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October 9, 2020

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

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

Dear Chairman Graham and Ranking Member Feinstein:

ADL (the Anti-Defamation League) was founded in 1913 with a simple but timeless mission: to stop the defamation of the Jewish people and to secure justice and fair treatment to all. In striving to achieve these goals, ADL has maintained a core set of principles for more than 100 years — prioritizing fighting antisemitism and all forms of bias and hate while opposing discriminatory barriers that deny equal opportunities to individuals based on their race, religion, gender, gender identity, national origin, sexual orientation, or other protected characteristics. We also have worked to build a just and inclusive society by ensuring the preservation of individual rights, including the Constitutional guarantees of freedom of religion and expression that must be protected to maintain a pluralistic and democratic nation.

We write to you now in anticipation of the upcoming hearings on the nomination of Judge Amy Coney Barrett to serve as an Associate Justice of the United States Supreme Court. Judge Barrett's academic pedigree, as well as her tenure as a Professor at the University of Notre Dame Law School and three years' service as a federal appellate court judge, have earned her the respect due to someone who has a strong track record of academic leadership and public service.

While we appreciate Judge Barrett's qualifications and respect her service, it is critical for the Judiciary Committee (the "Committee") to examine her judicial philosophy and views on a wide range of topics. ADL, of course, is particularly concerned about the views of potential justices on civil rights equities that are core to our organization's mission; indeed, the protection and advancement of these rights depends in great measure on the jurisprudence of the Supreme Court. Without asking Judge Barrett to comment on any pending cases, the Committee can and should seek her views on the Supreme Court's role in interpreting the United States Constitution and laws that protect fundamental civil rights and civil liberties. In this regard, we believe there are a number of areas that deserve the Committee's special attention. These areas, which the nominee should be invited to address, include the contemporary parameters of: (1) countering domestic extremism while safeguarding civil liberties; (2) the separation of church and state and freedom of religion (3) immigration; and (4) civil rights.

Consistent with recommendations that ADL has made to this Committee for the past three decades, here we present a series of potential questions to help the Committee ascertain Judge Barrett's views on these critical topics:

1. Countering Domestic Extremism While Safeguarding Civil Liberties

ADL has been recognized as a leading resource on effective responses to violent bigotry, conducting an annual Audit of Antisemitic Incidents and drafting model hate crime statutes for state legislatures. We were privileged to lead a broad coalition of civil rights, religious, educational, professional, law enforcement, and civic organizations to pass the landmark Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (HCPA).¹

ADL has also fought against bigotry and antisemitism by monitoring and reporting on extremist groups and movements who spread hate and commit acts of violence.² Through our Center on Technology and Society and Center on Extremism, ADL helps communities and government agencies alike to combat extremism, terrorism, and hate online and off.

It is of the utmost importance that, while our nation is addressing issues of terrorism at home and abroad, our government must be armed with the tools to effectively combat all incoming dangers while maintaining civil liberties for all. It is ADL's view that our democratic ideals do not need to be sacrificed in order to ensure our physical security. It is also the view of ADL that one branch of government should not be able to unilaterally make decisions in these areas, where checks and balances are established and in place to protect against abuses.

In light of our increasing concern about the threat posed by domestic extremism, particularly from white supremacists and right-wing extremists, ADL would encourage the Committee to explore Judge Barrett's views with respect to domestic extremism and the importance of carefully balancing security interests with civil liberty concerns when analyzing issues related to domestic extremism and domestic terrorism.

Senators should ask Judge Barrett:

- What civil rights and civil liberties concerns are or could be implicated in state and/or federal domestic terrorism laws, and how do these concerns differ when it comes to investigating domestic extremists as compared to foreign actors?
- Are there any constitutional obstacles to designating domestic extremist groups with no foreign ties as domestic terrorist organizations?

¹ "Hate Crimes," <https://www.adl.org/what-we-do/combat-hate/hate-crimes>.

² "Extremism, Terrorism, & Bigotry," <https://www.adl.org/what-we-do/combat-hate/extremism-terrorism-bigotry>.

2. First Amendment Religion Clauses

The two religion clauses of the First Amendment — the Establishment Clause and Free Exercise Clause — are vital to the preservation and protection of religious freedom in this country. The interpretation of both clauses, however, continues to generate considerable controversy. We think it is of the utmost importance for the Committee to gain clarity regarding Judge Barrett's perspective on both clauses.

a. The Establishment Clause

ADL has long believed that strict separation of church and state is necessary to protect the religious freedom and rights of all. We are concerned about various aspects of Establishment Clause jurisprudence, including the judicial standard employed when interpreting the First Amendment, the extent to which religious symbols can be displayed on public lands, the appropriateness of prayer in a government setting, and public funding of religious institutions or activity. In addition, while a judge's faith and moral convictions can be relevant to their work, judges must never put their personal beliefs ahead of the law and Constitution when carrying out their duties.

While it is difficult to assess whether Judge Barrett's faith might impact her jurisprudence, given her limited time on the Seventh Circuit, it is important for the Judiciary Committee to probe her views in this area.

Senators should ask Judge Barrett:

- What do you believe constitutes religious coercion under the Constitution?
- When is it acceptable for taxpayer funding to benefit religious organizations? Do you believe *Espinoza v. Montana Dept. of Revenue* was correctly decided?
- What is your view on the inclusion of prayer at an official public event?
- Do you think when a majority seeks to impose its religious views on marriage equality, contraception, adoption, or abortion, it constitutes impermissible coercion under the Establishment Clause?
- Can state Constitutions provide for stricter separation of government and religion than the Establishment Clause?
- Can you think of any type of case from which you would consider recusing yourself because of your views or beliefs?

- Do you believe that *American Legion v. American Humanist Association* was correctly decided?

b. The Free Exercise Clause

It is equally important for the Committee to explore Judge Barrett's view of the Court's role in preserving and protecting religious liberty and religious free exercise. It is ADL's firm belief that the right to free exercise must be supported only to the extent that such practice does not interfere with the rights of others. Today, we see many examples of those who seek to convert the shield of religious freedom into a sword to discriminate against LGBTQ+ communities, women, and religious minorities. Notably, both longstanding Supreme Court precedent and growing public consensus have increasingly and properly rejected the idea that religion can be used as a justification for discrimination in this manner.

Again, in this regard, Judge Barrett's personal statements and opinions, particularly with respect to gender equality, reproductive freedom, and LGBTQ+ rights (*see infra*), give cause for concern. This is in large part because these beliefs impinge on the rights of others. With cases like *Fulton v. City of Philadelphia* pending on the Supreme Court docket, we urge the Judiciary Committee to ask Judge Barrett about her understanding of the Free Exercise Clause, and in particular, the bounds of faith-based exceptions to neutral non-discrimination laws.

Senators should ask Judge Barrett:

- Under what circumstances can a person refuse to follow a law that violates their religious beliefs?
- When must an individual follow the law, even if they believe it compromises their religious beliefs?
- Are there circumstances in which religious liberty can lead to the abrogation of other civil rights? Should free exercise rights always prevail, even if such practice violates the rights of others?
- What is the legal balance between the religious liberty rights of one party and the right to be free from discrimination for another?
- Are there circumstances in which the exercise of religious liberty can lead to the abrogation of other civil rights? If so, where should the line be drawn to prevent that abrogation?
- How does the decision in *Burwell v. Hobby Lobby* (2014) affect the rights of religious minorities?

- What is the intent of RFRA and what are its limitations?
- Should a neutral and generally applicable anti-discrimination law apply to a business that has religious objections to serving a prospective customer because they are gay or transgender?

3. Immigration

ADL has advocated for fair and humane immigration policies since the organization's founding. As an anti-hate organization rooted in the Jewish community, we understand the plight of refugees and immigrants living in constant anxiety and uncertainty. For years, we have criticized the same types of anti-immigrant hate that were so viciously applied to Jews in earlier decades, and which have been a fixture of the recent immigration debate. ADL has always called for responsible policies that honor America's ideal as a nation welcoming of immigrants and refugees.³

ADL has been deeply troubled by this Administration's anti-immigrant executive actions and policies such as family separations at the border,⁴ efforts to end Deferred Action for Childhood Arrivals ("DACA"),⁵ and reported abuse at immigration detention facilities. The latter has included judicial findings of poor medical care, higher-than-average rates of coronavirus infections, and failure to release children from detention in accordance with the *Flores* settlement agreement.

Judge Barrett has decided against immigrants in a number of recent cases, and she has shown substantial deference to very concerning government decisions and policies regarding immigrant and refugee rights.

In *Cook County v. Wolf*, for example, she dissented from a ruling that struck down the Trump Administration's harsh "public charge" rule.⁶ The Seventh Circuit majority concluded that the Trump administration's rule violated the Administrative Procedure Act and would have prevented immigrants from receiving legal permanent residence status if in the past they had availed themselves of certain public benefits to which they were legally entitled, such as

³ Jonathan Greenblatt, "Once We Were Strangers Too: The Jewish Responsibility to Welcome Refugees" (Nov. 24, 2015), <https://www.adl.org/news/op-ed/once-we-were-strangers-too-the-jewish-responsibility-to-welcome-refugees>.

⁴ ADL Ltr. To Attorney General Sessions and Secretary Nielsen Regarding Family Separation Policy for Migrants (May 11, 2018), <https://www.adl.org/news/letters/letter-to-attorney-general-sessions-and-secretary-nielsen-regarding-family-separation>; ADL Testimony for the House Oversight Committee on the Trump Administration's Child Separation Policy at the Southern Border (July 12, 2019), <https://www.adl.org/news/article/adl-testimony-for-the-house-oversight-committee-on-the-trump-administrations-child>.

⁵ ADL, Civil Rights Coalition File Supreme Court Amicus Brief Challenging Homeland Security's Steps to Block DACA (Oct. 7, 2019), <https://www.adl.org/news/press-releases/adl-civil-rights-coalition-file-supreme-court-amicus-brief-challenging-homeland>.

⁶ 962 F.3d 208 (7th Cir. 2020).

Medicaid or food stamps, “setting a trap for the unwary by penalizing people for accepting benefits Congress made available to them.”⁷ Judge Barrett, however, disagreed with that conclusion and would have upheld the Trump administration’s denial of legal permanent residence to these immigrants. In a particularly troubling part of her dissent, she stated, “Litigation is not the vehicle for resolving policy disputes.”⁸

In another case, *Alvarenga-Flores v. Sessions*, Judge Barrett rejected the claims of an immigrant who sought asylum and protections under the Convention Against Torture.⁹ The immigrant feared that he would be killed if he were sent back to his home country of El Salvador after witnessing the murder of a friend and receiving threats from the gang members responsible. Judge Barrett, writing for the majority, focused on minor discrepancies in the plaintiff’s testimony and dismissed his case.

Judge Barrett also joined a recent opinion in *Yafai v. Pompeo*, rejecting a rehearing of a denial of a visa application,¹⁰ which was based on the applicant’s attempted smuggling of her children (who drowned) to the United States in violation of 8 USC § 1182(a)(6)(E). The dissent criticized the majority’s holding as a “dangerous abdication of judicial responsibility” by its endorsement of “such a broad understanding of the consular non reviewability rule.”¹¹

Senators should ask Judge Barrett:

- What is your view on a state’s capacity to enact laws related to the citizenship and/or immigration status of persons within its jurisdiction?
- What is your view on the constitutionality of sanctuary jurisdictions whose laws prevent local law enforcement from cooperating with federal immigration enforcement?
- What is your view on the Constitutional due process rights of undocumented persons apprehended at the border?
- What is your view on the Constitutional due process rights of undocumented persons within the United States?
- Is there an appropriate role for states to play in enforcing federal immigration laws?
- Do you believe that Trump v. Hawaii was correctly decided?

⁷ *Id.* at 228.

⁸ *Id.* at 254 (Barrett, J., dissenting).

⁹ 901 F.3d 922 (7th Cir. 2018).

¹⁰ 924 F.3d 969 (2019).

¹¹ *Id.* at 975 (Wood, C.J., dissenting from the *en banc* decision to deny appellant a rehearing).

- In your view, what is the relationship between Trump v. Hawaii and Korematsu v. United States?
- In your view, what is the scope of the Executive's authority in the immigration realm?

4. Civil Rights

Civil rights issues come before the Court on a regular basis. ADL has long sought to eradicate discrimination in employment, education, and housing, as well as in other areas of American life. ADL supports a broad interpretation of the Constitution's equal protection guarantees and its prohibition against discrimination on the basis of race, ethnicity, religion, national origin, gender, sexual orientation, and gender identity.

a. Voting Rights

Voting rights are the cornerstone of our democracy, and ADL considers the Voting Rights Act of 1965 ("VRA") to be one of the most important and effective pieces of civil rights legislation ever enacted. ADL has supported passage of the VRA and its extensions over the last 50 years, filed *amicus* briefs urging the Supreme Court to uphold the law, and encouraged the Department of Justice to use the VRA to protect voting rights for all. In its June 2013 *Shelby County v. Holder* decision, the United States Supreme Court struck down part of the VRA, essentially gutting the heart of the law. In so doing, the Court substituted its views for Congress's own conclusions after very extensive hearings and findings conducted in 2006, where Congress voted almost unanimously to reauthorize the VRA for another 25 years.

As the late honorable Justice Ruth Bader Ginsberg stated in her dissent in *Shelby County*, "Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."

Since this ruling, voters have faced and continue to face increasing restrictions, from laws requiring them to show identification at the voting booth — which threaten to disproportionately disenfranchise people of color, the elderly, students, and Latinx voters — to restricting early voting and imposing onerous requirements for voter registration.

If confirmed, Judge Barrett may have to rule on voting rights issues that could arise in connection with the upcoming presidential election — which are only compounded by the COVID-19 pandemic and the threat of extremists on- and offline seeking to manipulate and exploit fear and anger.

Senators should ask Judge Barrett:

- In light of the circumstances surrounding your nomination, would you consider recusing yourself in a potential case challenging the validity or outcome of the upcoming presidential election?
- What is the role of Congress and the Judiciary in interpreting the relevancy of the Voting Rights Act?
- Was the Court correct in its 2013 *Shelby County v. Holder* ruling, to substitute its views for Congress's regarding the Voting Rights Act?
- Would you apply an originalist and textualist analysis to novel legal issues on voting rights?

b. LGBTQ+ Rights

The landmark civil rights victory in *Obergefell v. Hodges* (2015), which held that the Constitution grants the right to marriage irrespective of sexual orientation, gave profound hope to same-sex couples across the nation. ADL has long supported LGBTQ+ rights as fundamental human rights. Our *amicus* brief in the landmark U.S. Supreme Court case *Obergefell v. Hodges* contributed to this historic step on the journey towards justice and fair treatment for all. Through our advocacy work, ADL has not only advocated inclusive anti-discrimination laws such as the Employment Non-Discrimination Act, but also for an inclusive interpretation¹² and enforcement of existing federal anti-discrimination laws, such as Title IX of the Education Amendments of 1972 and Title VII of the Civil Rights Act of 1964. ADL had also welcomed EEOC findings and judicial decisions protecting LGBTQ+ workers under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the workplace on the basis of sex, race, color, national origin, and religion. Further, ADL supported the Departments of Justice and Education when, in 2016, they made clear to school districts that transgender students are covered by Title IX, a most important federal civil rights law that protects students from discrimination based on sex. We were, of course, deeply disappointed when the current Administration rescinded that guidance. ADL decried that decision as “cruel, tinged with prejudice and unnecessary.”¹³

Unfortunately, Judge Barrett’s public comments seem to demonstrate opposition to the constitutional protection of marriage equality. In a talk she gave in November 2016, for example, she appeared to be critical of *Obergefell v. Hodges* and supportive of the dissent, which said

¹² ADL Comments Solicited under 79 FR 35418 (July 21, 2014), <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/ADL-comments-supporting-VAWA-Clery-Act-amendments.pdf>.

¹³ ADL Criticizes Federal Action Rescinding Guidance on Transgender Students as “Cruel, Tinged with Prejudice and Unnecessary” (Feb. 23, 2017), <https://www.adl.org/news/press-releases/adl-criticizes-federal-action-rescinding-guidance-on-transgender-students-as>.

marriage equality should be determined on a state-by-state basis. According to Judge Barrett, the *Obergefell* dissent “said that those who want same-sex marriage, you have every right to lobby in state legislatures to make that happen, but the dissent’s view was that it wasn’t for the court to decide. So I think *Obergefell*, and what we’re talking about for the future of the court, it’s really a who decides question.”¹⁴ Yet no one can “decide” to deny people their fundamental rights guaranteed under our federal Constitution. A justice who does not recognize these inherent rights would threaten not just access to the rights, benefits, and obligations of marriage, but access to other fundamental rights and protections for LGBTQ+ people at a time when such a threat can be ill afforded. As challenges to this Administration’s anti-LGBTQ+ policies wind their way through the courts, it is more vital than ever to have justices on the bench who understand the real-world implications and harms of institutionalized discrimination.

Moreover, in comments she made in 2016, Judge Barrett opined that the sex discrimination provisions of Title IX should not extend to transgender people. Discussing a case that had come before the Supreme Court about whether a transgender student should be permitted to use the restroom that correlated with his gender identity, Judge Barrett said “it does seem to strain the text of the statute to say that Title IX demands it.”¹⁵ She said that if policymakers want to add gender identity to Title IX, they should amend the statute. This position, however, is in direct contradiction to the Supreme Court’s text-based interpretation of an analogous statute, Title VII, in *Bostock v. Clayton County*, where the Court ruled 6-3 that the prohibition of employment discrimination on the basis of “sex” should be read to include gender identity and sexual orientation.

It is therefore particularly important that the Committee probe Judge Barrett’s approach to cases implicating LGBTQ+ rights.

Senators should ask Judge Barrett:

- Do you agree with the decision in *Obergefell v. Hodges* that the right to marry is a fundamental liberty? Do you believe it is settled law?
- Do you believe that the decision in *Obergefell v. Hodges* is fundamentally at odds with religious liberty?
- Is it your view that the Constitution protects against discrimination based on sexual orientation and gender identity?
- What is your interpretation of Title VII, as it relates to discrimination based on sexual orientation and gender identity? Was *Bostock* correctly decided?

¹⁴ Lucas Acosta, Amy Coney Barrett is an Absolute Threat to LGBTQ Rights, Human Rights Campaign, <https://www.hrc.org/news/amy-coney-barrett-is-an-absolute-threat-to-lgbtq-rights>; Hesburgh Lecture 2016: Professor Amy Barrett at the JU Public Policy Institute.

¹⁵ *Hesburgh Lecture 2016: Professor Amy Barrett at the JU Public Policy Institute*, YouTube (Jacksonville University, 2016), 41:40. <https://www.youtube.com/watch?v=7yjTEdZ811I>.

- What is your interpretation of Title IX, as it relates to discrimination based on sexual orientation and gender identity?
- Is it your belief that the Religious Freedom Restoration Act (RFRA) or the Free Exercise Clause permit those with religious objections to refuse to sell goods and services to or fire or refuse to hire members from the LGBTQ+ communities?
- Do you think that non-discrimination laws apply to transgender and non-gender-conforming people seeking healthcare?
- How do the decisions in *Burwell v. Hobby Lobby* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* affect the rights of the LGBTQ+ community?
- Do you believe that adoption agencies should prioritize placing children with cisgender, heterosexual couples, as opposed to LGBTQ+ couples?
- Do you believe that adoption agencies should be permitted to give preference to families of a particular faith?

c. **Employment Discrimination**

Our nation’s employment laws protect against policies or practices that discriminate against employees or potential employees on the basis of age, race, religion, gender, and national origin. These laws are critically important, because each time an employer engages in discrimination, it not only violates the rights of the individual victim but establishes an unwelcoming and hostile environment in both the workplace and adjacent social communities. ADL cares deeply about preventing discrimination in the workplace, including against religious minorities,¹⁶ and has identified several employment discrimination cases that have come before Judge Barrett which raise concerns and merit further inquiry.

In *Equal Employment Opportunity Commission v. AutoZone*,¹⁷ Judge Barrett ruled against an African-American worker whose employer involuntarily transferred him to another store. The EEOC claimed that AutoZone had an unlawful practice of segregating employees by race when it assigned African-American employees to stores in African-American neighborhoods and Latino employees to Latino neighborhoods. Judge Barrett denied a petition to rehear the case *en banc* after a three-judge panel ruled for the employer. Her disturbing ruling in this case permitted, in the words of the dissent, a “separate-but-equal arrangement.”¹⁸

¹⁶ ADL School & Workplace Accommodations for the Jewish High Holidays: Know Your Rights & Obligations, <https://www.adl.org/media/6934/download>.

¹⁷ 875 F.3d 860 (7th Cir. 2017).

¹⁸ *Id.* at 861 (Wood, J., dissenting).

In *Kleber v. CareFusion Corporation*, Judge Barrett joined a majority *en banc* panel that ruled that the Age Discrimination in Employment Act (“ADEA”) only protects current employees from discrimination due to disparate impact, but not outside job applicants.¹⁹ Four judges on the Seventh Circuit, including both Republican and Democratic appointees, dissented from the majority opinion that Judge Barrett joined, concluding, “Wearing blinders that prevent sensible interpretation of ambiguous statutory language, 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.”²⁰

It is therefore both appropriate and important to ask Judge Barrett about her commitment to justice and fair treatment for all in the employment context.

Senators should ask Judge Barrett:

- Other than circumstances where the First Amendment ministerial exception or Title VII religious employer exemption are applicable, is discrimination on the basis of age, race, religion, gender, or national origin ever constitutional or legally permissible?
- Should federal employees be protected by employment discrimination laws?
- What should an employee have to demonstrate to succeed on a discrimination claim?

d. Race-Based Decision-Making

Recent United States Supreme Court decisions have held that racial diversity is a compelling interest in public education. In *Fisher v. University of Texas* (2016), the United States Supreme Court upheld the admissions policy of the University of Texas at Austin, finding that the use of race as one element in a holistic undergraduate admissions process was constitutional. ADL agreed with the Court that such a policy does not impose quotas, assign people to categories based on their race, or use race as a determinative factor in making admissions decisions. Rather, as the Court observed, the consideration of race as one factor in a holistic review of each application is a proper means for a public university to achieve a diverse student body. Most recently, ADL filed an *amicus* brief in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard*, urging the First Circuit Court of Appeals to uphold Harvard College’s race-conscious admissions practices, which permit race to be considered as one factor among many in a holistic evaluation of each individual applicant.²¹ A central component of ADL’s brief was rejecting any argument that Harvard’s discriminatory admissions practices of the past—which

¹⁹ *Kleber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. 2019).

²⁰ *Id.* at 507 (Hamilton, J., dissenting).

²¹ “ADL Files Amicus Brief Urging First Circuit to Uphold Harvard’s Race-Conscious Admissions Practices,” *New England Anti-Defamation League* (Anti-Defamation League, May 22, 2020), <https://newengland.adl.org/news/adl-files-amicus-brief-urging-first-circuit-to-uphold-harvards-race-conscious-admissions-practices/>.

were clearly motivated by antisemitism and explicitly designed to decrease Jewish enrollment—are remotely comparable to its race-conscious admission practices today.

Judge Barrett has not decided any cases regarding the use of race in college admissions, but this is an issue that may once again be ripe before the Court.

Senators should ask Judge Barrett:

- What is your understanding of how race can be considered in college admissions?
- Do you believe that public universities have a compelling interest to seek and maintain racially diverse student bodies?

e. Criminal Justice

For decades, ADL has worked in coalition to reduce mass incarceration, oppose racism, reform practices that disproportionately impact communities of color, and help build trust between law enforcement and the communities they serve and protect.²² Judge Barrett’s criminal jurisprudence raises questions as to how she might rule in cases involving allegations of police brutality and misconduct. At a moment in history when our nation is grappling with longstanding systemic racism endemic in our criminal legal system, it is vital that the Judiciary Committee probe Judge Barrett regarding her philosophy in this regard.

In *McCottrell v. White*, Judge Barrett wrote a dissent siding with prison guards who fired buckshot from their shotguns, significantly injuring two inmates.²³ The majority reversed the district judge’s finding that the guards had fired “reasonable” warning shots and remanded the case. Judge Barrett dissented and would have denied the inmates an opportunity to prove at trial that excessive force was used against them in violation of the Eighth Amendment. Criticizing Judge Barrett, the majority stated: “the dissent suggests that firing two shotguns loaded with buckshot into the ceiling of a crowded dining hall cannot be deemed to be malicious and sadistic or even characterized as an intentional application of force without a showing that a guard ‘intended to hit or harm someone with his application of force.’ That standard is met here.”²⁴

Senators should ask Judge Barrett:

- Under what circumstances (if any) has the doctrine of qualified immunity been interpreted too broadly?

²² ADL Resolution on Criminal Justice Reform, <https://www.adl.org/resources/backgrounders/resolution-on-criminal-justice-reform>.

²³ 933 F.3d 651 (7th Cir. 2019).

²⁴ *Id.* at 665.

- Under what circumstances should law enforcement be held accountable for police brutality?
- What is your view on the importance of unanimous jury verdicts in criminal cases?

f. Higher Education: Discrimination and Sexual Assault on College Campuses

Fighting hate and discrimination has long been an ADL priority, including on American college campuses. We have seen a rise in hate incidents on campuses, including antisemitic incidents, and efforts by government officials and university leaders to respond. Responding to these questions requires finding the right balance between sometimes competing rights to freedom of expression and equal protection.

The intersection between misogyny and white supremacy has been a particular concern.²⁵ It is not unusual for misogyny to lead to sexual assault, and in the context of college campuses, Judge Barrett has made it more difficult for sexual assault and harassment survivors to bring their perpetrators to justice. In *Doe v. Purdue University*, Judge Barrett wrote an opinion that allowed a male student—who was credibly accused of committing multiple sexual assaults and suspended from the university—to advance a Title IX lawsuit against the university alleging that he was discriminated against because he was a man.²⁶ As one commentator has noted, “Judge Barrett’s ruling turned a sex discrimination statute on its head, using a law meant to prevent and address sexual assault to promote impunity for that very same behavior.”²⁷ Judge Barrett’s decision may very well discourage universities from disciplining male perpetrators of sexual violence since doing so may result in their being sued for sex discrimination.

Senators should ask Judge Barrett:

- How would you strike the balance between equal protection and freedom of expression in responding to incidents of antisemitism and other forms of hate on America’s college campuses?
- What is your view of college and university sexual harassment and sexual assault procedures?
- What is your view of the U.S. Department of Education’s Obama-era 2011 Title IX guidance?

²⁵ See <https://www.adl.org/resources/reports/when-women-are-the-enemy-the-intersection-of-misogyny-and-white-supremacy>

²⁶ 928 F.3d 652 (7th Cir. 2019).

²⁷ Alexandra Brodsky, “Understanding Judge Barrett’s Opinion in *Doe v. Purdue*,” Public Justice, September 24, 2020, <https://www.publicjustice.net/understanding-judge-barretts-opinion-in-doe-v-purdue>.

- Do you believe this guidance results in discrimination against men?

Conclusion

We hope this submission, highlighting issues of concern to ADL and the communities we represent, will be of assistance to the Committee as it undertakes its evaluation of Judge Amy Coney Barrett. Again, we have considerable admiration for Judge Barrett's service and her dedication to her country. However, these facts do not diminish from the questions that must be probed in order to ascertain her views that relate to a series of core issues likely to come before the Court during her tenure.

Of the many subjects a new Justice is likely to confront, we attach particular importance to understanding the nominee's approach to addressing questions related to hate and extremism, discrimination, church-state separation and immigration. These have long been priorities for ADL, touching on fundamental principles of justice and fair treatment that matter to communities across the country.

In ADL's view, the Senate's role in the nomination process is equally as important as the President's responsibility to nominate. At a time when communities of color, immigrants, religious minorities, and other targets of discrimination in our country are feeling particularly vulnerable, the role of the Court in protecting their rights is critical. We believe it is vitally important that Committee members assess whether Judge Barrett will respect basic principles of equality, independence, church-state separation, and civil rights, as outlined above.

Sincerely,



Esta Gordon Epstein
National Chair



Jonathan A. Greenblatt
CEO and National Director