MEMORANDUM
National Organization for Women Foundation

To: NOW Foundation Board Members
From: Jan Erickson, NOW Foundation Director of Programs and Stephanie Glascock, NOW Foundation Public Policy Intern
Date: Oct. 27 and Dec. 14, 2020

At Issue: Future of the Affordable Care Act.

California v. Texas (consolidated with Texas v. California) 19-840

Issues: (1) Whether the individual and state plaintiffs in this case have established Article III standing to challenge the minimum-coverage provision in Section 5000A(a) of the Patient Protection and Affordable Care Act (ACA); (2) whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum-coverage provision unconstitutional; and (3) if so, whether the minimum-coverage provision is severable from the rest of the ACA.

This pivotal case which will determine the fate of the Affordable Care Act was argued on November 11th.

The main question in this case is whether the individual mandate remains constitutional and if not, what that means for the ACA's constitutionality. In the 2012 case *National Federation of Independent Business v. Sebelius,* the Court upheld the individual mandate as constitutional in an opinion by Chief Justice Roberts. Instead of classifying the ACA under the Commerce Clause, the Court ruled that the individual mandate falls within Congress's taxing authority and thus it is a constitutional exercise of power.

However, in 2017 Congress passed the Tax Cuts and Jobs Act which reduced the penalty for not complying with the individual mandate to zero. A coalition of various groups and states, led by Texas, used this to challenge the constitutionality of the law, claiming that the penalty is no longer a tax. They argue that when Congress reduced the fee to no penalty, that turned the choice between paying and getting a fee into a command. Somehow, it is now more coercive with no penalty than without one. Furthermore, they hold that the individual mandate is inseparable from the rest of the ACA and argue that it too should be struck down.

The state of California and a group of Democratic members of the U.S. House of Representatives argued that a tax set to zero is still a valid exercise of Congress's taxing power. Even if it is not, the Court ought to go by the intention of the 2017 Congress to preserve the rest of the law. On Tuesday, justices seemed inclined to agree with California that the mandate and ACA can be separated. Most notably, both Chief Justice Roberts and Justice Kavanaugh claimed that it was not the role of the Court to strike down the entirety of the ACA even if it finds the individual mandate unconstitutional. While it is unclear what the Court will rule on the mandate's constitutionality, the comments made suggest that it is unlikely for the whole law to be struck down.

An extensive discussion of this important case can be found at, https://www.scotusblog.com/case-files/cases/california-v-texas/

Amicus Briefs that NOW Foundation has Joined

Virginia, Illinois, Nevada v. Ferriero
United States District Court for the District of Columbia, Brief in support of plaintiffs
Issue(s): Equal Rights Amendment

In January 2020, the Commonwealth of Virginia became the 38th and final state to ratify the Equal Rights Amendment (ERA). Originally proposed in 1923 and ratified by Congress in 1972, the ERA's introduction into the Constitution is long overdue. However, instead of recognizing Virginia's ratification, Archivist Ferriero announced he would not certify the ERA unless ordered by a court to do so. Hence, Virginia, Illinois, and Nevada – the three final states to ratify the amendment – requested that the Court order the Archivist to publish the ERA and certify it as the Twenty-Eighth amendment to the Constitution.

This case thus deals with the constitutionality of allowing the ERA as an amendment given the time taken between congressional ratification and state ratification. The Archivist's argument is predicated on the seven-year limitation (plus the three year extension) included in the resolution that Congress ratified, which states in the resolved clause that the amendment "shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years form the date of its submission by the Congress." Here, the defendant uses *Dillon v. Gloss* – where the Supreme Court unanimously agreed that a seven year limitation imposed by Congress on the Prohibition Amendment was constitutional – to assert that the limitation in the resolution is binding and constitutional, delegitimizing Virginia's ratification and nullifying the ERA as an amendment.

However, the plaintiffs assert that "[u]nder Article V, the moment that Virginia ratified the Equal Rights Amendment, the Constitution was changed, and the Equal Rights

Amendment became the 28th Amendment." Moreover, *Dillon* "involved a different kind of deadline: one that was submitted to (and therefore ratified by) the States in the text of the amendment itself" whereas the seven year limitation in the ERA was not part of the text certified by states, meaning that the subject at hand substantially differs from previous rulings. Furthermore, in response to the claim that too much time has passed per both Article V and *Dillon*, the plaintiffs cite how *Dillon* held that ratification must occur while "sentiment may fairly be supposed to exist" rather than a specific time limit. Thus, the recent ratifications have not outlived the ERA's legal life span. Finally, addressing the five states that have rescinded their ratifications, the plaintiffs argue that these rescissions are contrary to what the Founders' envisioned and even Archivist Ferriero himself acknowledged that states are unable to validly rescind ratifications.

This case is monumental for women's equality in the United States, which is why NOW joined **The Women's Movement** in filing an amicus brief in support of the plaintiffs. Here, the brief uses the history of women's oppression in the U.S. to show the need for constitutional protection from sex-based discrimination. Citing examples from John Adams dismissing his wife's request to "remember the ladies" in "the new Code of Law" to *Bradwell v. State of Illinois* where three judges would've allowed states to prevent women from receiving licenses because they believed women had no right "to engage in any and every profession, occupation or employment in civil life," this brief addresses the direct discrimination and inequality women have faced as a result of the Founders and previous Courts. Moreover, it holds that there exists a pertinent need for the ERA today as women continue to face "persistent inequality in nearly every sphere" such as domestic and sexual violence, and inequality in economics and employment. The court must therefore order the Archivist to accept Virginia's ratification of the ERA and hold the ERA as the Twenty-Eighth amendment to the Constitution because "there can be no time limit on equality."

Bose v. Rhodes College
Supreme Court of the United States
Issue(s): Title IX, sexual assault
Docket No, 20-216

This case, *Bose v. Rhodes College*, seeks to overturn the Sixth Circuit's ruling that Title IX does not offer protection to a student, Prianka Bose, from being expelled from Rhodes College as a result of retaliation on behalf of her professor, Robert de la Salud Bea. The plaintiff argues that the discrimination perpetuated by her professor and her university were on the basis of sex, and thus under Title IX, Bose was excluded from and denied the benefits of educational opportunities at her institution.

NOW joins **Legal Momentum, the Women's Legal Defense and Education Fund,** in filing this amicus brief in order to protect students from harassment and retaliation from university employees. About one in five college students experiences sexual harassment to the point that it interferes with their educational success making this case and its interpretation of Title IX tremendously relevant. The Sixth Circuit's ruling

proliferates a culture of harassment and retaliation, which emboldens abusers and further discourages victims of sexual assault, including women, people of color, and the LBGTQ+ community, from reporting. This case is therefore crucial to protecting students from harassment and retaliation, and holding universities accountable for the actions of their employees.

Brief in support of petitioner – Summary

Prianka Bose, a student at Rhodes College, suffered from sex-based discrimination in the form of romantic advances from Professor Bea. Upon confrontation, Bea falsified an exam answer key and reported Bose to the college which subsequently ended in her expulsion. Despite evidence of fabrication and retaliation, the Sixth Court ruled that Bose could not provide evidence of causation between her rejection of Bea's advances and her expulsion. Using precedence from *Gebser v. Lago Vista Independent School District*¸ the Sixth Circuit held that Rhodes College was not responsible for the independent actions of Bea.

This brief, however, argues that the actions taken by Bea and the college both violated Title IX and thus the Sixth Circuit's ruling should be overturned. Specifically, it holds that had Bose been male, her expulsion would not have occurred, and that the Sixth Circuit's ruling is a wrongful interpretation of the *Gebser* case. Bea's retaliatory behavior was predicated on intentions to academically punish Bea for refusing his advances, which would not have happened had she been male. Thus, Bea acted in a discriminatory manner against Bea. Consequently, the Sixth Circuit's ruling severs the causal link between the school's expulsion and the professor's biased conduct, eradicates Title IX protections for victims of sexual harassment, and thus ought to be overturned.

Sagaille v. Carrega
New York Supreme Court
County Index No. 154010/2018
First Dep't., Case No. 2020-02369

Protecting sexual assault survivors from retaliatory defamation suits by their named assailants solely because the survivor has filed a police report

The National Women's Law Center, along with the law firm partner Kirkland & Ellis, filed amicus brief to the New York Supreme Court, Appellate Division, in support of a sexual assault survivor who has been sued for defamation in *Sagaille v. Carrega*. The case involves Christina Carrega, a Black woman, who was sued by her named assailant, a former sex crimes prosecutor who is also Black, after she reported the sexual assault to the police. At the time, she worked as a reporter for the *Daily News*, which printed two articles summarizing the contents of her police report regarding the assault and the subsequent criminal proceedings.

The named abuser brought a defamation lawsuit against both Christina and the *Daily News*. The court dismissed the defamation suit against the news entity but is allowing

the case against Christina to go forward, ruling that accusations of sexual assault are inherently so "reprehensible" and "extravagant" that it can be "inferred" that her police report was made with "actual malice" – i.e., out of "personal spite" *and* with the "knowledge or reckless disregard" that her statements were false.

This is an outrageous decision because it essentially puts anyone who reports sexual assault to the police at greater risk of a defamation suit and gives support to the idea that any named assailant will be able to proceed in a defamation suit against a survivor *solely because* the survivor reported the sexual assault to the police.

The amicus brief explains that sexual assault is both widely prevalent and vastly underreported, that survivors (particularly Black women) are often disbelieved and punished when they come forward. The amicus brief also highlights the ways that defamation suits are increasingly weaponized by named harassers as a silencing and retaliatory tactic. *Amici* also point out that this decision, if not overturned, will further exacerbate the underreporting of sexual assault, will embolden named abusers, and will allow named assailants to subject survivors to ongoing litigation thereby forcing survivors to relive the traumatizing details of their assault in a case as a defendant.

Kadel et al. v. North Carolina State Health Plan et al.
United States Court of Appeals for the Fourth Circuit
Issue(s): Transgender rights, Healthcare
Case No, 20-1409

The plaintiffs in this case were denied coverage for gender-affirming care as transgender individuals. Although they and their family members receive health insurance from North Carolina's State Health Plan (NCSHP), they were denied access to this medically needed care. The plaintiffs argue that this exclusion is discriminatory and therefore violates Title IX, the Due Process Clause, and Section 1557 of the Affordable Care Act, which prohibits sex discrimination in health care. The NCSHP has appealed their case, arguing that accepting federal funds under the ACA does not waive its sovereign immunity related to discrimination within its health plan.

NOW joins The National Women's Law Center and Wilkinson Walsh LLP in filing an amicus brief outlining that all states must follow Section 1557's protection of transgender individuals and that all states that accept funds under the ACA waive their immunity from these types of claims. The long history of statutes addressing similar sex discrimination further that the actions taken by NCSHP are discriminatory towards the transgender community.

Pambakian v. Blatt
United States Court of Appeals for the Ninth Circuit
Issue(s): Sexual Assault, Workplace Rights
Case No, 20-55076

In December 2016, Rosette Pambakian, a Senior Executive at Tinder, experienced verbal and sexual harassment from Tinder's CEO, Gregory Blatt. After reporting the case to her supervisor, Pambakian was offered compensation in reward for a signing a nondisclosure agreement, which she refused. Shortly after, Tinder sent a mandatory company policy including an arbitration agreement that all employees had to sign. Pambakian signed unaware that it included an arbitration agreement, leading to her termination.

The brief, submitted on behalf of **The National Women's Law Center and American Association for Justice** argues in favor Pambakian's appeal to the District Court's ruling that submits her case to the arbitration agreement previously mentioned. It outlines how these types of arbitration agreements effectively silence survivors and embolden abusers as it "keeps proceedings secret, findings seals, and victims silent." In cases of arbitration surrounding sexual assault in the workplace, levels of reporting have declined, employees rarely win, and employees receive less damages. Given that 60% of women experience sex-based discrimination at work and only ¼ employees come forward about cases of sexual assault, this case has important implications for the protection of employees and support for survivors.

Peltier, et al v. Charter Day School
United States Court of Appeals for the Fourth Circuit
Issue(s): Title IX, Equal Rights

Founded on the intention to "preserve chivalry" and promote the idea that a woman is "regarded as a fragile vessel that men are supposed to care of and honor, "Charter Day School implemented a strict dress code requiring girls to wear knee length skirts and prohibiting them from wearing pants or shorts. This blatantly discriminatory dress code violates the Equal Protection Clause of the Fourteenth Amendment and perpetuates sex stereotypes that Title IX attempts to eradicate while denying girls equal opportunity to an education. That is why NOW joined The National Women's Law Center in filing an amicus brief in favor of the plaintiffs, arguing that Title IX clearly prohibits this type of sex discrimination and dress codes such as this one inhibits women's equality.

This case is extremely relevant to women's equality, especially in the sphere of education. When girls are forced to abide by different rules than boys on basis of sex, they are denied opportunities and prevented from developing the qualities that are fundamental to their success. When they're taught that sitting properly in dress code and that they can't play on the playground while boys can, girls' morale is defeated. This lack of opportunity and discrimination is exacerbated for girls of color and transgender individuals, as they are more likely to be punished for violating the traditional gender norms imposed by the dress code. As society continually evolves to be more equal, there is no place for sexist dress codes that are an attempt to preserve the discriminatory traditionalism of the past.

Abortion Cases in the Supreme Court Pipeline

Amy Coney Barrett's was confirmed on October 22nd. When Justice Kavanaugh was confirmed, our worst fears came true as he tipped the balance against reproductive rights. Now, Barrett would solidify a conservative majority on the Court, endangering reproductive rights and threatening a wide array of various protections we have today. Following her confirmation, it is highly likely that she will rule on abortion-related cases in the near future.

With an uncertain future surrounding the legality of abortion in the United States, the following list tracks recent abortion cases, many of which have the potential to reach the Supreme Court. Cases* with one asterisk indicate the case has been denied from being heard by the Supreme Court. Cases** with two asterisks indicate the case has already been heard in a Circuit court and either could be appealed or already has been appealed to the Supreme Court. These cases are of most concern currently to reach the Supreme Court.

Amy Bryant, et al. v. Jim Woodall
Case No: 19-1685
Case Last Heard: U.S. District Court for the Middle District of North Carolina
Case To be Heard: U.S. Court of Appeals for the Fourth District
Description: This case deals with a challenge to North Carolina's twenty-week abortion ban. On March 25, 2019, the district court permanently enjoined the State from enforcing the abortion ban. Since then, the State filed an appeal within the Fourth Circuit and is currently pending

American College of Obstetricians & Gynecologists et al. v. U.S. Food & Drug Administration et al.*
Docket No: 20A34
Case Number: 20-1824; 20-1970
Case Last Heard: Fourth Circuit – District Court for the District of Maryland
Case to be heard: Petition Denied, referred back to District Court
Description: This case is a challenge to the FDA's nationwide Risk Evaluation and Mitigation Strategy (REMS) requirement that mifepristone be dispensed in-person at a health center during the COVID-19 pandemic. The government is seeking a stay of an injunction on the District Court's ruling that prevents the FDA from enforcing in-person dispensation requirements for mifepristone.

Planned Parenthood of Maryland, Inc. et al. v. Azar et al.
Case No: 20-2006
Case Last Heard: The U.S. District Court for the District of Maryland
Description: This case blocked a Trump administration rule designed to make insurance companies stop offering coverage for abortion. district court vacated and enjoined a Trump administration rule that would have required separate insurance payments for

abortion care and all other health care for people insured by certain plans under the Affordable Care Act

Gee v. Planned Parenthood of Gulf Coast, Inc.*
Docket No: 17-1492
Case No: 18-30699
Case Last Heard: Fifth Circuit
Case to be heard: Petition Denied
Description: The case regards an individual's right to sue to challenge a state's disqualification of a Medicaid provider. It originated because Planned Parenthood Louisiana was removed from a list of Medicaid providers. A district court issued an injunction, and the Fifth Circuit affirmed. Petition of the case in the Supreme Court was denied in December 2018.

Azar v. Mayor and City Council of Baltimore**
Case No: 19-1614
Docket No: 20-454
Case Last Heard: U.S. Court of Appeals for the Fourth District (Opinion)
Case to be heard: Petition pending to Supreme Court
Description: This case is linked with AMA v. Azar (see below) and concerns 1) Whether the Department of Health and Human Services' rule, which prohibits Title X projects from providing referrals for abortion as a method of family planning, falls within the agency's statutory authority; and (2) whether the rule is the product of reasoned decision making.

American Medical Association v. Azar**
Docket No: 20-429
Case Last Heard: United States Court of Appeals for the Ninth District
Case to be heard: Petition pending to Supreme Court
Description: This case seeks to overturn the Department of Health and Human Services (HHS) gag rule that dictates what physicians practicing at facilities funded under Title X family planning grant program are allowed to say to patients. The American Medical Association filed a petition requesting that the Supreme Court review the case.

Jackson Women´s Health Organization et al. v. Thomas Dobbs et al.**
Case Number: 18-60868
Case last Heard: United States Court of Appeals for the Fifth Circuit
Case to be Heard: Supreme Court
Description: This case deals with a Mississippi ban on abortions after fifteen weeks and the constitutionality of pre-viability prohibitions. The Fifth Circuit ruled that Mississippi's ban violates that Constitution by imposing an undue burden on women receiving abortions. The case is pending before the Supreme Court and is waiting to be scheduled.

Whole Women's Health v. Paxton
Case Number: 17-51060

Case Last Heard: U.S. Court of Appeals, Fifth Circuit
Description: This case concerns a July 2017 Texas law that forces the burial or cremation of embryonic and fetal tissue when a woman has a miscarriage management procedure, ectopic pregnancy surgery, or an abortion. The law also requires a waiting period, ultrasounds, and a ban on dilation and evacuation (D&E). A federal district court filed an injunction against the law, the State appealed. On October 13, 2020, the Fifth Circuit ruled that the Texas law violates the 14th Amendment by overburdening women who want to obtain a previability abortion.

Whole Woman's Health et al. v. Charles Smith*
Case Number: 18-50730
Case Last Heard: U.S. Court of Appeals, Fifth Circuit
Case to be Heard: Petitioned Denied
Description: This case surrounds a Texas law that healthcare providers who perform abortions in the state have to provide cremation or burials of fetal tissues. The plaintiffs alleged that this process places and undue burden on women seeking an abortion as there is only one facility in the state able to process the fetal tissue. The Supreme Court declined to review the petition for write of certiorari in February 2019.

EMW Women's Surgical Center et al. v. Adam Meier et al.*
Case Number: 18-6161
Case Last Heard: U.S. Court of Appeals, Sixth Circuit
Case to be heard: Petition Denied
Description: This case concerns a Kentucky law that required a "speech-and-display requirement" with an ultrasound before administration of an abortion, as well as use of a fetal heart rate monitor. The law was struck down in a U.S. District Court in 2017. The case was appealed in the Sixth Circuit Court of Appeals and on April 4, 2019, the Sixth Circuit upheld the law, despite the fact that a similar law was struck down by the Fourth Circuit in 2014. On September 25, 2019 a petition for writ of certiorari was filed in the Supreme Court but the Court denied the petition on December 9, 2019.

Memphis Center for Reproductive Health v. Slatery
Case Number: 20-5969
Case to be heard: United States District Court for the Middle District of Tennessee
Description: This case challenges a Tennessee law that bans abortion after six weeks of pregnancy. However, if the six weeks law is found to be unconstitutional, the law then takes effects at eight-weeks, then ten weeks, twelve, fifteen, eighteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four weeks of pregnancy. In addition to banning abortion based on sex, race, or diagnosis of Down Syndrome, this case pushes the limit on what week of pregnancy is considered unconstitutional to place an abortion ban on.

Box v. Planned Parenthood of Indiana and Kentucky**
Docket No: 18-483
Case No: 17-2428
Case Last Heard: U.S. Supreme Court

Description: The Court held that Indiana's law requiring disposition of fetal remains is constitutional. However, it denied certiorari on the question whether abortions based on sex, race, or disability are constitutional, citing that the Seventh Circuit is the only appeals court to have addressed the issue (the Seventh Circuit struck down Indiana's provision).

Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of the Indiana State Department of Health et al
Case No: 20-2407
Case Last Heard: U.S. District Court for the Southern District of Indiana
Case to be Heard: United States Court of Appeals for the Seventh Circuit
Description: In 2018, the Indiana General Assembly passed SEA 340 which required physicians, hospitals, and abortion clinics to report cases involving abortion complications. On July 7, 2020, the District Court struck down this las as medically unnecessary and a cruel intimidation tactic. The Attorney General of Indiana has since filed an appeal asking the Seventh Circuit to reverse the District Court's decision.

Hopkins v. Jegley
Case No: 17-2879
Case Last Heard: U.S. Court of Appeals for the Eighth Circuit
Case to Be Heard: U.S. District Court, E.D. Arkansas, Western Division
Description: This case challenged four abortion restrictions passed in Arkansas in 2017, including a ban on D&E procedure, the most common abortion procedure after sixteen weeks, and the disposition of fetal remains. In light of the Supreme Court's rulings on June Medical Services v. Russo and Box v. Planned Parenthood of Ind. & Ky., Inc., the Eighth Circuit sent the case back to the district court for reconsideration.

Little Rock Family Planning Services et al. v. Leslie Rutledge et al.
Case No: 19-2690; 20-0470
Case Last Heard: U.S. District Court, E.D. Arkansas, Western Division
Description: This case challenges three Arkansas abortion restrictions including their eighteen-week abortion ban, ban on abortion based off Down Syndrome diagnosis, and requirement that all abortion providers be board-certified or board-eligible OB-GYNs. Since the initial case, it has expanded to include a challenge to Arkansas limiting abortions during the pandemic.

Reproductive Health Services et al. v. Michael Parson
Case No: 19-2882
Case Last Heard: U.S. District Court for the Western District of Missouri
Case to be Heard: U.S. Court of Appeals, Eighth Circuit
Description: This case challenges a Missouri law that bans abortion after eight, fourteen, eighteen, and twenty weeks of pregnancy and if the reason for abortion is the fetus's sex, race, or diagnosis of Down Syndrome. Similar to Memphis Center for Reproductive Health v. Slatery, this case pushes the limits of at what point abortion can be constitutionally banned.

Reproductive Health Services et al. v. Daryl Bailey
Case No: 17-13561
Case Last Heard: United States District Court for the Middle District of Alabama
Case to be Heard: U.S. Court of Appeals, Eleventh Circuit
Description: This case challenges an Alabama law that requires a court to allow a minor's parents and the district attorney to participate in judicial bypass. By requiring parental involvement, the Alabama law puts minors in abusive households at a greater risk for future abuse and manipulation. The case is pending review in the Eleventh Circuit.

SisterSong v. Brian Kemp
Case No: 20-13024-G
Case Last Heard: U.S. District Court for the Northern District of Georgia, Atlanta Division
Case to be Heard: U.S Court of Appeals, Eleventh Circuit
Description: Governor Kemp of Georgia is asking the Eleventh Circuit to undo the District Court's block on the state law that banned abortions after six weeks or after a heartbeat was detected. The District Court found the law to be unconstitutional

Whole Woman's Health Alliance v. Hill*
Docket No: 19-743
Case Last Heard: U.S. Court of Appeals, Seventh Circuit
Case to be heard: Petition denied
Description: This case concerns the 2016 Indiana Law and the provision in it that requires an 18-hour waiting period between having an ultrasound and an abortion procedure. The Seventh Circuit upheld a U.S. District Court Injunction, and the state has filed a petition with the Supreme Court to overturn that injunction.

EMW Women's Surgical Center et al. v. Andrew Beshear et al.
Case Last Heard: U.S. Court of Appeals, Sixth Circuit
Description: This case concerns a Kentucky law that required a "speech-and-display requirement" with an ultrasound before administration of an abortion, as well as use of a fetal heart rate monitor. The law was struck down in a U.S. District Court in 2017. The case was appealed in the Sixth Circuit Court of Appeals and on April 4, 2019, the Sixth Circuit upheld the law, despite the fact that a similar law was struck down by the Fourth Circuit in 2014.

Planned Parenthood of Indiana and Kentucky v. Adams
Case No: 17-2428
Case Last Heard: U.S. Court of Appeals, Seventh Circuit
Description: On August 27, 2019, the Seventh Circuit ruled that the Indiana law requiring parental consent for minors seeking abortions, where parents must provide government ID to the court, did not address any problem it was attempting to solve and created a burden for minors trying to seek an abortion.

Republicans' Sham Process in Pushing Through Third Justice

Donald Trump's new justice for the high court, Amy Coney Barrett, sailed through hearings revealing little about her views on key issues and refusing to provide a solid assurance that she would respect judicial precedence. Barrett is the stealth nominee that could vote to overturn many of the important equality gains of the last 60 years, including access to affordable birth control, a right to abortion care, same sex marriage, and protection of LGBTQIA+ rights under Title VII, among key advances. The nominee shocked many on Thursday when she described what is settled science of climate change as still in dispute!

Barrett is the polar opposite of Justice Ruth Bader Ginsberg, a champion of equality, women's rights and a committed protector of the environment, who during her last days asked that the Senate wait until the next administration to consider her replacement.

Nonetheless, Majority Leader Mitch McConnell (R-KY) and Judiciary Chair Lindsey Graham (R-SC) pushed her nomination through at break-neck speed. Three days of grim hearings were held, followed by a floor vote to confirm on Oct. 26 Opposition to the nominee from Democrats, civil rights groups, women's rights organizations, environmental organizations, health care advocacy and countless others was intense. Rallies, petitions, mass mailing and calling efforts to senators are continuing apace even though Barrett's confirmation looks assured.

Barrett, an ultra-conservative acolyte of the late Justice Antonin Scalia and an 'originalist' in her interpretation of what the Constitution means, will move the conservative majority further to the right, 6 - 3.

Barrett, a judge on the U.S. Court of Appeals, Seventh Circuit since 2017, says she is an "originalist" -- that is, she would interpret the Constitution as to what the drafters of the Constitution meant in 1787. Of course, women, African Americans and Native Americans had virtually no rights under the law in 1787. Scalia, Barrett's mentor, had said that there is no protection for women against discrimination in the Constitution. He also had said that the Constitution contains no right to abortion; *Roe v. Wade* was decided on a finding of privacy as protected by the Constitution.

Barrett has also said that she, like Scalia, is a 'textualist' -- which means that a word is interpreted based on its ordinary meaning.

Some believe that both 'originalist' and 'textualist' are mere covers for far-right judicial activism that would reverse any gains made be legislation advancing equal rights, improve socio-economic conditions and protect the environment. Certainly, this judicial philosophy flies in the face of a widely accepted view of the Constitution as a 'living document' – meaning that the document as written essentially meets the needs of a changing society. Explained another way, the document's meaning changes as society naturally re-frames the Constitution. Not to be overlooked, is a body of rights and protections in the 28 amendments and are looking to gain a 29th, the Equal Rights Amendment.

From her writings, we know that Judge Barrett is an avowed opponent of abortion rights, the Affordable Care Act, may not be supportive same sex marriage and would likely oppose laws against regulating firearms, among other regressive views.

Activists were cautioned be Republicans not to criticize Amy Coney Barrett's religion: she is Catholic and member of a small sect of Christians called People of Praise, which emphasizes strict gender roles with women being subservient to men. Ms. Barrett had a special role in the sect as a "handmaid", a title which has since been changed when author Margaret Atwood book, The Handmaid's Tale, gained national attention when a series of this dystopian future was dramatized on cable television.

In our view, Justice Barrett's ultra-conservative upbringing and continued membership in the sect will influence her views on any case which attempts to advance equality between women and men. We agree with our friends at Catholics for Choice who called on "the U.S. Senate to safeguard the fundamental freedoms of all Americans, by ensuring that any nominee to the Supreme Court is willing to apply the law impartially and equitably, and rejects discrimination based on religion. Based on her public statements and judicial record, the nomination of Judge Amy Coney Barrett does not meet this critically important standard."

Record of Supreme Court Justice Amy Coney Barrett

Following the death of Supreme Court Justice Ruth Bader Ginsburg, President Trump quickly nominated Amy Coney Barrett, a judge on the United States Court of Appeals for the Seventh Circuit, to fill her spot. Praised as someone dedicated to upholding law, Barrett has been presented by Republicans and the Trump Administration as a highly qualified justice with a long record of experience. However, that very record exemplifies a long history of undermining judicial precedent, overturning crucial protections, and promoting discrimination. Her previous rulings and past statements on certain cases threaten healthcare access, reproductive rights, civil rights, and other critical legal protections.

Judicial Precedent – Barrett's record exemplifies her tendency to value ideology over law. She has called the *Miranda* doctrine an example of "the court's choice to over-enforce a constitutional norm," disregarding constitutional protections. She additionally has been critical of stare decisis (a long held legal principal of following judicial precedent). Undermining this precedent means that Barrett could overturn watershed civil rights cases ruling including *Brown v. Board*, *Griswold v. Connecticut*, *Roe v. Wade*, and *Obergefell v. Hodges.*

Healthcare – Barrett passed Trump's litmus test for gutting the ACA, exemplified by her criticism of Chief Justice Robert's decision upholding Congress's authority to enact portions of the ACA. Barrett also wrote favorably of the dissent in *King v. Burwell* where the Court affirmed tax credits for millions of families. In speeches and statements, she's argued that the ACA is unconstitutional, indicating that were she to be confirmed before

November 10th when the ACA goes in front of the Supreme Court, she would rule against the ACA, hindering millions of Americans' access to healthcare.

Reproductive Rights – Starting with the belief that *Roe v. Wade* was a "judicial fiat" that ushered in abortion on demand, Barrett is a direct threat to reproductive freedom in the U.S. Not only has her role as previous President of Americans for Life and membership in Notre Dame's Faculty for life show her commitment to the pro life movement, her rulings in the Seventh circuit are concrete proof that she values upholding the tenets of the pro life movement above the rule of law. In cases regarding reproductive justice, she's wanted to overturn precedent permitting the regulation of protestors at abortion clinics, criticized the ACA for making employers cover contraception in their health insurance, and would've upheld an Indiana law requiring parental notification in cases of minors receiving abortions.

Discrimination in The Workplace – One of the most publicized disapprovals of Barrett's record regarding civil rights was her ruling in *EEOC v. Autozone* where she ruled in favor of a company that segregated its employees by race. The Chief Judge of the Seventh Circuit remarked that Barrett was supporting a "separate but equal" arrangement, thereby promoting discrimination. Barrett also sided against an employee who was fired in retaliation for his for complaints of racial bias in *Smith v. Illinois Department of Transportation.* She has similarly ruled to allow companies to discriminate applicants based on age, weaken mechanisms that prevent companies from financially abusing their customers, and let companies get away without paying their employees overtime. Her record illustrates her predisposition to side with employers over employees, emboldening discrimination and abuse instead of protecting workplace rights.

Civil Rights – Barrett has also made it easier for students who committed sexual assault to sue schools on the basis of sex discrimination, voiced quarrels over *Obergefell v. Hodges,* and stated that transgender individuals do not deserve protections from discrimination under federal law. In responding to questions about marriage equality, Barrett has frequently used the words "sexual preference" when referring to sexuality, indicative of her beliefs that sexuality is a choice and not an inherent aspect of someone's identities. Her seat on the Court would introduce further marginalization and discrimination for women and the LGBTQ community.

Her record of undermining widespread rights gives a glimpse into how she would rule on the Court. Not only does Barrett possess beliefs that endanger protections, her record illustrates a neglect for the rule of law and an indication that her own personal convictions are above the rights of American citizens. Her presence on the Court would slash current protections and undermine the Court as we know it.