

Will Supreme Court Nominee Amy Coney Barrett Be A Reliable Vote for Big Business?

BY BECCA DAMANTE[†]

OCTOBER 2020

I. Introduction

On September 26, 2020, President Trump nominated Judge Amy Coney Barrett to fill the Supreme Court vacancy created by the death of Justice Ruth Bader Ginsburg.¹ His announcement was immediately met with celebration from the corporate community. In a press release, the CEO of the U.S. Chamber of Commerce Thomas J. Donahue called Judge Barrett an “eminently qualified jurist” and said she would make an “excellent associate justice.”² He also added: “America’s free enterprise system depends on the fair application of the law, and the U.S. Chamber of Commerce has no doubt that Judge Barrett will treat all litigants—including the business community—fairly.”³ In addition, *Axios* is reporting that the U.S. Chamber of Commerce will be lobbying for Judge Barrett.⁴

Similarly, Fisher Phillips, a law firm that provides legal services to employers in labor and employment law disputes, predicted that “employers will probably fare very well in front of Barrett” should she be confirmed. The law firm further explained that employers will likely be able to rely on Judge Barrett to

[†] Becca Damante is the Senior Research Associate at the Constitutional Accountability Center.

¹ *President Donald J. Trump Announces Intent to Nominate Judge Amy Coney Barrett to the Supreme Court of the United States*, The White House (Sept. 26, 2020), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-amy-coney-barrett-supreme-court-united-states/>.

² 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>.

³ *Id.*

⁴ Alayna Treene, *U.S. Chamber to Launch Widespread Lobbying Effort for Barrett Fight*, *Axios* (Sept. 27, 2020), <https://www.axios.com/chamber-congress-amy-coney-barrett-5169d4f2-d4a2-4b21-b1e6-4a97ca33dd6f.html>.

“limit plaintiffs’ ability to initiate and continue litigation in the federal courts.”⁵ Likewise, in her statement of support, Senator Marsha Blackburn highlighted that Judge Barrett, among her conservative bona fides, is “pro-business.”⁶

If Judge Barrett is as friendly to big business interests as these immediate responses suggest, she would only reinforce the already pro-corporate majority at the Supreme Court. While corporations should certainly win when the law is on their side, they fare disproportionately well at the Court, as exemplified by the increasing success of the U.S. Chamber of Commerce in its Supreme Court litigation. Since 2010, the Constitutional Accountability Center (CAC) has tracked the Supreme Court activities of the Chamber of Commerce and released empirical studies documenting a sharp increase in the Chamber’s success rate since the start of the Roberts Court.⁷ CAC has shown that the Chamber now wins the vast majority of its cases: 70% during the Roberts Court,⁸ compared to 56% during the late Rehnquist Court and 43% during the late Burger Court.⁹ Furthermore, there is a sharp ideological divide on the Roberts Court in favor of the Chamber, with the Court’s conservatives almost always ruling in favor of the Chamber in closely decided cases.¹⁰ This suggests that far from a fair application of the law, there is a thumb on the scale for powerful business interests.

This Issue Brief analyzes Judge Barrett’s jurisprudence on issues relevant to corporate interests on the U.S. Court of Appeals for the Seventh Circuit, the court on which Judge Barrett has sat for the entirety of her three years on the federal bench. This Brief highlights a few of Judge Barrett’s most troubling opinions in several different issue areas: discrimination in the workplace, access to justice, and arbitration. Across these different issue areas, a common theme emerges: Judge Barrett routinely sides with corporations and employers over consumers and employees. As Accountable.US recently documented, throughout her tenure as a judge on the Seventh Circuit, Judge Barrett has sided with corporations more than 76% of the time.¹¹ Based on this record, there is significant reason to worry that Judge Barrett, if she is confirmed, will continue the Roberts Court’s trend toward improperly favoring the interests of big businesses over all Americans. This is particularly concerning given that she has been nominated to take the seat of Justice Ruth Bader Ginsburg, who knew all too well the ways that corporations could use their power to discriminate against employees, limit access to justice, and avoid accountability for harm to consumers and workers.

⁵ Raymond W. Duer et al., *What Employers Need To Know About SCOTUS Nominee Amy Coney Barrett*, Fisher Phillips: Legal Alerts (Sept. 28, 2020), <https://www.fisherphillips.com/pp/alert-what-employers-need-to-know-about-scotus.pdf>.

⁶ Mary Francis Hoots, *Marsha Blackburn Speaks With Channel 3 on SCOTUS Nominee*, WRCBtv (Sept. 27, 2020), <https://www.wrcbtv.com/story/42687844/marsha-blackburn-speaks-with-channel-3-on-scotus-nominee>.

⁷ See *Corporations and the Supreme Court*, Constitutional Accountability Center, <https://www.theusconstitution.org/series/chamber-study/>.

⁸ Brian R. Frazelle, *Big Business Powers Ahead With Another Successful Term at the Roberts Court*, CAC (Oct. 1, 2020), https://www.theusconstitution.org/think_tank/big-business-powers-ahead-with-another-successful-term-at-the-roberts-court-2019-2020-term/.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Press Release, Accountable.US, *Report: Coney Barrett Sided with Corporations Over People 76% of the Time* (Sept. 29, 2020), <https://www.accountable.us/news/report-coney-barrett-sided-with-corporations-over-people-76-of-the-time/>.

II. Discrimination in the Workplace

Over the course of her short tenure as a judge on the Seventh Circuit, Judge Barrett has ruled against plaintiffs facing employment discrimination in several areas. In *Kleber v. CareFusion Corporation*, Judge Barrett joined the majority opinion that held that the Age Discrimination in Employment Act’s (ADEA) disparate impact provision does not protect outside job applicants from discrimination.¹² This created a major loophole in the statute that allowed employers to subject older Americans to employment practices that may be fair in form, but discriminatory in operation. As the dissent pointed out, “the majority adopts the improbable view that the Act outlawed employment practices with disparate impacts on older workers, but excluded from that protection everyone not already working for the employer in question.”¹³ This makes little sense given that “[a] central goal—arguably the most central goal—of the statute was to prevent age discrimination *in hiring*.”¹⁴

Next, in *U.S. Equal Employment Opportunity Commission v. AutoZone, Inc.*, Judge Barrett voted not to rehear en banc a case that had allowed an employer to transfer an African American worker to another store in order to maintain racially segregated stores.¹⁵ More specifically, the plaintiffs in this case alleged that AutoZone violated Title VII by transferring an African American employee from its “Hispanic” store to its “African-American” store to maintain racial homogeneity.¹⁶ Judge Barrett signed onto an opinion that let stand a panel decision claiming that this transfer was permissible because both facilities were “equal.”¹⁷ But as the dissent from the denial of rehearing en banc rightly pointed out, “[t]hat conclusion . . . 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*.”¹⁸ Significantly, *Brown* has been a point of concern regarding Judge Barrett’s record ever since her Seventh Circuit confirmation hearing when Judge Barrett refused to say whether *Brown* was superprecedent,¹⁹ which she has defined as case law that no justice should overrule.²⁰

¹² *Kleber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. 2019).

¹³ *Id.* at 507 (Hamilton, J., dissenting).

¹⁴ *Id.*

¹⁵ *U.S. Equal Employment Opportunity Comm’n v. AutoZone, Inc.*, 875 F.3d 860 (7th Cir. 2017).

¹⁶ *Id.* at 861 (Wood, J., dissenting from the denial of rehearing en banc).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Questions From Senator Whitehouse on the Nomination of Amy Coney Barrett to the U.S. Court of Appeals for the Seventh Circuit: Nomination Before S. Comm. on the Judiciary*, 115th Cong. (Sept. 13, 2017), <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Whitehouse%20QFRs.pdf>.

²⁰ Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1734 (2013).

III. Access to Justice

Throughout her time on the Seventh Circuit Court of Appeals, Judge Barrett has often made it more difficult for individuals to vindicate their rights in court against corporate defendants. For example, in ***Chronis v. United States***, Judge Barrett wrote a majority opinion dismissing a woman’s request for \$332 after she was injured from a routine pap smear.²¹ According to Judge Barrett, the district court was correct in dismissing the plaintiff’s complaint because she failed to exhaust her administrative remedies by properly presenting her claim to a federal agency.²² More specifically, Judge Barrett held that the plaintiff did not properly present her claim to a federal agency, as required by the Federal Tort Claims Act, because her letter to the U.S. Department of Health and Human Service’s Centers for Medicare and Medicaid Services did not demand a specific sum of money. Judge Barrett reached this result even though the letter requested “restitution” and included an attachment indicating that she had previously requested \$332 from the health center that injured her.²³ As the dissent pointed out, “Our circuit applies a flexible standard to the exhaustion requirements for plaintiffs making claims under the Federal Tort Claims Act, excusing technical deficiencies so as not to preclude all but the savviest of plaintiffs from receiving a hearing on the merits. The majority’s decision demands far more of Chronis than our precedent requires.”²⁴

Judge Barrett’s opinions on the Seventh Circuit also take a crabbed view of the rights of consumers to sue to vindicate their rights under federal consumer protection laws, such as the Fair Debt Collection Practices Act (FDCPA), which protects consumers from abusive practices by debt collectors. For example, in ***Casillas v. Madison Avenue Associates, Inc.***, Judge Barrett held that an individual did not have standing to enforce a violation of the FDCPA.²⁵ Under the FDCPA, debt collectors must let consumers know about the FDCPA’s process for verifying a debt.²⁶ But in this case, the plaintiff was never notified that she needed to respond to the debt collection letter *in writing* to trigger the statutory protections.²⁷ Despite conflicting Sixth Circuit precedent in a case with “materially indistinguishable facts,”²⁸ Judge Barrett concluded that the plaintiff did not have standing because the omission was harmless.²⁹ But as the dissent explained: “It is a fair inference from Casillas’s complaint that Madison’s omissions at a minimum put her in imminent risk of losing the many protections in the Act that are designed to regulate the debt-collection process as it goes forward.”³⁰ And Judge Barrett’s opinion has serious consequences for those pursuing claims under the FDCPA. The dissent explained, “[W]ithout a reminder that [consumers] must reduce their concerns to writing, they are likely to forfeit the

²¹ *Chronis v. United States*, 932 F.3d 544, 545 (7th Cir. 2019).

²² *Id.* at 545-46.

²³ *Id.* at 545, 547.

²⁴ *Id.* at 550 (Rovner, J., dissenting).

²⁵ *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329 (7th Cir. 2019).

²⁶ *Id.* at 331.

²⁷ *Id.*

²⁸ *Id.* at 340 (Wood, J., dissenting).

²⁹ *Id.* at 331-32 (majority opinion).

³⁰ *Id.* at 341 (Wood, J., dissenting).

important substantive rights the Act provides for them.”³¹ Judge Barrett’s opinion, the dissent explained, “will make it much more difficult for consumers to enforce the protections against abusive debt collection practices that Congress conferred in the Act.”³²

Finally, in *Federal Trade Commission v. Credit Bureau Center*, Judge Barrett joined the majority’s opinion that limited the Federal Trade Commission’s (FTC) ability to pursue restitution, which protects consumers from fraud and allows consumers to get their money back in fraudulent situations.³³ In this case, the FTC sued a credit-monitoring service for a fraudulent marketing scheme that promised consumers a free credit report and score, but obscured the fact that this would also enroll them in a monthly membership subscription of nearly \$30 per month.³⁴ The district court ruled in favor of the FTC and awarded more than \$5 million in restitution to the Commission.³⁵ But Judge Barrett voted to reverse the district court’s decision and held that restitution was not authorized under Section 13(b) of the Federal Trade Commission Act (FTCA).³⁶ According to the dissent, this decision broke with thirty years of Seventh Circuit precedent,³⁷ and a “straightforward reading” of the FTCA “support[ed] the power of the FTC to use [restitution].”³⁸ The dissent also criticized the majority opinion for ignoring the conflicting precedent of eight other circuit courts, explaining: “[t]o 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.”³⁹

IV. Arbitration

Judge Barrett has also 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. For instance, in *Wallace v. Grubhub Holdings, Inc.*, Judge Barrett ruled against Grubhub drivers who did not receive overtime pay.⁴⁰ The plaintiffs in this case argued that they should not be compelled to arbitrate because as “workers engaged in foreign or interstate commerce,” the employees’ contracts should be exempt from the Federal Arbitration Act (FAA).⁴¹ However, Judge Barrett disagreed, holding that the employees must arbitrate their claims because “the interstate movement of goods is [not] a central part of the[ir] job description,” and thus

³¹ *Id.*

³² *Id.* at 340.

³³ *Fed. Trade Comm’n v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019).

³⁴ *Id.* at 766.

³⁵ *Id.*

³⁶ *Id.* at 786 (majority opinion).

³⁷ *Id.* at 786 (Wood, J., dissenting from the denial of rehearing en banc).

³⁸ *Id.* at 787.

³⁹ *Id.* at 786.

⁴⁰ *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020).

⁴¹ *Id.* at 799 (quoting FAA).

they are not exempt from arbitration under the FAA.⁴² Judge Barrett’s decision significantly narrowed the scope of the FAA’s exemption, forcing more workers to arbitrate their claims. This is deeply concerning because arbitration tends to favor employers and corporations and precludes workers from bringing their claims to federal court.⁴³

Similarly, in ***Webb v. Financial Industry Regulatory Authority, Inc.***, Judge Barrett voted to dismiss a case against an arbitration board, rejecting the claims of two fired employees who argued that the arbitration was improperly conducted.⁴⁴ In this case, two brokers who were fired challenged their termination in an arbitration forum operated by the Financial Industry Regulatory Authority (FINRA).⁴⁵ After their arbitration failed, the brokers sued FINRA for a number of reasons, including “failing to properly train arbitrators, failing to provide arbitrators with appropriate procedural mechanisms, interfering with the arbitrators’ discretion, and failing to permit reasonable discovery.”⁴⁶ The district court dismissed the suit because it concluded that FINRA was entitled to arbitral immunity,⁴⁷ and Judge Barrett voted to vacate the district court’s decision for lack of federal jurisdiction.⁴⁸ However, as Judge Ripple’s dissent pointed out, Judge Barrett’s opinion ignored precedent regarding diversity jurisdiction. Under Illinois law, a case removed to federal court on diversity grounds can remain there unless there is “legal certainty” that there is no jurisdiction.⁴⁹ But as Judge Ripple explained, there was no “legal certainty” that the court lacked jurisdiction.⁵⁰ Thus, Judge Ripple concluded, Judge Barrett’s opinion ignored “established practice, grounded in well-settled case law across the Nation.”⁵¹

Finally, Judge Barrett’s opinions suggest that she would, like a majority of the current Supreme Court, be hostile to class-wide arbitration, making it harder for workers to band together to vindicate legal claims against a common employer. Judge Barrett has complained that class-wide arbitration “reduce[s] efficiency” and subjects employers to a “bet the company” affair.⁵² In ***Herrington v. Waterstone Mortgage Corporation***, Judge Barrett voted to vacate the enforcement of a class-wide arbitration award, which required the company to pay more than \$10 million to the plaintiff and 174 employees.⁵³ The district court held that the waiver of class-wide arbitration was unlawful,⁵⁴ but Judge Barrett disagreed, concluding that the Supreme Court’s opinion in *Epic Systems v. Lewis*

⁴² *Id.* at 803.

⁴³ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, Economic Policy Institute 3 (Dec. 7, 2015), <https://files.epi.org/2015/arbitration-epidemic.pdf>.

⁴⁴ *Webb v. Fin. Indus. Regulatory Auth., Inc.*, 889 F.3d 853 (7th Cir. 2018).

⁴⁵ *Id.* at 855.

⁴⁶ *Id.* at 856.

⁴⁷ *Id.*

⁴⁸ *Id.* at 861.

⁴⁹ *Id.* (Ripple, J., concurring in part and dissenting in part).

⁵⁰ *Id.*

⁵¹ *Id.* at 864.

⁵² *Herrington v. Waterstone Mortgage Corp.*, 907 F.3d 502, 509-10 (7th Cir. 2018) (internal citations omitted).

⁵³ *Id.* at 503.

⁵⁴ *Id.*

permitted such a waiver clause. As Judge Barrett wrote, “If imposing collective arbitration on Waterstone violated that waiver, we must instruct the district court to vacate the award, which would put Herrington back at square one.”⁵⁵ She remanded the case for the district court to decide whether the arbitration provision, in fact, permitted class-wide arbitration, stressing that this was a fundamental question that had to be decided by a court, not an arbitrator.⁵⁶ According to Judge Barrett, the stakes of a class-wide arbitration for the employer required judicial sign-off. She further explained: “Transforming an individual dispute into a class or collective action can turn a small claim into a whopping one. When that whopping claim is arbitrated, the defendant might find itself bet[ting] the company with no effective means of review of either class certification or final judgment.”⁵⁷ *Herrington* suggests that, if confirmed, Judge Barrett will join a conservative bloc that has been hostile to one of the most effective forms of arbitration for employees seeking to hold corporate employers to account.

V. Conclusion

As this Issue Brief has shown, time and again Judge Barrett has sided with corporate and employer interests even when consumers and workers had the text of the law and precedent on their side. If the Senate continues to consider her nomination, Senators should ask her about this record. The American people should know whether Judge Barrett’s confirmation will further cement the pro-corporate majority at the Supreme Court, and whether she will be a champion of big businesses or of all Americans for the decades she could potentially serve on our high court.

⁵⁵ *Id.*

⁵⁶ *Id.* at 504.

⁵⁷ *Id.* at 510 (internal quotations and citations omitted).