

Amy Coney Barrett's Record on Issues Affecting People with Disabilities

Background: Amy Coney Barrett was nominated by Donald Trump to the Seventh Circuit Court of Appeals on May 8, 2017 and confirmed by the Senate on Oct. 31, 2017. She is 48 years old and a member of the Federalist Society. Before her confirmation to the Seventh Circuit, she was a law professor at Notre Dame law school. She clerked for Justice Antonin Scalia on the U.S. Supreme Court and conservative judge Laurence Silberman on the D.C. Circuit Court of Appeals. She also worked briefly (three years) for a law firm, where she assisted with representation of George Bush in the Supreme Court case of *Bush v. Gore*. She has seven children, including one with Down Syndrome and two adopted from Haiti.

Barrett was on President Trump's short list for the Supreme Court in 2018, when he selected Neil Gorsuch and [reportedly told others](#) that "I'm saving her [Barrett] for Ginsburg." She was also on the short list for the Court in 2018, when the President selected Brett Kavanaugh.

Judge Barrett Has a Record of Hostility Toward Disability Rights: Unlike Justice Ruth Bader Ginsburg, whose decisions consistently respected and advanced the rights of individuals with disabilities, Amy Coney Barrett has demonstrated a hostility to disability rights that raises grave concerns about her replacement of Justice Ginsburg on the Supreme Court.

Healthcare: Barrett has [written](#) that the Affordable Care Act (ACA) should have been struck down as unconstitutional, and criticized Justice Roberts for concluding that the penalty for not having health insurance was a tax. That conclusion was the basis for the Court upholding the ACA's constitutionality in *NFIB v. Sebelius*. Judge Barrett [wrote](#) that:

In *NFIB v. Sebelius* . . . Chief Justice 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.

If Judge Barrett's view had prevailed, the ACA would have been invalidated and tens of millions of Americans would have lost their health coverage. Even more would have lost access to coverage of needed services.

Judge Barrett also [disagreed](#) with another Supreme Court decision where a 6-3 majority rejected an attack on the ACA. In that case, *King v. Burwell*, plaintiffs argued that the ACA did not allow health insurance subsidies to be provided in states that had opted to use a federally administered health insurance exchange rather than

setting up their own health insurance exchanges. The case aimed to weaken the ACA by eliminating subsidies that helped millions of Americans buy insurance. The Court, in a decision written by Justice Roberts, rejected that challenge. Justice Roberts found that the statute was ambiguous, but that Congress’s intent was clearly to provide subsidies for individuals purchasing health insurance on both state and federal exchanges. Judge Barrett [stated](#) on public radio that she believed that Justice Scalia had “the better of the legal argument” in his dissent, which read the law to prohibit subsidies in states with federal exchanges.

The ACA is critically important to the disability community. It has provided health care to millions of Americans who would otherwise be uninsured. It has also expanded the types of coverage that are important to people with disabilities, including long-term care services. It is now a critical component of this country’s health care system and provides particularly crucial protections for people with disabilities. The law’s protections for individuals with pre-existing conditions, expansion of Medicaid, requirements to cover mental health services as well as habilitation services for people with intellectual and developmental disabilities, expansion of home and community-based service options, expansion of the reach of mental health parity, and protections against disability discrimination, have been essential to the health, independence, and self-sufficiency of people with disabilities.

Invalidating the ACA would leave millions of people with disabilities without the services they need to survive and thrive, particularly during a life-threatening pandemic. The Supreme Court has already considered multiple challenges to the ACA and is scheduled to hear another case challenging the law on November 10, 2020. If Judge Barrett were confirmed in accordance with the planned confirmation schedule, she would participate in this November 10 argument. Only four of the Justices who were in the majority in NFIB and King remain on the Court. In light of Judge Barrett’s expressed views about the ACA’s constitutionality and her [view](#) that the doctrine of stare decisis—adherence to the Court’s precedent—should give way when a Justice disagrees with the precedent’s interpretation of the Constitution, her confirmation may spell the demise of the ACA.

Public Charge Rule: Judge Barrett dissented from a Seventh Circuit decision concluding that the Trump Administration Department of Homeland Security’s “public charge” rule discriminates against people with disabilities. As the Seventh Circuit concluded, this rule, which makes it difficult for immigrants with significant disabilities to come to the U.S. or become permanent residents by dramatically increasing the chances that they will be considered likely to become a “public charge” due to their disability, violates Section 504 of the Rehabilitation Act. That court [held](#):

The conclusion is inescapable that the Rule penalizes disabled persons in contravention of the Rehabilitation Act. All else being equal—education and skills, work history and potential, health besides disability, etc.—the disabled are saddled with at least two heavily weighted negative factors

directly as a result of their disability. Even while DHS purports to follow the statutorily-required totality of the circumstances test, the Rule disproportionately burdens disabled people and in many instances makes it all but inevitable that a person's disability will be the but-for cause of her being deemed likely to become a public charge.

Judge Barrett [dissented](#) from that opinion, concluding that the Trump Administration's public charge rule was a reasonable interpretation of the law.

Other Disability Rights Cases: Judge Barrett's record in another disability rights case also raises significant concern. She [joined](#) a decision that Wisconsin did not discriminate based on disability by requiring children with learning disabilities to apply for placement in other school districts separately from all other children and allowing their exclusion from those districts on the basis of their service needs. The decision joined observed that the Americans with Disabilities Act (ADA) and Section 504 prohibited discrimination based on stereotypes, but that treatment of people with disabilities based on the "actual attributes" of their disabilities was not discriminatory. This view of the law is inconsistent with Congress's intent and would immunize many egregious practices that clearly discriminate.

Judge Barrett has [sided overwhelmingly](#) against workers, including workers with disabilities, and civil rights plaintiffs in her decisions. While the outcome in any one case means little by itself, the consistency of this trend is troubling and suggests that if Judge Barrett were confirmed to the Supreme Court, she would tend to rule similarly.