RHODES COLLEGE ALUMNI FOR REPRODUCTIVE RIGHTS

President Jennifer Collins
Rhodes College
2000 North Parkway
Memphis, TN 38112

Richard Adams
Director of Community Standards
Rhodes College
2000 North Parkway
Memphis, TN 38112

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Dear President Collins and Director Adams,

We, together with the undersigned alumni, are writing to you today to request that you remove Justice Amy Coney Barrett from the Rhodes College Hall of Fame. Our firm belief in the Rhodes Honor Code we all signed impels us to make this request.

This request is based on Justice Barrett's public breach of the Honor Code in her testimony before the United States Senate during her October 12 -15, 2020 confirmation hearings to become an Associate Justice on the Supreme Court of the United States.

The Rhodes College Honor System

The Rhodes Honor System consists of the Honor Code, the Social Regulations Code, and the Rhodes Commitment to Diversity. In the College's own words, "By participating in the Honor System, all who make up the Rhodes College community maintain the values by which we live together."

The Honor System is a set of principles which Rhodes students agree to adhere to not only during undergraduate studies, but throughout our entire lives. The fundamental values underlying this code are truthfulness, frankness, and transparency. Amy Coney Barrett, by any measure, fell far short of this standard in her testimony.

Justice Barrett Has Violated the Rhodes Honor Code

We believe that Justice Barrett violated the Rhodes Honor Code in her testimony before the Senate regarding her position on overruling Supreme Court precedent (including statements she made regarding *Roe v. Wade*) and about her judicial decision-making process.

In each of the categories above, Justice Amy Coney Barrett's adherence to an originalist interpretive methodology of constitutional textual analysis (as reflected in her scholarly legal articles) appears to be at odds with statements she made to the United States Senate.

Originalism, in the words of Justice Barrett from her 2017 *Notre Dame Law Review* article, "Originalism and Stare Decisis," maintains "both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative." And, to an originalist, "the meaning of the text is fixed so long as it is discoverable."

In her confirmation hearing, in response to a question from Sen. John Kennedy (R-La.) on who determines what a constitutional text meant at the time it was drafted, Justice Barrett responded that it was "the people at the time," those "informed observers" "that are familiar with the [Framers'] debates" and is made clear by knowing whether "between 1791 and 1801…people have roughly the same understanding" of a particular text.

1. Testimony Regarding Precedent and Stare Decisis

During her Supreme Court confirmation hearings the then-nominee was asked several questions, based on her prior scholarly writings and her close relationship with late Justice Antonin Scalia, regarding whether she would follow prior Supreme Court precedent if appointed to the nation's highest court. As she explained, "precedent is the principle that cases that have been decided by the Court before [**this one**] lands on the docket are presumptively controlling" and that precedent comes from a concept legal scholars call *stare decisis*. *Stare decisis* means that a justice is not going to overrule precedent without clear "justification for doing so."

In response to an inquiry as to whether she would uphold Supreme Court precedent, Justice Barrett committed to "obey all the rules of *stare decisis* that if a question comes up before me about whether [*Planned Parenthood v.*] *Casey* or any other case should be overruled, that I will follow the law of *stare decisis* applying it as the Court has articulated it." Justice Barrett noted that her record as a judge on the United States Court of Appeals for the Seventh Circuit reflects her respect for *stare decisis* and upholding precedent; as an example, she noted a decision upholding a law creating a bubble zone around Chicago-area abortion facilities. In that case, Justice Barrett confirmed that she was bound by prior Supreme Court precedent regarding the First Amendment.

However, citing her record as a judge on a lower appellate court is misleading, as lower courts are required by law to follow the precedent of the Supreme Court. The Supreme Court is not bound by its own precedent, and, as Justice Barrett notes, "no justice "throughout history has ever maintained the position that overruling a case is never appropriate," citing *Lawrence v. Texas* and *Brown v. Board of Education*. While the Supreme Court has always said that in some cases overruling precedent is the right course for the courts to take, it is not done "willy-nilly."

Justice Barrett repeatedly refused to provide any insight as to her views on certain Supreme Court precedent, citing both Justices Ruth Bader Ginsburg and Elena Kagan as examples, and asserting that any off-the-cuff response would circumvent the legal process. She did, however, testify that she had no agenda for overturning precedent such as *Roe* or *Casey*. This statement seems not only disingenuous in retrospect after the *Dobbs* decision, but at the time it would have been at odds with her scholarly writings. It was, at the very least, misleading.

In Justice Barrett's 2013 article in the *Texas Law Review* titled "Precedent and Jurisprudential Disagreement," she advocates for *stare decisis* as an overlooked function for mediating jurisprudential disagreement. In the article, she contemplates an approach of:

> Placing the burden of justification on those justices who would reverse precedent disciplines jurisprudential disagreement lest it become too disruptive. ***A new majority cannot impose its vision with only votes.*** It must defend its approach to the Constitution and be sure enough of that approach to warrant unsettling reliance interests. Uncertainty in that regard counsels retention of the status quo." (emphasis added)

In "Originalism and Stare Decisis" (her 2017 *Notre Dame Law Review* article) she notes that, among other choices, the Court also decides how much precedent to unsettle when it decides how broadly to write an opinion. "These choices are not best understood as choices about the strength of *stare decisis*. They are better understood as choices about whether to put the merits of precedent on the agenda, thereby forcing the Court to consider whether *stare decisis* should hold the precedent in place."

These assertions regarding the value of *stare decisis* certainly seem to be more forthright and more reflective of Justice Barrett's actual views than the misleading statements she made during her confirmation hearing. Moreover, we fear it may be predictive of her future rulings. Given Justice Barrett's own writings, taken together with Justice Clarence Thomas' assertions in his concurring opinion on the *Dobbs* decision regarding several other important related precedents – including *Griswold v. Connecticut* (which established the right to have access to contraception), *Lawrence v. Texas* (the right for consenting adults to enjoy the privacy of their home), and *Obergefell v. Hodges,* (the right to same-sex marriage) – we greatly fear for the future of our country.

2. *Testimony Regarding Roe v. Wade*

With respect to *Roe,* Justice Barrett made clear in her hearing that she did not consider *Roe* to be a super-precedent. "Super-precedents," as used in legal scholarship, refers to "cases that are so well settled that no political actors push for overruling." In an exchange with Sen. Amy Klobuchar (D- Minn.), Justice Barrett explained that in her view, *Roe* does not fall in the category of a super-precedent. However, as Justice Barrett noted, just because the case is not a super-precedent, that "does not mean it ***should*** be overruled" in the view of scholars. (emphasis added).

She did, however, refuse to give a response to Sen. Dianne Feinstein (D-Calif.) regarding whether she agreed with Justice Scalia that "*Roe* was wrongly decided and can and should be overruled consistent with our traditional approach to *stare decisis* in constitutional cases." Justice Barrett declined to answer, instead responding that while she had a desire to be forthright and answer every question, she thought it would be improper of her as a sitting judge to offer any opinion about it.

While we are not constitutional law scholars, it is reasonable to conclude that under originalism, any challenge to *Roe* or *Casey* could be successful only on the premises that the right to an abortion is not in the Constitution. And, in her testimony before the Senate, Justice Barrett confirmed that the word "abortion" does not appear in the Constitution. It is important to note that this testimony corresponds with the basis of the holding in *Dobbs*, which asserts that "*Roe* and *Casey* ***must*** be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision." (emphasis added).

It was, at best, disingenuous of Justice Barrett to admit that she did not believe *Roe* to be a "super-precedent" yet then suggest that did not mean the case "should" be overruled, despite clearly adhering to a legal philosophy that would obviously lead her to rule against *Roe.*

Therefore, we find Justice Barrett's testimony regarding *Roe v. Wade* to be disingenuous and misleading.

3. *Testimony re Judicial Decision Making*

During her confirmation hearing, Justice Barrett faced questions regarding her impartiality. In response to a question from then-Sen. Kamala Harris, Justice Barrett confirmed that it is important for the American people to believe that Supreme Court justices are independent, fair, and impartial. Her only agenda, she said, was to stick to the rule of law. Justice Barrett also noted that in her role as a Supreme Court justice, she can't get up and say "you

are going to live by my policy preferences, because I have life tenure, and you can't kick me out if you don't like them."

With respect to her decision making and the potential impact her decisions could have on individuals, Justice Barrett said that part of the decision in every case is considering the consequences of her ruling on people's lives. And, Justice Barrett repeatedly noted that the *stare decisis* doctrine incorporates an analysis of "reliance interests" – the concept that a right, once established by Court precedent, resulted in millions of Americans relying on that right in structuring their affairs "in accordance with the Court's existing cases."

Thus, their reliance on the continued existence of that right should factor into any justice's decision to take it away, no matter what the constitutional merits would be of doing so. It is important to note that Justice Barrett could not provide a commitment on how she would weigh certain factors or structure her decision-making process in such cases. In discussing the potential detrimental effect of a ruling on others, Justice's Barrett said her responsibility is to ensure that, emotion aside, she "can see that it's been a balance strictly driven by legal analysis" and that the language in the opinion will be respectful to the party who will ultimately be disappointed.

The above approach as described by Justice Barrett appears misleading as it relates to originalism and her scholarly articles. While reliance and the importance of the impact of judicial rulings on individual lives are considered under *stare decisis,* they are not in any way determinative.

As Justice Barrett wrote in "Originalism and Stare Decisis," originalism stands in contrast to other theories that treat the Constitution's meaning as susceptible to evolution over time, noting in the introduction (as she did in her hearing) that *stare decisis* protects reliance interests. However, as she explained in "Precedent and Jurisprudential Disagreement," the "need to take account of reliance interests" is simply a mechanism to force a justice "to think carefully about whether she is sure enough about her rationale for overruling to pay the cost of upsetting institutional investment in the prior approach." In the event precedent conflicts with the original meaning of a constitutional text, according to Justice Barrett, originalists "have difficulty identifying a principled justification for following such precedent, even when the consequences of overruling it would be extraordinarily disruptive."

Therefore, we find any claim by Justice Barrett during her nomination hearings that she would consider the potential detrimental effect of overruling precedent on a given individual to be disingenuous and misleading. She's told us herself that if one stays true to originalism and the text of the Constitution, it is immaterial as to whether an action could result in widespread chaos or trampling on the reliance interests of millions of Americans. *Dobbs* and the current state of women's health care post-*Roe* confirms this.

Justice Barrett's misleading confirmation-era promises aside, her likelihood to shred decades of precedent in the future is no merely theoretical matter. We do not want the country to return to 1800, and we fear the devastating effect of the Supreme Court's recent rulings in *Dobbs*, *New York State Rifle & Pistol Assoc. v. Bruen* (gun rights), *West Virginia v. Environmental Protection Agency* (climate change), *Carson v. Makin* (separation of church and state), *Kennedy v. Bremerton School District*, (school prayer), and *Oklahoma v. Castro-Huerta* (tribal prosecutions) will have not only on real people's lives, but also on important upcoming cases.

The Supreme Court is set to hear a North Carolina redistricting case in the fall that voting rights experts say could bring chaos to elections. We, like many in the American public, are wondering whether the Supreme Court is in a legitimacy crisis. Is it, as Justice Barrett notes above, funded by "political actors" who are trying to take the country back to a time when only white men had rights?

There is one statement in Justice Barrett's testimony with which we could not agree more – "Nobody wants to live in a world with the law of Amy." Yet, we fear that is what the nation will be subjected to -- a nation where the majority on the Supreme Court imposes their will on the American people, even when a large majority of the country may be opposed to such a decision.

For many years, Justice Barrett has been telling us in writing through scholarly articles and court opinions her actual views as a jurist. These writings reflect a viewpoint that we find deeply inconsistent with her Senate testimony.

We believe it is time to take her at her written, rather than spoken, word. And we believe that Justice Amy Coney Barrett is one of the biggest current threats to our fundamental rights, the stability of our nation, and our democracy. Moreover, as Rhodes alumni who pledged the same fealty to "truth, loyalty, and service" as she did, we find her actions to be a clear – and perhaps history's most destructive to date – violation of the Honor Code we all hold dear.

The Rhodes Hall of Fame is an honor bestowed on seniors who have contributed, in some significant way, to the life of the College. Simply being one of our most famous alumni is not a sufficient reason for the College to continue honoring someone thus who has very publicly breached the most fundamental Rhodes values. Therefore, we respectfully request that Justice Barrett be removed from the Rhodes College Hall of Fame based on the above violations of the Rhodes Honor System.

Sincerely,

Rob Marus, '97, Rhodes Hall of Fame
Katherine Morgan Breslin, '98, Kappa Delta '95

Add your name by clicking here.