reynolds failed to meet the prejudice test in [Strickland v. Washington](#), which states that “but for the counsel’s unprofessional errors, the result of the proceeding would have been different.” The court found that the conflict of interest did not change the ultimate outcome of the trial.

Judge Diane Wood dissented. She explained that *Strickland* was the wrong test. In another Supreme Court case, [Cuyler v. Sullivan](#), the Court held that the defendant must show that an actual conflict of interest adversely impacted the attorney’s performance. Here, Reynolds’ public defender did in fact limit his work because he was no longer being paid by the state. As Wood wrote, “If the lawyer puts his or her interests first, the client is the loser.”

### ***Barrett Has Attacked Miranda Rights***

In a law review [article](#) discussing canons of constitutional interpretation, Barrett said that “[t]he *Miranda* doctrine, which inevitably excludes from evidence even some confessions freely given, is an example” of “the court’s choice to over-enforce a constitutional norm by developing prophylactic doctrines that go beyond constitutional meaning.”

Of course, the *Miranda* doctrine protects people from coercive police tactics aimed at forcing people to incriminate themselves in violation of the Fifth Amendment. Even Chief Justice William Rehnquist [upheld](#) the *Miranda* doctrine as being necessary in an age of “modern custodial police interrogation” that, “by its very nature, isolates and pressures the individual” and where “the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements.” Eroding or eliminating the *Miranda* doctrine, as Barrett seemingly wants to do, would loosen restrictions on police interrogation and expose the most vulnerable members of society to coercive police tactics.

### ***Barrett Has Upheld Unconstitutional Policing***

Again breaking with the majority on the Seventh Circuit, Barrett authored a dissent in [McCottrell v. White](#). There, the majority denied summary judgment to prison guards who fired their weapons over a crowded prison dining hall during a fight between inmates, striking several inmates with buckshot and causing significant injuries. The majority opinion, written by a judge appointed by President George H.W. Bush, Judge Rovner, found that there were disputed issues of material fact as to whether the guards were liable because they acted maliciously and sadistically. Because a reasonable jury could hold that the guards violated the Eighth Amendment, she sent the case back to the lower court for trial.

Judge Rovner highlighted the guards' "shifting" accounts of the incident. The guards claimed, for example, that they fired their shots at the ceiling rather than at those in the dining hall. In fact, the guards aimed directly into the crowd. Moreover, video evidence proved the fight they claimed to be breaking up was over when they intervened.

Barrett dissented, agreeing with the guards' version of the facts. She relied heavily on an internal prison report to conclude that the guards fired their shots at the ceiling rather than at those who were in the dining hall. As the majority pointed out, that same report concludes that the guards "used an unreasonable amount" of force, did "not expressly analyze" the direction of the shots, and at most was "nothing more than a competing view" of contested facts and "not conclusive for summary judgment purposes." Based on the record in the case, the majority explained, Barrett's view that there was no evidence that the guards "shot into the crowd" was simply "incorrect."

Barrett also [joined](#) a decision granting qualified immunity to two police officers after a teenager died in their custody.

The case involved Terrell Day, 18, who was arrested after he allegedly shoplifted a watch from Burlington Coat Factory. Confronted by security, Day returned the watch but then fled across the parking lot, eventually collapsing near a gas station.

Indianapolis police arrived and placed Day in handcuffs. Day told officers he was having trouble breathing, and the police told Day he exerted himself by running and instructed him to take slow breaths. Day was not remaining in an upright seated position and at one point soiled himself. He again told the officers he could not breathe. An ambulance was called, and paramedics concluded that Day was breathing normally, and did not need to go to the hospital.

An officer then requested the "jail wagon" to transport Day to detention. Before it arrived, however, a second pair of handcuffs was added to Day's wrists. When the jail transport arrived, the driver found Day unresponsive and lying on his back. A second ambulance was called. Paramedics performed CPR for 30 minutes, but Day was dead. The autopsy report listed the cause of death as "Sudden Cardiac Death due to Acute Ischemic Change." Listed as a contributing cause was sustained respiratory compromise as a result of having his hands cuffed behind his back.

Day's parents sued in September 2017. The officers claimed qualified immunity, but the district court [denied](#) summary judgment on the plaintiffs' Fourth Amendment excessive force claim. The court concluded, in part, "reasonable officers would know they were violating an established right by leaving Day's hands cuffed behind his back after he complained of difficulty breathing."

The Seventh Circuit [reversed](#) and remanded. Judge Manion, in an opinion joined by Amy Coney Barrett and Frank Easterbrook, emphasized that Day

“never complained that the tightness of the handcuff was restricting his breathing.” Moreover, “the record contains no evidence that there was any indication the handcuffs were the cause of Day’s breathing difficulty until the autopsy report was released. Thus, Day’s right ‘to be free from an officer’s knowing use of handcuffs in a way that would not inflict unnecessary pain or injury’ was not violated.”

### ***Barrett Has Sought to Undermine Criminal Justice Reform***

The First Step Act, signed into law in 2018, reduced mandatory minimum prison sentences for various offenses. Unlike most sentencing changes, which apply only to future prosecutions, the First Step Act applied retroactively to people who had already been convicted of crimes but had not yet been sentenced. The law’s broad applicability reflects Congress’s intent to reduce draconian mandatory minimum sentences for as many people as possible.

In [\*United States v. Uriarte\*](#), the Seventh Circuit, sitting en banc, considered whether Hector Uriarte should be sentenced under the First Step Act’s reduced mandatory minimum sentences. Uriarte had previously been convicted of drug and firearm offenses and, with a mandatory minimum sentence of 42 years, sentenced to 50 years’ imprisonment. However, after an unrelated Supreme Court case rendered Uriarte’s sentence unlawful, the Seventh Circuit vacated his sentence. By the time re-sentencing was set to occur, the First Step Act had become law. Therefore, the District Court applied the Act’s new guidelines and sentenced Uriarte to 20 years’ imprisonment. The Trump Administration challenged this reduced sentence.

A majority of the Seventh Circuit held that the District Court was correct to apply the First Step Act’s reduced mandatory minimum sentences, and not to the old, harsher minimums. Writing for the majority, Judge Kenneth Ripple, a Reagan appointee, noted that the case was “straightforward”: under Supreme Court and Seventh Circuit precedent, vacating a defendant’s sentence “wipe[s] the slate clean,” meaning that “there is no sentence until the district court imposes a new one.” Because a sentence that no longer exists cannot be “imposed,” defendants with vacated sentences are entitled to re-sentencing under the First Step Act.

In dissent, Barrett rejected this straightforward application of the law. She argued that whether a sentence had previously been imposed should be determined solely on a historical – not a legal – analysis. Therefore, in Barrett’s view, even a wrongful sentence that was nullified should be sufficient to prevent the First Step Act from applying. In support of this argument, Barrett claimed that the Act’s language in § 403(b) referring to “a sentence” in reality meant “*any* sentence” — even one that had been vacated. Her analysis attempted to change the language of federal law by claiming that one word actually means another.

As Judge Ripple correctly noted, Barrett’s dubious interpretation of the First Step Act “introduces a significant amount of ambiguity and internal contradiction.” Particularly damning is that § 403(b) already includes the word “any” when applying the Act’s reduced mandatory minimums to persons convicted of “any offenses.” If Congress had truly intended “a sentence” to mean “any sentence,” as Barrett argues, it would simply have said so, as it did regarding offenses earlier in the very same section of the law.

## DETAINEE RIGHTS

Barrett authored an [article](#) criticizing the Supreme Court’s decision in *Boumediene v. Bush*, which held that foreign citizens detained at Guantanamo Bay could file habeas corpus petitions in federal court challenging their detention. Barrett [wrote](#) that the decision was “contrary to precedent and unsupported by the Constitution’s text and history.” She argued that “the *Boumediene* Court conceded that the historical record fails to establish that courts had ever entertained habeas petitions filed by noncitizens held in other countries. The dissenters, who maintained that the Suspension Clause did not override Congress’s choice to deny federal jurisdiction, had the better of the argument.”

As a more general matter, Barrett has [argued](#) that most historical statutes suspending the writ of habeas corpus have delegated too much authority to the Executive insofar as they have permitted the President to decide whether, when, where, and for how long to exercise emergency power. She concludes that “while the Suspension Clause does not prohibit Congress from giving the President some responsibility for the suspension decision, it does require Congress to decide the most significant constitutional predicates for itself: that an invasion or rebellion has occurred and that protecting the public safety may require the exercise of emergency power.” At the same time, she allows that while Congress cannot authorize the President to suspend the writ, it “can render suspension an automatic consequence of the President’s determination that the conditions for the statute’s effectiveness exist.”

## ENVIRONMENT

More than a decade ago, Orchard Hill Building Co. asked the Army Corp of Engineers for a “jurisdictional determination” if 13 acres of wetlands were covered by the Clean Water Act. In 2006, the Army Corps of Engineers determined that the Environmental Protection Agency (EPA) did indeed have jurisdiction over the wetlands at issue. They found that the wetlands, which were approximately 11 miles away from the nearest navigable river, were “waters

of the United States.” As a result, Orchard Hills Building Co. stopped plans to develop the land. While Orchard Hill Building Co. appealed, the Supreme Court decided that jurisdictional determinations in wetlands must be made on a case-by-case basis. The Army Corps, in 2010, made another determination that the EPA had jurisdiction over the wetlands, and Orchard Hill challenged the determination in the Seventh Circuit.

The Seventh Circuit, in an [opinion](#) joined by Amy Coney Barrett, sent the case back to the U.S. Army Corps of Engineers for reconsideration. The panel concluded that the determination by the Corps was not backed by “substantial evidence in the record.” The court found that the Army Corps had failed to provide sufficient factual support for its conclusion that there was a significant nexus between the Orchard Hill wetlands and navigable water sufficient to be considered “waters of the United States” for jurisdiction under the Clean Water Act.

## CONCLUSION

Barrett’s inclusion on Trump’s short-list demonstrates that she passes his key [litmus tests with flying colors](#). She has been identified as someone who, if given the opportunity will [dismantle](#) the Affordable Care Act and gut *Roe v. Wade*. On the bench, she has continued to show hostility to reproductive rights, access to justice, due process, and the rights of Americans to be free from discrimination in the workplace.

Alliance for Justice strongly opposes her confirmation to the U.S. Supreme Court.

