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TO: Leaders
FROM: Phillip L. Jauregui, President, Judicial Action Group
DATE: June 27, 2018
RE: Brief Comparison of Two Leading Supreme Court Prospects: Judge Brett Kavanaugh (D.C. Cir.) and Judge Amy Coney Barrett (Seventh Cir.)

On June 27, 2018, Justice Anthony Kennedy announced his upcoming retirement from the United States Supreme Court. Two of the top prospects to replace Justice Kennedy are Judge Brett Kavanaugh and Judge Amy Coney Barrett.

There are strong opinions about these two prospects because the consequences of the next nomination(s) to the Supreme Court are monumental. If Kennedy (a constitutional liberal) is replaced by a true constitutionalist, then constitutionalists will assume a majority of the Supreme Court for the first time in over two generations. While some Republicans desire to establish a conservative constitutionalist majority, others do not. Consequently, it is essential that constitutionalists evaluate these Supreme Court prospects according to the parameters that are essential to their worldviews and constitutional philosophies.

The following memorandum is not exhaustive but compares Kavanaugh's and Barrett's: (1) professional history (brief), (2) views on the constitutionality of the Obamacare statute, (3) views on the issue of abortion and protecting life, and (4) views on the intersection of religious freedom and abortion.¹ This memorandum concludes that Barrett is preferable to Kavanaugh and encourages leaders to recommend her to President Trump and his advisors.

1. Prospects' Professional History

Judge Brett M. Kavanaugh – Judge on the U.S. Court of Appeals for the D.C. Circuit²

Male, Age 53. Born: Washington, D.C. Yale (J.D.) (B.A.)

- 2006 - present, Judge, U.S. Court of Appeals for the D.C. Circuit
- 2003 - 2006, Assistant to the President, Staff Secretary, President George W. Bush
- 2001 - 2003, Assoc. Counsel to President George W. Bush
- 1997 - 1998, 1999 to 2001, Partner, Kirkland & Ellis (private practice in D.C.)

¹ Research on the larger list of twenty-five potential Supreme Court nominees is available from Judicial Action Group. The limited purpose of this memorandum is to compare Kavanaugh and Barrett on a few major matters.

² United States Court of Appeals, District of Columbia Circuit, <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+++Judges++BMK> (last visited Apr. 20, 2018).

- 1994 - 1997 (1998), Assoc. Counsel, Special Counsel, Ken Starr (Investigation of President Bill Clinton)
- 1993 - 1994, Law Clerk, United States Supreme Court, Justice Anthony Kennedy
- 1992 - 1993, Attorney, Office of United States Solicitor General,
- 1991 - 1992, Law Clerk, U.S. Court of Appeals, 9th Circuit, Judge Alex Kozinski
- 1990 - 1991, Law Clerk, U.S. Court of Appeals, 3rd Circuit, Judge Walter Stapleton

Judge Amy Coney Barrett – Judge on the U.S. Court of Appeals for the Seventh Circuit³

Female, Age 46. Born: New Orleans, LA. Notre Dame (J.D.) Rhodes (B.A.)

- 2017 – present, Judge, U.S. Court of Appeals for the Seventh Circuit.
- 2002 - 2017, Professor of Law, Notre Dame Law School
- 2011 - 2016 (various dates in June), Volunteer Presenter at Alliance Defending Freedom’s Blackstone Legal Fellowship Program.
- 2007, Visiting Assoc. Professor of Law, University Virginia School of Law
- 2001 - 2002, Fellow in Law at George Washington University Law School
- Spring 2001, Adjunct Faculty, George Washington University Law School
- 1999 - 2001, Private practice, Miller Cassidy, D.C and Baker Botts, D.C.
- 1998 - 1999, Law Clerk, United States Supreme Court, Justice Antonin Scalia
- 1997 - 1998, Law Clerk, U.S. Court of Appeals, D.C. Circuit, Judge Laurence Silberman

2. Prospects’ Views on Obamacare and The “Tax” Opinion of Chief Justice Roberts

Kavanaugh and Chief Justice Roberts Both Distorted the Text of the Obamacare Law by Claiming that It Imposed a “Tax.” Chief Justice Robert’s most infamous decision joined the liberal members of the U.S. Supreme Court to save the Affordable Care Act (commonly referred to as “Obamacare”) by ignoring its plain textual meaning and declaring it a tax. President Trump said Roberts “turned out to be an absolute disaster, because he gave us Obamacare.”⁴ Senators Cruz and Lee also criticized Roberts⁵ as did four members of the Supreme Court. Justice Scalia criticized Roberts’ claim that Obamacare created a “tax,” writing that judges “cannot rewrite the statute to be what it is not.”⁶

³ Amy Coney Barrett’s answers to the Questionnaire of the United States Senate Judiciary Committee, [https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ(PUBLIC).pdf) (last visited Apr. 20, 2018).

⁴ Nicki Rossell, *Donald Trump Calls Chief Justice John Roberts a “Nightmare for Conservatives,”* ABCNews, Jan 17, 2016, <http://abcnews.go.com/Politics/donald-trump-calls-chief-justice-john-roberts-nightmare/story?id=36336627> (last visited Apr. 20, 2018).

⁵ Senator Ted Cruz said: “If instead of David Souter and John Roberts, the Presidents Bush had nominated Edith Jones and Mike Luttig, Obamacare would have been struck down three years ago, and the marriage laws of every state would still be on the books.” David Weigel and Katie Zezima *Once a John Roberts booster, Ted Cruz continues to turn against him*, The Washington Post, Sept. 12, 2015; https://www.washingtonpost.com/news/post-politics/wp/2015/09/12/once-a-john-roberts-booster-ted-cruz-continues-to-turn-against-him/?noredirect=on&utm_term=.e2719aa74fb9 (last visited Apr. 20, 2018). Senator Mike Lee wrote an entire book on the subject. Mike Lee, *Why John Roberts was Wrong about Healthcare* (2013).

⁶ *NFIB v. Sebelius*, 567 U.S. 519, 661 (2012) (Scalia, J., dissenting).

The text of the Obamacare statute did not create a tax. Where then did this errant claim originate? The Obama administration's briefs to the Supreme Court defending Obamacare relied heavily on an opinion of Kavanaugh, who had previously claimed that Obamacare was a "tax."⁷ Kavanaugh's opinion avoided deciding whether Obamacare was unconstitutional by claiming – contrary to the text of the Obamacare law – that it created a "tax penalty."⁸ This "tax" language was then repeated by the Obama administration and ultimately by Chief Justice Roberts and the four liberal members of the Supreme Court in their effort to save Obamacare by characterizing it as a "tax."

Kavanaugh did not address the merits of the Obamacare case. However, since he – like Roberts and the four liberal members of the Court – concluded the Obamacare statute was a "tax," it is reasonable to conclude that Kavanaugh would have joined their controversial opinion to preserve Obamacare by declaring it a tax.

Barrett Criticized Roberts' "Tax" Opinion in The Supreme Court Obamacare Case. Barrett disagreed with Chief Justice Roberts' opinion (and implicitly the opinion of Kavanaugh) which claimed that the Obamacare penalty was a tax. Barrett said Roberts:

"... pushed the Affordable Care Act beyond its plausible meaning to save the statute. He construed the penalty imposed on those without health insurance as a *tax*, which permitted him to sustain the statute as a valid exercise of the taxing power; had he treated the payment as the statute did – as a penalty – he would have had to invalidate the statute as lying beyond Congress's commerce power."⁹

She continued:

"[A] *judge* who adopts an interpretation *inconsistent with the text* fails to enforce the statute that commanded majority support. If the majority did *not enact a 'tax,'* interpreting the statute *to impose a tax lacks democratic legitimacy.*"¹⁰

She concluded: "... it is illegitimate for the Court to distort either the Constitution or a statute to achieve what it deems a preferable result."¹¹

3. Prospects' Views on Abortion and Protecting Life

Kavanaugh's Role in the Garza Abortion Case Presents Concerns. In *Garza*, after a pregnant minor illegal alien was detained at the U.S. Border she then sought an abortion.¹² The lower court

⁷ See Brief for Petitioners at 52-61, *NFIB v. Sebelius*. In fact, deputy solicitor general for the Obama administration, Edwin S. Kneeder, made the same claims during Supreme Court oral argument when he referred to the individual mandate penalty as a "tax penalty" – the exact phrase repeatedly used by Kavanaugh which was contrary to the text of the statute. Supreme Court of the United States, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/11-393.pdf (last visited Apr. 20, 2018).

⁸ *Seven-Sky v. Holder*, 661 F.3d 1, 21 (D.C. Cir. 2011).

⁹ Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 Const. Comm. 61 at 80. (2017), <https://conservancy.umn.edu/bitstream/handle/11299/183482/4%20-%20Barrett.pdf?sequence=1&isAllowed=y> (last visited Apr. 20, 2018).

¹⁰ *Id.* (Emphasis added.)

¹¹ *Id.* at 84.

¹² *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017).

ordered the abortion, but on appeal the case came before Kavanaugh and two other judges. Kavanaugh wrote an opinion placing the lower court order on hold while seeking to find a sponsor to help the girl decide whether to have an abortion. The entire D.C. Circuit then heard the case, vacated Kavanaugh's order, and created the opportunity for the abortion to take place.

Despite Kavanaugh's dissenting vote there are two concerns with his role in this case.

First, although he dissented, Kavanaugh went too far in claiming “[i]n sum, under the Government's arguments in this case and the Supreme Court's precedents, *the unlawful immigrant minor is assumed to have a right under precedent to an abortion*.”¹³ Judge Henderson joined Kavanaugh's dissent but then wrote separately to explain that the minor illegal alien:

“... *cannot successfully assert a due process right to an elective abortion*.”

“In concluding otherwise, the Court elevates the right to elective abortion above every other constitutional entitlement.”¹⁴

Kavanaugh did not join Henderson's dissent, which notably includes the position that an illegal alien minor does *not* have a constitutional “due process right to an elective abortion.” To the contrary, he encouraged the government to assume – as he himself assumed – that the minor *did* have a constitutional right to an abortion.

Second, during oral argument Judges Kavanaugh and Millett, (a liberal Obama nominee), pressured the Department of Justice (“DOJ”) to take the position that *Roe v. Wade* applied to the case. The DOJ attorney repeatedly refused to do so, but as Judge Henderson explains, after repeated pressure from Kavanaugh and Millett, the attorney finally – but temporarily – said that the Court could assume *Roe* applied. However, in the end, the attorney corrected the record and refused to concede that *Roe* applied in this context.¹⁵ Henderson, joined Kavanaugh's dissent, but then pointed out in her separate dissent that the government did *not assume* – but rather “declared time and again that it is *not taking a position* on whether [the minor illegal alien] has a constitutional right to an abortion.”¹⁶

¹³ 874 F.3d at 754 (emphasis added). Also, Kavanaugh wrote: “*First*, the Government has assumed, presumably based on its reading of Supreme Court precedent, that an unlawful immigrant minor such as Jane Doe who is in Government custody has a right to an abortion. The Government has also expressly assumed, again presumably based on its reading of Supreme Court precedent, that the Government lacks authority to block Jane Doe from obtaining an abortion. For purposes of this case, all parties have assumed, in other words, that unlawful immigrant minors such as Jane Doe have a right under Supreme Court precedent to obtain an abortion in the United States.” 874 F.3d at 753.

¹⁴ 874 F.3d at 750 (emphasis added).

¹⁵ The DOJ attorney said: “Your honor I am not authorized to take a position on that issue, and here we have not disputed it; we have assumed for purposes of the argument that if there is a constitutional right that still does not constitute facilitation.” United States Court of Appeals for the District of Columbia Circuit,

[https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/EE442BCAB574219F852581BF0057B320/\\$file/17-5236.mp3](https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/EE442BCAB574219F852581BF0057B320/$file/17-5236.mp3) (from 18:35 – 18:51 of the recording) (last visited Apr. 20, 2018).

¹⁶ 874 F.3d at 746 n. 6. Also, Henderson wrote: “Does an alien minor who attempts to enter the United States eight weeks pregnant—and who is immediately apprehended and then in custody for 36 days between arriving and filing a federal suit—have a constitutional right to an elective abortion? The government has inexplicably and wrongheadedly failed to take a position on that antecedent question. I say wrongheadedly because at least to me the answer is plainly – and easily – no. To conclude otherwise rewards lawlessness and erases the fundamental difference between citizenship and illegal presence in our country.” 874 F.3d at 743.

This case exemplifies why Kavanaugh is not the best available Supreme Court prospect. While he was certainly not the worst judge in the *Garza* case, (after all, he dissented), the best judge in the case was Henderson. Her dissent was the most principled writing on the issue of life; it followed the legislative text and Supreme Court precedent. In short, *Garza* shows that Kavanaugh is not radical like Millett on the issue of abortion, but neither is he as constitutionally principled as Henderson.

Barrett Believes *Roe v. Wade* is Judicially, Societally, and Morally Incorrect.

Barrett believes that *Roe* “creat[ed] through judicial fiat a framework of abortion on demand” that “ignited a national controversy.” Barrett believes *Roe* was controversial because “abortion deals with the life of a child so it differs from the earlier case[s] relating to privacy.”¹⁷

Barrett says *Roe v. Wade* is not settled by society and, therefore, may be reversed. Barrett says that so-called “super-precedents” are cases that “no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds.”¹⁸ She lists several super-precedents including *Marbury v. Madison* and *Brown v. Board of Education*, but does not list *Roe v. Wade*. She explains that since the litigants in *Planned Parenthood of Southeastern Pennsylvania v. Casey* challenged *Roe v. Wade*, it demonstrates that *Roe* is not “super-precedent” because its validity is still questioned by the people.¹⁹

Additionally, Barrett was a member of the University of Notre Dame’s “Faculty for Life” group²⁰ and believes life begins at conception.²¹ Moreover, she joined a letter to the Synod Fathers in Christ giving witness to “the Church’s teachings – on the dignity of the human person and the value of the human person and the value of human life from conception to natural death.”²²

4. Prospects’ Views on the Intersection of Religious Freedom and Abortion

Kavanaugh’s Dissent in the Priests for Life Case²³ is Concerning Because – While He Correctly Dissented – He Made an Unnecessary and Critical Concession. Priests for Life sued the government because Obamacare forced this faith-based nonprofit and other religious ministries to facilitate access to contraception and abortifacients for their employees. This government policy forced them to violate their deeply held religious beliefs.

¹⁷ John Nagy, *Students, faculty mark 40 years of Roe*. Notre Dame Magazine, Jan. 25, 2013;

<https://magazine.nd.edu/news/lazy-i-students-faculty-mark-40-years-of-roe/> (last visited Apr. 20, 2018).

¹⁸ Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711 at 1734 (2013).

¹⁹ *Id.* at 1735.

²⁰ Amy Coney Barrett, Answers to the Senate Judiciary Questionnaire; available at:

[https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ(PUBLIC).pdf) (last visited Apr. 20, 2018).

²¹ John Nagy, *Students, faculty mark 40 years of Roe*, Notre Dame Magazine, Jan. 25, 2013;

<https://magazine.nd.edu/news/lazy-i-students-faculty-mark-40-years-of-roe/> (last visited Apr. 20, 2018).

²² Letter to Synod Fathers from Catholic Women, *Ethics & Public Policy Center*, Oct. 1, 2015;

<https://eppc.org/synodletter/> (last visited Apr. 20, 2018).

²³ *Priests for Life v. U.S. Dep’t of Health & Human Services*, 808 F.3d 1 (D.C. Cir. 2015).

The D.C. Circuit ruled against Priests for Life, but Judges Henderson, Brown, and Kavanaugh ruled for them.²⁴ Two conservative female judges, Janice Rogers Brown and Karen LeCraft Henderson joined in a strong dissent written by Brown that agreed with the Priests on *all* points. Kavanaugh did not join their dissent, but instead wrote a moderate dissent ruling for the Priests, but *disagreeing* with them and all religious organizations on a *foundational constitutional principle*.

In his dissent, Kavanaugh disagreed with the Priests by unnecessarily conceding that the government has a compelling interest in forcing religious organizations to facilitate contraception and abortifacients for their employees. Ultimately, Kavanaugh found that the Priests did not have to facilitate contraception and abortifacients under the facts of this particular case because the government did not use the least restrictive available means. However, Kavanaugh's concession created very damaging precedent that was *not* required by the Supreme Court. In fact, he admitted that his concession was *not* required when he noted that Supreme Court precedent was *not* expressly on point. He wrote:

“Justice Kennedy’s *Hobby Lobby* opinion *did not expressly discuss* whether a compelling governmental interest in ensuring general coverage for contraceptives encompasses ensuring coverage for those specific drugs and services that, some believe, operate as *abortifacients and result in the destruction of embryos*.”²⁵

Kavanaugh was *not* required to make this critical concession; after all, Brown and Henderson did not. However, even if the concession had been required, that still would not explain the concerning way Kavanaugh did so.

It is one thing to submit to a perceived binding precedent; it is quite another thing to act as an apologist and booster for erroneous so-called binding precedent. Kavanaugh did the latter when he acted as an advocate for Justice Kennedy’s pro-abortion agenda by claiming “[i]t is *not difficult to comprehend* why a majority of the Justices in *Hobby Lobby* [Justice Kennedy plus four liberal dissenters: Ginsburg, Breyer, Sotomayor, and Kagan] would suggest that the government has a compelling interest in facilitating women’s access to contraception.”²⁶

Kavanaugh unnecessarily and inexcusably extolled “the *numerous benefits*” of contraception and abortifacients and then concluded:

“... it *comes as no surprise that Justice Kennedy’s opinion expressly referred to a ‘compelling’ governmental interest in facilitating women’s access to contraception* [by forcing *religious organizations* to facilitate *contraception and abortifacients*].”²⁷

²⁴ An original three-judge panel ruled against Priests for Life, and the question before the full D.C. Circuit was whether they should hear the case. The majority said they would not hear the case, which left the panel decision in place, but Judges Henderson, Brown, and Kavanaugh dissented and would have heard the case and ruled in favor of Priests for Life.

²⁵ *Priests for Life v. U.S. Dep’t of Health & Human Services*, 808 F.3d at 23 n. 10 (emphasis added).

²⁶ *Id.* at 22 (emphasis added).

²⁷ *Id.* at 22-23 (footnote omitted) (emphasis added).

Kavanaugh correctly dissented in *Priests for Life*, yet he incorrectly and unnecessarily adopted and promoted Justice Kennedy’s pro-abortion principle that the government has a compelling interest in forcing religious employers to facilitate contraception and abortifacients. This concession by Kavanaugh was as unconstitutional as it was unnecessary.

Barrett Opposed the Obamacare Requirement that Employers Provide Contraceptive Coverage in Health Care Plans. Barrett signed a statement of constitutional scholars and religious freedom advocates entitled “Unacceptable.” This group statement was a “response to President Obama’s announcement of a government compromise over the new controversial mandate requiring employers to pay for abortion-causing drugs and other services”²⁸

Barrett agreed:

“It is morally obtuse for the [Obama] administration to suggest (as it does) that this is a meaningful accommodation of religious liberty because the insurance company will be the one to inform the employee that she is entitled to the embryo-destroying “five day after pill” pursuant to the insurance contract purchased by the religious employer. It does not matter *who* explains the terms of the policy purchased by the religiously affiliated or observant employer. What matters is what services the policy covers.”

...

“This is a *grave violation of religious freedom and cannot stand*. It is an insult to the intelligence of Catholics, Protestants, Eastern Orthodox Christians, Jews, Muslims, and other people of faith and conscience to imagine that they will accept an assault on their religious liberty if only it is covered up by a cheap accounting trick.”²⁹

5. Conclusion

In my judgment, Judge Amy Coney Barrett is a substantially better prospect than Judge Brett Kavanaugh, and is also the best prospect on President Trump’s entire list of twenty-five potential nominees to the United States Supreme Court.

Kavanaugh and Barrett have very different life experiences. Kavanaugh was born, reared, and educated in Washington, D.C. Thereafter, he spent his entire professional life in Washington, D.C. working as: a law clerk for Justice Kennedy, an attorney for Special Prosecutor Ken Starr, a lawyer in private practice, and an attorney for the George W. Bush White House.

Barrett was born in New Orleans, Louisiana, and received her law degree from Notre Dame. After clerking for Justice Scalia at the U.S. Supreme Court she practiced law briefly in Washington, D.C. Before becoming a judge, she served as a Professor of Law at Notre Dame Law School. She is widely respected by pillars of the constitutionalist legal movement and by social

²⁸ The statement was originally drafted by Robert P. George, Mary Ann Glendon, Carter Snead, John Garvey, and Yuval Levin. Becket Fund, <https://www.becketlaw.org/media/unacceptable/>; see also Kathryn Jean Lopez, *The Fleecing of Religious Liberty*, National Review, Feb. 10, 2012, <https://www.nationalreview.com/corner/fleecing-religious-liberty-kathryn-jean-lopez/> (last visited Apr. 20, 2018).

²⁹ Kathryn Jean Lopez, *The Fleecing of Religious Liberty*, National Review, Feb. 10, 2012, <https://www.nationalreview.com/corner/fleecing-religious-liberty-kathryn-jean-lopez/> (last visited Apr. 20, 2018).

conservatives who believe the judiciary should return to the role of deciding cases rather than legislating from the bench.

Some in D.C. have voiced a “concern” that Barrett may be “young” or need “more judicial experience.” Another view is that her age and experience are beneficial and historically acceptable. If confirmed she would be *older than Justice Clarence Thomas* was when he was confirmed and have *more judicial experience than Justice Elena Kagan* had when she was confirmed. Specifically, at confirmation Barrett would be age forty-six (46) with about a year of judicial experience. Justice Thomas (regarded by many as our best current Justice) was younger at age forty-three (43) with about a year of judicial experience when confirmed. Justice Kagan (the last Obama addition to the Court) was age fifty (50), but with no judicial experience when confirmed. Again, Barrett would be *three years older than Thomas* and have *more experience than Kagan* at confirmation. By Republican and Democrat standards, she is of sufficient age and experience to serve on the Supreme Court.

There is always some degree of risk with any nominee, but, in my judgment, Kavanaugh is a decidedly riskier nominee than Barrett. Given both of their records and what we know of their judicial philosophies, it is fair to surmise that a Justice Kavanaugh would be a moderate constitutionalist somewhere between Justice Kennedy and Chief Justice Roberts, and that a Justice Barrett would be a strong constitutionalist somewhere between Justice Thomas and Justice Alito. Some may contend that Kavanaugh would be an acceptable nominee, but to my knowledge, no one has said that he is constitutionally to the right of Barrett.

Some argue that because Barrett is female, political considerations dictate that she should be held in reserve to replace female Justice Ginsburg. This argument fails to account for the potential that Ginsburg may remain on the Court during President Trump’s term. More importantly, if Barrett is the best prospect now then she should be put on the Court now. If this present opportunity is not seized it may never come around again. Kavanaugh may be a decent nominee, but this present opportunity demands more than “decent” – it demands our best. If Justice Kennedy retires, constitutionalists can take control of the Supreme Court by replacing a constitutional liberal (Kennedy), with a true constitutionalist (Barrett). If we miss this opportunity of a lifetime and replace Kennedy with someone like him, then that nominee may remain on the bench for another thirty years and we may *never* have another chance to take back the Supreme Court.

Our present moment can be likened to the “Triple Crown” in horse racing. Triple Crown champions are rare and highly valued. For the first time in two generations, we have the rare opportunity to reclaim the Third Branch of our government. Therefore, we must treasure this moment, identify the best constitutionalist nominee for the Supreme Court, and then humbly but boldly share our counsel with President Trump and his advisors. This is our opportunity, duty and call.