

**CONSTITUTIONAL
ACCOUNTABILITY CENTER**

October 21, 2020

The Honorable Lindsey Graham
Chairman, Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510-6275

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510-6275

Dear Chairman Graham, Ranking Member Feinstein, and members of the Senate Judiciary Committee:

On October 9, 2020, I wrote to you expressing grave concerns about Judge Amy Coney Barrett's nomination to the Supreme Court of the United States and the scheduling of her confirmation hearing.¹ The letter noted how holding the confirmation hearing at this time damages the legitimacy of the Court: there has not been a consistent standard for considering a President's nominee to the Supreme Court during an election year, let alone once millions of votes have already been cast; the President has indicated how he expects his nominees will vote on certain issues; and he has also stated that he wants Judge Barrett on the bench in time to "look at the ballots" in the election following his repeated false claims of mail-in ballot fraud. As a result, I said, "This hearing should not be happening now."² However, as Senate leadership insisted on the hearing moving forward, regardless of the damage it would do to the institutional integrity of the Court, I asked for you to examine closely Judge Barrett's record and question her to determine whether she would be faithful to the text, history, and values of the whole Constitution; be fair-minded and not put her thumb on the scales of justice in favor of big business; and serve as an independent check on the President who nominated her. I had concerns that she not only passed President Trump's litmus tests to overturn *Roe v. Wade* and dismantle the Affordable Care Act, but also would "work to undo the legal legacy of Ruth Bader Ginsburg, move the Roberts Court further away from mainstream legal thought, and be a reliable vote for big business over the interests of all people."³ Unfortunately, Judge Barrett said nothing during her confirmation hearings to dispel those concerns. Furthermore, she refused to answer simple questions about the text of the Constitution that would indicate we could trust her to be an independent check on the President who nominated her. Therefore, **I write to you today on behalf of the Constitutional Accountability Center to oppose her elevation to the Supreme Court.**

The Constitutional Accountability Center ("CAC") was founded in 2008 as a public interest law firm, think tank, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests. As a law firm, CAC makes arguments grounded in constitutional text and history. As a think tank, we produce original scholarship on the text and history of the Constitution, distilling the best legal and

¹ Letter from Elizabeth Wydra to Chairman Grassley & Ranking Member Feinstein et al., on the Nomination of Judge Amy Coney Barrett to the U.S. Supreme Court (Oct. 9, 2020), *available at* <https://www.theusconstitution.org/wp-content/uploads/2020/10/CAC-Barrett-Letter-of-Concern.pdf>.

² *Id.* at 4.

³ *Id.* at 3.

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historical scholarship to help Americans better understand our Constitution and inform how modern debates about its meaning should be resolved. And, as an action center, we explain why the Constitution is, in its most vital respects, a progressive document, written by revolutionaries and amended by those who prevailed in the most tumultuous social upheavals in our nation's history—Reconstruction, Suffrage, and the Civil Rights movement. Through litigation, scholarship, and advocacy, we seek lasting victories rooted in the text, history, and values of the whole Constitution.

As litigators and defenders of the judiciary and the rule of law, CAC has a vested interest in nominations to the federal courts; and there are no nominations more important than those to the Supreme Court, one of the most powerful arbiters of constitutional liberties and protections. The American people are entitled to Supreme Court justices who will not only safeguard the whole Constitution, but also treat each litigant fairly and with dignity, and serve as an impartial, independent check on the President and Congress. It is with these considerations in mind that we reviewed the nomination of Judge Amy Coney Barrett and determined CAC must oppose her confirmation to the U.S. Supreme Court.

1. JUDGE BARRETT'S SELECTIVE AGREEMENT WITH CONSTITUTIONAL PRECEDENT AND DISCUSSION OF CONSTITUTIONAL PROVISIONS

Judge Barrett is a self-professed originalist. As Judge Barrett herself mentioned during her testimony, we at CAC consider ourselves originalists, too. However, to live up to the name, originalists must be faithful to the text and history of the *whole* Constitution, including the powerful Amendments that have, over time, pushed our country further along the arc of progress. These Amendments, among other things, removed the stain of chattel slavery from our nation's charter, promised equal protection of the law to all persons, protected the right to vote from discrimination based on race and gender, and prohibited poll taxes so that the right to vote would not depend on a person's ability to pay a fee. To have a justice on the Supreme Court who takes seriously this arc of progress, written into the words of our Constitution, and uses it as their north star in deciding the cases of national import that reach the Supreme Court is something CAC would cheer—even if that nominee is not necessarily the one that we would have chosen, all other things considered.

Although Judge Barrett describes herself as an originalist, we cannot agree with her definition of the term. Judge Barrett believes originalists are jurists who resolve constitutional disputes by relying on the text and history of the provision in question as understood at the time of its ratification.⁴ This methodology does not, however, take into account how that text might have been changed by subsequent amendments to the Constitution. This is why CAC stresses a fidelity to the *whole* Constitution, for to truly understand the text, one must read our national charter in its entirety. The definition Judge Barrett provided during her confirmation hearing sheds light on why her pre-hearing record, as we have shown, raised concerns about whether she is an erratic originalist, committed only to following some of the Constitution's text and history, but not all.⁵ Regrettably, Judge Barrett's testimony at her confirmation hearing did not dispel those concerns. While Judge Barrett gave good but narrow answers to questions about certain constitutional provisions and values as well

⁴ *Confirmation Hearing on the Nomination of Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 116th Cong. (Oct. 13, 2020) [hereinafter *October 13 Hearings*], (statement of Judge Barrett in conversation with Sen. Graham), available at https://www.youtube.com/watch?v=XvZ7_TxFxj0.

⁵ David H. Gans, *Judge Amy Coney Barrett's Partial Constitution: A Review of Her Constitutional Jurisprudence*, CAC (Oct. 9, 2020), <https://www.theconstitution.org/wp-content/uploads/2020/10/Issue-Brief-Judge-Amy-Coney-Barrett%E2%80%99s-Partial-Constitution-A-Review-of-Her-Constitutional-Jurisprudence.pdf>.

as precedents of the Supreme Court, her unwillingness to address other provisions and cases in fact heightened the concerns about her fidelity to the entire Constitution.

Not surprisingly, a number of Senators sought to elicit Judge Barrett's jurisprudential views of Supreme Court rulings protecting fundamental rights. This is a legitimate line of questioning of a Supreme Court nominee. But in response to Senators' questions about some of the most important constitutional rulings by the Court in the past 66 years, Judge Barrett was very selective in her replies, stating her agreement with the Court's rulings in some of those cases but refusing to state whether or not she agreed with others or thought they vindicated the text and history of the relevant constitutional amendments.

For example, Judge Barrett repeatedly referred to *Marbury v. Madison*⁶ and *Brown v. Board of Education*⁷ as "super precedent,"⁸ meaning, in her words, they are "cases that are so well settled that no political actors and no people seriously push for their overruling."⁹ Considering these cases are the building blocks for judicial review and equal protection, we are heartened to know Judge Barrett gives them a special pride of place among all Supreme Court precedent.

Judge Barrett affirmed that both *Brown* and *Loving v. Virginia*¹⁰ were correctly decided.¹¹ However, the declaration that *Brown* and *Loving* were correctly decided stands in sharp contrast to Judge Barrett's refusal to state whether she agreed with the Court or believed it got the text and history of the Constitution right in *Griswold v. Connecticut*,¹² *Eisenstadt v. Baird*,¹³ *Roe v. Wade*,¹⁴ *Lawrence v. Texas*,¹⁵ and *Obergefell v. Hodges*.¹⁶ In these cases, the Supreme Court held that the Constitution protects fundamental rights going to the heart of personal liberty and autonomy—reproductive freedom (including the right to use contraceptives and the right to abortion), sexual intimacy between consenting adults, and marriage equality.

All that Judge Barrett would say about these cases is that she cannot "grade precedent," relying on past statements taken out of context from Justices Ruth Bader Ginsburg and Elena Kagan during their own Supreme Court confirmation hearings. And yet she was able to give a grade to *Brown* and *Loving*: correctly decided. Even Chief Justice John Roberts, at his own Supreme Court confirmation hearing, testified that he agreed with the Court's ruling in *Griswold*,¹⁷ while Justice Samuel Alito, at his hearing, stated that he agreed

⁶ 5 U.S. (1 Cranch) 137 (1803).

⁷ 347 U.S. 483 (1954).

⁸ *October 13 Hearings* (statement of Judge Barrett in conversation with Senator Crapo); *Confirmation Hearing on the Nomination of Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 116th Cong. (Oct. 14, 2020) [hereinafter *October 14 Hearings*], (statement of Judge Barrett in conversation with Sen. Graham), available at <https://www.youtube.com/watch?v=TUQbMQgm6e0>.

⁹ *October 13 Hearings* (statement of Judge Barrett in conversation with Sen. Klobuchar).

¹⁰ 388 U.S. 1 (1967).

¹¹ *October 14 Hearings* (statement of Judge Barrett in conversation with Sen. Blumenthal).

¹² 381 U.S. 479 (1965).

¹³ 405 U.S. 438 (1972).

¹⁴ 410 U.S. 113 (1973).

¹⁵ 539 U.S. 558 (2003).

¹⁶ 576 U.S. 644 (2015).

¹⁷ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 207 (Sept. 13, 2005) (statement of Chief Justice John G. Roberts, Jr. in conversation with Sen. Kohl).

with the ruling in *Eisenstadt*.¹⁸ Even though Senator Richard Blumenthal quoted statements from Justice Anthony Kennedy and Justice Clarence Thomas during their confirmation hearings in support of *Griswold*, she would not state her agreement with any of the cases that make up an important fabric of American law: the last half century of constitutional precedents beginning with *Griswold* that protect the full scope of liberty for all in accordance with constitutional text and history.¹⁹ Her evasions leave open to doubt whether she would protect fundamental rights essential to liberty not explicitly enumerated in the four corners of the Constitution's text.

As if this evasion weren't enough cause for concern, Judge Barrett's answers when she *did* choose to share some insight as to her understanding of some of these cases indicate troubling positions.

For example, when asked by Senator Blumenthal if the Constitution protects the right to abortion, Judge Barrett said that "*Roe v. Wade* clearly held that the Constitution protects . . . a woman's right to terminate a pregnancy. [*Planned Parenthood v. Casey* upheld that central holding and spelled out in greater detail the test that the court uses to consider the legality of abortion regulations."²⁰ Judge Barrett was very specific here. She did not say that the Constitution protects the right to abortion, she said that the Court held that it does. This distinction, combined with Judge Barrett's refusal to state that *Roe* was correctly decided,²¹ her decision to sign her name to letters that referred to the legacy of *Roe* as "barbaric,"²² her repeated votes upholding or suggesting she might be likely to uphold restrictive state abortion laws, her rejection of the idea that the long line of Supreme Court decisions that have held that the Constitution safeguards the right to abortion should be treated as settled law,²³ and her reference to abortion chosen for specific reasons as "eugenics,"²⁴ are all signals that Judge Barrett does not recognize that the Fourteenth Amendment protects the right to abortion.

Similarly, Judge Barrett indicated hostility toward the fundamental right to marry when she expressed her understanding of *Loving v. Virginia*. When asked by Senator Blumenthal if *Loving* was rightly decided, Judge Barrett said that it was because it "follows directly from *Brown*."²⁵ But that is not quite right. *Brown* was decided based on the Equal Protection Clause of the Fourteenth Amendment, holding that separate schools based on race are inherently unequal. In *Loving*, the Court relied on both the Equal Protection Clause as well as the Due Process Clause of the Fourteenth Amendment. The majority called the right to marry a "fundamental freedom" and held to "deny [the right to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive to the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."²⁶ The majority in *Obergefell* reaffirmed the strong connection between the Clauses, between liberty and equal protection, in

¹⁸ *Confirmation Hearing on the Nomination of Samuel A. Alito to be an Associate Justice of the Supreme Court of the United States before the S. Comm. on the Judiciary*, 109th Cong. 318 (Jan. 10, 2006) (statement of Justice Samuel A. Alito in conversation with Chairman Specter).

¹⁹ *October 14 Hearings* (statement of Judge Barrett in conversation with Sen. Blumenthal).

²⁰ *October 13 Hearings* (statement of Judge Barrett in conversation with Sen. Blumenthal).

²¹ *Id.*

²² Sam Stein, *Amy Coney Barrett Signed Letter Urging End of 'Barbaric' Roe v. Wade*, *The Daily Beast* (Oct. 1, 2020), <https://www.thedailybeast.com/amy-coney-barrett-signed-letter-urging-end-of-barbaric-roe-v-wade>.

²³ Gans, *supra* note 5.

²⁴ *October 13 Hearings* (statement of Judge Barrett in conversation with Sen. Leahy).

²⁵ *October 14 Hearings* (statement of Judge Barrett in conversation with Sen. Blumenthal).

²⁶ 388 U.S. at 12.

protecting the right to marry, going so far as to call the connection “profound.”²⁷ Ignoring the liberty protections guaranteed by the Fourteenth Amendment not only casts acute doubt on Judge Barrett’s commitment to defending marriage equality, but also the right to contraception and freedom to engage in consensual sexual acts between same-sex adults. Furthermore, Judge Barrett referred to sexual orientation as “sexual preference.”²⁸ This suggestion that she considers sexual orientation to be a choice not only implies a conservative and scientifically outdated view on sexuality, but also raises serious concerns about her understanding of the rights of the LGBTQ+ community under law.

Just as Judge Barrett’s understanding of the meaning of the Fourteenth Amendment is troubling, so too is her understanding of the Second Amendment. Judge Barrett’s dissent in *Kanter v. Barr*²⁹ was a subject of many questions during her confirmation hearings. And rightly so—her dissent demonstrates that she has a sweeping view of the individual right to bear arms, and if she is confirmed to the Supreme Court, she could threaten the authority of government to enact reasonable gun regulations. In her dissent, Judge Barrett took the position that the legislature’s power to prohibit felons from possessing guns extends only to felons who are dangerous because “[f]ounding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons.”³⁰ But this is not how originalism works. As my colleague David Gans explained in his Issue Brief on Judge Barrett’s fidelity to the text, history, and values of the whole Constitution:

“[T]he Second Amendment does not limit us to the gun laws of the Founding generation. Governments act in innovative ways all the time, and there is no principle of constitutional law that says that the government must show that its particular method of regulating is deeply rooted in Framing-era history. Government must respect our constitutional rights, but it also has broad authority to pass and enforce reasonable gun regulation to protect public safety.”³¹

And while Judge Barrett’s dissent discussed Founding-era history and practice at length, it failed to discuss the original public meaning of the Second Amendment, even though that is what she considers to be the law.³² During her confirmation hearing, Judge Barrett needed to make clear her understanding of the original public meaning of the Second Amendment, and she failed to do so. She doubled down on her dissent, claiming that she “spent a lot of time in that opinion looking at the history of the Second Amendment and looking at the Supreme Court’s cases,” and her methodology in that case is “the way in which [she] would approach the review of gun regulation . . . to look very carefully at the text, to look carefully at what the original meaning was.”³³ But she never elucidated, neither in her dissent, nor during the two days of inquiry by the Senators of the Committee on the Judiciary, what her understanding of the original public meaning of the Second Amendment is.

Senator Richard Durbin was particularly troubled by her decision to privilege the right to bear arms over the right to vote—as am I. In her dissent, Judge Barrett repeatedly distinguished between felon disenfranchisement

²⁷ 576 U.S. at 672 (“The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.”).

²⁸ *October 13 Hearings* (statement of Judge Barrett in conversation with Ranking Member Feinstein).

²⁹ 919 F.3d 437 (7th Cir. 2019).

³⁰ *Id.* at 451 (Barrett, J., dissenting).

³¹ Gans, *supra* note 5, at 6.

³² *October 13 Hearings* (statement of Judge Barrett in conversation with Sen. Kennedy).

³³ *Id.* (statement of Judge Barrett in conversation with Ranking Member Feinstein).

and felon dispossession, approving the former and condemning the latter. In her view, the right to bear arms is an individual right, but the right to vote is a collective right, which can be limited to “virtuous citizens.”³⁴ As voting is a collective right, according to Judge Barrett, the government has more latitude to impose restrictions. This disturbing reasoning would treat voting—the right protected in the most number of places within the Constitution—as more vulnerable to deprivation than many other constitutional rights held by the individual. When Senator Durbin asked her about this distinction, Judge Barrett was consistent and did not waiver from her position in *Kanter*.³⁵ When pressed about whether she would put the right to vote on equal footing with the right protected by the Second Amendment, Judge Barrett would only say that “voting is a fundamental right.” She “expressed no view about . . . what the constitutional limits of that might be or whether the law should change with respect to felon voting rights,” and said she didn’t have an “agenda on felon voting rights or guns or campaign finance or anything else.”³⁶ And while we agree that she should not have such an agenda, we are still deeply troubled by the fact that she gives the Second Amendment pride of place over the right to vote, which is protected by more parts of the Constitution than any other right. In fact, when Senator Booker pressed Judge Barrett on whether poll taxes—bidden by the Twenty-fourth Amendment—are unconstitutional, Barrett demurred multiple times, eventually referring to the Voting Rights Act but never citing the Twenty-fourth Amendment.³⁷

The previous example explains why CAC measures nominees for the federal judiciary by their fidelity to the text and history of the *whole* Constitution. True originalists acknowledge our Constitution’s arc of progress, recognizing the transformative amendments that have made our society more just, inclusive, and free. Judge Barrett treating the right to vote like a second-class right is indicative of a failure to acknowledge and celebrate the whole Constitution. Unfortunately, it is not the only example where she demonstrated a misapplication of constitutional text, history, and values.

Senator Ben Sasse asked Judge Barrett, “What role does the Declaration of Independence play in interpreting the Constitution? Or what’s the relationship between the two documents?”³⁸ Judge Barrett sharply distinguished the Declaration from the Constitution, observing that the Declaration “isn’t binding law,” though she added that it is “an expression of our ideas, expression of our desire to be free of England . . . and tells us a lot about history and about the roots of our republic.”³⁹ While it is obviously true that the Declaration as a document itself is not “the law,” an originalist committed to the text and history of the entire Constitution would recognize that the Framers of the Fourteenth Amendment wrote the Declaration’s promises of liberty and equality directly into the Constitution. As the Reconstruction Framers recognized, the Fourteenth Amendment would be the “gem of the Constitution” because “it is the Declaration of Independence placed immutably and forever in our Constitution.”⁴⁰ The Fourteenth Amendment was designed to guarantee to all the “unalienable rights” to which

³⁴ 919 F. 3d at 462 (“[H]istory does show that felons could be disqualified from exercising certain rights—like the rights to vote and serve on juries—because these rights belonged only to virtuous citizens.”).

³⁵ *October 13 Hearings* (statement of Judge Barrett in conversation with Sen. Durbin) (“That’s consistent with the language and the historical context, the way the briefs describe it, and it was part of the dispute in *Heller* of whether the Second Amendment was an individual right or a civic one that was possessed collectively for the sake of the common good. And everybody was treating voting as one of the civic rights.”).

³⁶ *Id.*

³⁷ *October 14 Hearings* (statement of Judge Barrett in conversation with Sen. Booker).

³⁸ *October 14 Hearings* (statement of Sen. Sasse in conversation with Judge Barrett).

³⁹ *Id.* (statement of Judge Barrett in conversation with Sen. Sasse).

⁴⁰ See Hon. Schuyler Colfax, *My Policy Revisited: Necessity of the Constitutional Amendment* (Aug. 7, 1866), in *Cincinnati Commercial*, Aug. 9, 1866, reprinted in *Speeches of the Campaign of 1866 in the States of Ohio, Indiana, and Kentucky* 14 (1866).

the Declaration referred. Judge Barrett, however, failed to honor this critical aspect of our Constitution's text and history and, as noted above, refused to express her agreement with a half-century of seminal Supreme Court's jurisprudence.

Over time, We the People have amended the Constitution to confront and ameliorate this nation's history of racism, sexism, and other forms of discrimination. Therefore, it is critical that any federal judge, and particularly those appointed to the Supreme Court, recognize anti-discrimination as a core constitutional value that must be protected. Thankfully, Judge Barrett condemns white supremacy⁴¹ and believes both racism and discrimination are "abhorrent," although she referred to sexual orientation as "sexual preference" in the same breath.⁴² However, discrimination is not always blatant and obvious. It is important that judges recognize that implicit bias permeates all forms of American life, including the judiciary in which they serve, so that litigants receive a fair day in court. When asked by Senator Cory Booker about implicit racial bias in the criminal justice system, Judge Barrett struggled to admit that it exists. She was very careful in her statements regarding studies on the matter, refusing to acknowledge disparate sentencing along racial lines as fact, only conceding that studies exist. In the end, after a long colloquy, she finally stated, "yes, I think that in our large criminal justice system, it would be inconceivable that there wasn't some implicit bias."⁴³ In order for our judicial system to fulfill its constitutional function, it must have legitimacy in the eyes of those who come to seek justice. To provide that legitimacy, litigants must feel as though they will be treated fairly in order to accept the court's judgement. Judge Barrett's refusal to unequivocally and clearly state that implicit bias, and particularly implicit racial bias, exists in the judicial system is troubling and would harm the legitimacy of the Court.

In addition to refusing to provide a full-throated statement that implicit bias exists in the judicial system, Judge Barrett, after several prompts from Senator Kamala Harris, refused to state as fact that, quoting Chief Justice John Roberts's opinion in *Shelby County v. Holder*, "voting discrimination still exists."⁴⁴ Judge Barrett would only go so far as to say that "racial discrimination still exists in the United States," but she would not say it existed in the realm of voting.⁴⁵ She claimed that she did not want to opine on the statements of a fellow judge, and when asked directly, "Do you think that voting discrimination exists based on race in America in any form?" Judge Barrett demurred because the issue is "charged."⁴⁶ This refusal to acknowledge discrimination in voting, coupled with her statements regarding her *Kanter* dissent and felon disenfranchisement, cast serious doubt on Judge Barrett's commitment to the constitutional values of inclusive democratic participation free from discrimination.

2. JUDGE BARRETT AS A RELIABLE VOTE FOR BIG BUSINESS

As a judge on the U.S. Court of Appeals for the Seventh Circuit, Judge Barrett's record signals that she is a reliable vote for big business. While corporate interests should obviously prevail in cases where the law is truly on their side, judges should not put a thumb on the scale of justice to favor the powerful. Judge Barrett has authored opinions that demonstrate crabbed interpretations of laws protecting workers from discrimination,

⁴¹ *October 13 Hearings* (statement of Judge Barrett in conversation with Sen. Booker).

⁴² *Id.* (statement of Judge Barrett in conversation with Ranking Member Feinstein) ("Senator, I have no agenda and I do want to be clear that I have never discriminated on the basis of sexual preference and would not ever discriminate on the basis of sexual preference. Like racism, I think discrimination is abhorrent.").

⁴³ *Id.* (statement of Judge Barrett in conversation with Sen. Booker).

⁴⁴ *October 14 Hearings* (statement of Sen. Harris in conversation with Judge Barrett) (quoting *Shelby County v. Holder*, 570 U.S. 529, 536 (2013)).

⁴⁵ *Id.* (statement of Judge Barrett in conversation with Sen. Harris).

⁴⁶ *Id.*

strongly favor arbitration beyond what is required by governing statutes, and make it more difficult for people to vindicate their rights in court against corporate defendants. These opinions, detailed in CAC’s Issue Brief, “**Will Supreme Court Nominee Amy Coney Barrett Be A Reliable Vote for Big Business?**,”⁴⁷ help explain the praise from the corporate community upon the President’s announcement of Judge Barrett’s nomination to our nation’s highest court.⁴⁸ But to those of us who are focused on fair and equal justice for all, her support for corporate interests over the rights of individuals in the cases discussed in the report was concerning. The concern deepened when one considers that the Roberts Court, with the conservative Justices leading the charge, has ruled in favor of positions taken by the U.S. Chamber of Commerce 70 percent of the time.⁴⁹ CAC hoped Judge Barrett would explain her opinions in these cases in such a way that would dispel all doubt about her seeming preference for corporate litigants. Unfortunately, her few colloquies with the Senators on this subject only compounded the fear that on the Supreme Court she would rule, far more often than not, in favor of big business over the interests of individuals.

For example, Judge Barrett has authored several troubling opinions in the arbitration context, forcing individuals to use a process that is all too often slanted against employees and consumers when they seek to vindicate their federal rights. However, before analyzing or revisiting any of Judge Barrett’s arbitration cases, Senator Harris asked Judge Barrett an important baseline question: does she acknowledge that there is an “extreme imbalance of power between large corporations and individual workers?”⁵⁰ Judge Barrett refused to answer the question. Unfortunately, Senators did not ask any other questions concerning arbitration, so CAC’s concerns about Judge Barrett being favorable to big business in the scope of forced arbitration remain.

Further troubling are Judge Barrett’s comments on climate change, an area of the law where big business can benefit from a lack of consideration for the environment. During her colloquy with Senator Blumenthal, Judge Barrett refused to admit that human beings cause global warming.⁵¹ Later, she refused to state to Senator Harris that “climate change is happening and it’s threatening the air we breathe and the water we drink,”⁵² despite the overwhelming scientific consensus on this matter. Notably Judge Barrett was willing to concede certain scientific facts—she stated that COVID-19 is infectious and that smoking causes cancer⁵³—so her less-than-artful dodge of Senator Harris’s question raises serious doubt that she will be a fair arbiter when it comes to legislative or agency efforts to combat the scientific fact of climate change.

3. JUDGE BARRETT’S UNLIKELINESS TO BE AN INDEPENDENT CHECK ON THE PRESIDENT

Based on her pre-hearing record, CAC could not evaluate Judge Barrett’s willingness to check unlawful actions by the president because neither her academic writings nor her record as a judge on the Seventh Circuit

⁴⁷ Becca Damante, *Will Supreme Court Nominee Amy Coney Barrett Be A Reliable Vote for Big Business?*, CAC (Oct. 9, 2020), <https://www.theconstitution.org/wp-content/uploads/2020/10/Issue-Brief-Will-Supreme-Court-Nominee-Amy-Coney-Barrett-Be-A-Reliable-Vote-for-Big-Business-1.pdf>.

⁴⁸ Press Release, U.S. Chamber of Commerce, *U.S Chamber Supports President Trump’s Nominee Barrett for Supreme Court* (Sept. 26, 2020), <https://www.uschamber.com/press-release/us-chamber-supports-president-trump-s-nominee-barrett-supreme-court>.

⁴⁹ Brian R. Frazelle, *Big Business Powers Ahead With Another Successful Term at the Roberts Court*, CAC (Oct. 1, 2020), https://www.theconstitution.org/think_tank/big-business-powers-ahead-with-another-successful-term-at-the-robertscourt-2019-2020-term/.

⁵⁰ *October 14 Hearings* (statement of Sen. Harris in conversation with Judge Barrett).

⁵¹ *October 14 Hearings* (statement of Judge Barrett in conversation with Sen. Blumenthal).

⁵² *Id.* (statement of Sen. Harris in conversation with Judge Barrett).

⁵³ *Id.*

provided sufficient information to make an assessment. Fortunately, Senators engaged with Judge Barrett on the subject, providing ample evidence that confirmation hearings are critical to the constitutional duty of the Senate to advise and consent, for records alone cannot always demonstrate the measure of one's fitness for the bench. However, her answers were alarming. Judge Barrett's refusal to comment on the Constitution's limitations on presidential power concerning elections, pardon power, and complying with court orders provides sufficient grounds for CAC to oppose her confirmation to the U.S. Supreme Court on this matter alone.

President Trump has repeatedly used his office to make radical statements that undermine our democracy. He has made wild claims of vote-by-mail voter fraud during a global pandemic,⁵⁴ suggested he would unilaterally delay the 2020 election,⁵⁵ encouraged his supporters to intimidate voters,⁵⁶ and indicated he might not step down peacefully should he lose the election. As a federal judge, and particularly as a Supreme Court justice, Judge Barrett will be called to defend our constitutional commitment to free and fair elections, time and time again. However, she refused to recognize the importance of voting by mail during a global pandemic.⁵⁷ When asked if the Constitution or any federal law gives the President the authority to unilaterally delay a general election, Judge Barrett said she would need to hear arguments from both sides.⁵⁸ When asked if it is illegal under federal law to intimidate voters at the polls, a simple question resolved by the US Code, Judge Barrett refused to answer.⁵⁹ And, astonishingly, Judge Barrett would not say whether she thinks presidents should commit to the peaceful transfer of power.⁶⁰

These answers are unacceptable, particularly from a self-proclaimed originalist. The text of the Constitution and federal law is clear: voting is a fundamental right that should be exercised regardless of the presence of a pandemic (indeed, the courts should *ensure* that people can exercise that fundamental right during a pandemic), a president cannot unilaterally postpone an election, it is a federal crime to intimidate voters, and new presidents are inaugurated on January 20th. To claim that it is either improper to answer any of these questions or that the proper answers might be debatable is extremely alarming, especially in light of President Trump's statement that he wishes Judge Barrett to be on the Court before the election so she and the other justices can "look at the ballots"⁶¹.

Judge Barrett cast additional doubts on her ability to be an independent check on President Trump when she would not provide clear answers concerning anti-corruption issues. First, she refused to state unequivocally that presidents cannot pardon themselves for past and future federal crimes.⁶² Then, she would not give a definite answer when asked if a president who refused to follow a court ruling would pose a threat to the

⁵⁴ Stephanie Saul and Reid J. Epstein, *Trump Is Pushing a False Argument on Vote-by-Mail Fraud. Here Are the Facts*, N.Y. Times (Sept. 28, 2020), <https://www.nytimes.com/article/mail-in-voting-explained.html>.

⁵⁵ *Trump Defends 'Delay the Election' Tweet, Even Though He Can't Do It*, N.Y. Times (July 30, 2020, last updated Aug. 20, 2020), <https://www.nytimes.com/2020/07/30/us/elections/biden-vs-trump.html>.

⁵⁶ Daniella Silva, *Trump's Call for Supporters to Watch Polls 'Very Carefully' Raises Concerns of Voter Intimidation*, NBC News (Sept. 30, 2020), <https://www.nbcnews.com/news/us-news/trump-s-call-supporters-watch-polls-very-carefully-raises-concerns-n1241613>.

⁵⁷ *October 14 Hearings* (statement of Judge Barrett in conversation with Sen. Klobuchar).

⁵⁸ *October 13 Hearings* (statement of Judge Barrett in conversation with Ranking Member Feinstein).

⁵⁹ *Id.* (statement of Judge Barrett in conversation with Sen. Klobuchar).

⁶⁰ *Id.* (statement of Judge Barrett in conversation with Sen. Booker).

⁶¹ Lisa Mascaro, *Trump Thrusts Supreme Court Pick Into Election Turmoil*, The Associated Press (Sept. 30, 2020), <https://apnews.com/article/election-2020-virus-outbreak-joe-biden-donald-trump-voting-e7fa904df7e51320e154efd7c0d7fd2a>.

⁶² *October 13 Hearings* (statement of Judge Barrett in conversation with Sen. Booker); *October 14 Hearings* (statement of Judge Barrett in conversation with Sen. Leahy).

constitutional system of checks and balances.⁶³ And finally, Judge Barrett flatly refused to acknowledge the Foreign Emoluments Clause of the Constitution as an anti-corruption clause, reducing its purpose to “prevent[ing] foreign countries from having influence.”⁶⁴ For any originalist, these questions should have been considered softballs, but Judge Barrett concealed her thoughts from the Committee. She did acknowledge several times that “no one is above the law.”⁶⁵ However, that statement alone cannot ameliorate the concerns established by her avoiding simple questions, direct answers to which would have demonstrated that she is truly committed to the value that that no one, including the President of the United States, is above the law.

CONCLUSION

Should Judge Barrett be confirmed to a lifetime appointment as an Associate Justice, we sincerely hope that our concerns about her will prove to be wrong. If she is confirmed, we at CAC will present to Justice Barrett the best originalist arguments, rooted in the text and history of the Constitution, in support of constitutional rights, liberties, and structural protections that help make our nation more free, fair, and equal for all. For the history of our whole Constitution is one of progress over time, increased democratic participation, and the constant quest to make equality and justice a reality for all persons in this country. True and faithful originalists recognize this arc of our Constitution’s progress and apply it to the constitutional questions before them. Should she be confirmed, we hope a Justice Barrett would do the same. Unfortunately, with the information before us at this point—and at a moment where the stakes for our nation could not be higher—we cannot be sure that a Justice Barrett will faithfully apply the whole Constitution to preserve our fundamental rights and constitutional freedoms. Therefore, we must oppose her nomination to the Supreme Court.

If you have any questions or concerns about the contents of this letter, or if you would like to learn more about progressive originalism, please contact CAC’s Director of Policy, Kristine Kippins at kristine@theusconstitution.org.

Sincerely,



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⁶³ *October 14 Hearings* (statement of Judge Barrett in conversation with Sen. Leahy).

⁶⁴ *Id.*

⁶⁵ *October 14 Hearings* (statements of Judge Barrett in conversation with Sens. Leahy, Blumenthal, and Crapo).