

October 4, 2017

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: 27 LGBT Groups Oppose Confirmation of Joan Larsen and Amy Coney Barrett

Dear Chairman Grassley and Ranking Member Feinstein:

We, the undersigned 27 national, state and local advocacy organizations, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and everyone living with HIV, write to oppose the nomination of Joan Larsen to the U.S. Court of Appeals for the Sixth Circuit and the nomination of Amy Coney Barrett to the U.S. Court of Appeals for the Seventh Circuit.

After reviewing the records of Justice Larsen and Professor Barrett, we have concluded that their views on civil rights issues are fundamentally at odds with the notion that LGBT people are entitled to equality, liberty, justice and dignity under the law. We wish to call to your attention aspects of their records that illustrate why these nominees pose a grave threat to the communities that our organizations serve.

Joan Larsen

First and foremost, we continue to have serious concerns about Justice Larsen's willingness to comply fully with the U.S. Supreme Court's ruling in *Obergefell v. Hodges*.¹ In 2016, when Justice Larsen was serving on the Michigan Supreme Court, she refused to review an appellate court's decision in *Mabry v. Mabry*.² That decision concerned whether a lesbian parent, who did not have custody of her child and had separated from her partner of 15 years, could obtain parental rights under Michigan's equitable-parentage doctrine, which applies to married couples. After *Obergefell* was decided, the non-biological parent filed a complaint for custody and parenting time pursuant to this common law doctrine. However, the appellate court found lack of standing for the non-biological parent to seek custody, even though during the entire period of their relationship, Michigan unconstitutionally prohibited same-sex couples from marrying and barred second-parent adoption between unmarried couples.

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584.

² 499 Mich. 997 (2016).

Justice Larsen’s wholesale rejection of this appeal is particularly troubling given that the children of same-sex couples and their constitutional rights were central to the Supreme Court’s analysis in *Obergefell*. As the Court reasoned:

“Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.”³

Indeed, the children of same-sex couples and the right to equal application and access to “the constellation of benefits that the States have linked to marriage” are core to the Supreme Court’s 2017 ruling in *Pavan v. Smith*.⁴ In *Pavan*, the Court summarily reversed a decision from the Arkansas Supreme Court refusing to list both members of a same-sex married couple on their child’s birth certificate. When Justice Larsen was pressed to answer whether she agreed with the *Pavan* majority that *Obergefell*, which expressly identified “birth and death certificates,” clearly controlled, she declined to “opine on the merits of any particular Supreme Court opinion.”⁵

Justice Larsen’s unwillingness to apply the constitutional commands of *Obergefell* is also out of step with the rulings of many state courts, including Maryland, Oregon and Oklahoma, which have extended similar common-law parentage doctrine to same-sex couples after *Obergefell*.⁶ Similarly discounted by Justice Larsen was the reasoning of the dissent in *Mabry*, which noted that refusing to grant review “illustrates and perpetuates the troubling effect of this state’s unconstitutional ban on same-sex marriage and second-parent adoption identified by the Supreme Court in *Obergefell*.”⁷ When asked by Senator Feinstein to explain how this vote to deny review could be reconciled with *Obergefell*, Justice Larsen evaded the question by responding that the Michigan Supreme Court was busy and selective.⁸ Justice Larsen also refused to answer Senator Whitehouse’s question about whether *Obergefell* compels equal application of parentage laws to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married.⁹ These frustrating and

³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-2601 (2015).

⁴ *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

⁵ *Nomination of Joan Larsen to the U.S. Court of Appeals for the Sixth Circuit, Questions for the Record Submitted September 13, 2017—Questions from Senator Whitehouse* at 3, available at <https://www.judiciary.senate.gov/imo/media/doc/Larson%20Responses%20to%20Whitehouse%20QFRs.pdf>.

⁶ *Conover v. Conover*, ___ Md ___, ___ (July 7, 2016) (Docket No. 79), pp 35-36; *In re Registered Domestic Partnership of Madrone*, 271 Or App 116, 129 (2015); *Ramey v. Sutton*, 2015 Okla 79, ¶ 13; 362 P3d 217, 220-221 (2015).

⁷ *Mabry v. Mabry*, 499 Mich. 997 (2016) (McCormack, J., dissenting).

⁸ *Nomination of Joan Larsen to the U.S. Court of Appeals for the Sixth Circuit, Questions for the Record Submitted September 13, 2017—Questions from Senator Feinstein* at 10, available at <https://www.judiciary.senate.gov/imo/media/doc/Larson%20Responses%20to%20Feinstein%20QFRs.pdf>.

⁹ *Nomination of Joan Larsen to the U.S. Court of Appeals for the Sixth Circuit, Questions for the Record Submitted September 13, 2017—Questions from Senator Whitehouse* at 3, available at <https://www.judiciary.senate.gov/imo/media/doc/Larson%20Responses%20to%20Whitehouse%20QFRs.pdf>.

repeatedly evasive responses to these constitutional questions of critical importance to the LGBT community provide cold comfort.

Justice Larsen’s scholarship and speeches do offer some insight into her narrow view of LGBT rights under the Constitution. Justice Larsen refused to comment on a 2012 speech to a chapter of the Federalist Society in which she criticized the Obama Justice Department’s refusal to defend the so-called “Defense of Marriage Act” in court.¹⁰ In a 2004 article, Justice Larsen disagreed with the Supreme Court’s inclusion of international law and norms as a factor in deciding *Lawrence v. Texas*, the 2003 landmark ruling that struck down Texas’s sodomy law as an unconstitutional deprivation of liberty.¹¹ In the introduction to the article, Justice Larsen frames her criticism of *Lawrence* broadly, writing: “The decision of the U.S. Supreme Court in *Lawrence v. Texas* is remarkable for many reasons, not the least of which is the Court’s reliance on international and foreign law sources in its constitutional interpretation.”¹² Justice Larsen further wrote: “It would be an understatement in the extreme to call the Supreme Court’s decision in *Lawrence v. Texas* revolutionary....”¹³ When asked to explain what she meant by this provocative statement, Justice Larsen once again refused to answer. Instead, she claimed – rather implausibly – that that she did “not recall what specifically she found so ‘remarkable’” about the Court’s decision in *Lawrence* beyond the partial reliance on international norms.¹⁴ Notwithstanding Justice Larsen’s attempt to shield her views on this and other matters from public view, her record speaks for itself. Specifically, her criticisms of *Lawrence* closely align with one of the arguments advanced in the dissenting opinion of her former boss, Justice Scalia, whom she has described as “a great judge for the people of the United States.”¹⁵

A careful review of her record reveals that Justice Larsen shares far more in common with Justice Scalia than a criticism of *Lawrence*. They also share an approach to judicial decision-making that would essentially write LGBT people out of the Constitution entirely. Under the “Judicial Philosophy” section of her Michigan Supreme Court campaign website, Justice Larsen advocated for taking an originalist-type approach, noting that “Justice Joan knows it’s not her job to legislate from the bench,” and “[s]he understands our State Constitution is not a ‘living document’....”¹⁶ When asked to explain how an originalist approach to interpretation would comport with *Brown v. Board of Education*, *Roe v. Wade*, *Romer v. Evans*, *Lawrence*, *U.S. v. Windsor* and *Obergefell*, Justice Larsen refused to do so, and simply offered the same non-answer that she repeated during her confirmation hearing: “Each of the

¹⁰ *Nomination of Joan Larsen to the U.S. Court of Appeals for the Sixth Circuit, Questions for the Record Submitted September 13, 2017—Questions from Senator Feinstein* at 2, available at <https://www.judiciary.senate.gov/imo/media/doc/Larsen%20Responses%20to%20Feinstein%20QFRs.pdf>.

¹¹ Joan L. Larsen, *Importing Constitutional Norms from a ‘Wider Civilization’: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 Ohio St. L. J. 1283 (2004).

¹² *Id.* at 1283.

¹³ *Id.* at 1283-84.

¹⁴ *Nomination of Joan Larsen to the U.S. Court of Appeals for the Sixth Circuit, Questions for the Record Submitted September 13, 2017—Questions from Senator Whitehouse* at 4, available at <https://www.judiciary.senate.gov/imo/media/doc/Larson%20Responses%20to%20Whitehouse%20QFRs.pdf>.

¹⁵ Dean Cousino, *Justices urge support for ‘rule of law’ judges*, Monroe News (Oct. 13, 2016), available at <http://www.monroenews.com/news/20161013/justices-urge-support-for-rule-of-law-judges>.

¹⁶ *Judicial Philosophy*, Justice Joan Larsen for Michigan Supreme Court, available at <http://justicejoan.com/services/judicial-philosophy/>.

above-mentioned cases is a precedent of the Supreme Court that binds me as a Justice of the Michigan Supreme Court and would bind me if I were confirmed to the Sixth Circuit.”¹⁷ Needless to say, her evasive answers to these and similar questions have done nothing to allay our concerns.

Finally, Justice Larsen’s name appeared along with Justice Neil Gorsuch on Donald Trump’s list of potential Supreme Court nominees. One of the key litmus tests that Mr. Trump articulated at the time was appointing justices who would overturn *Roe v. Wade*. While Justice Larsen has managed to avoid creating a clear public record about her views on *Roe*, the suggestion that she will view this question with an open mind requires nothing short of “suspension of disbelief,” a phrase defined as “a willingness to suspend one’s critical faculties and believe the unbelievable.”¹⁸ There is little room for doubt that those advancing Justice Larsen’s nomination know exactly where she stands on this issue, and are confident that she will seize opportunities to dismantle *Roe v. Wade*. A decision by this Committee to advance her nomination will be rightly understood as a threat not only to *Roe* but also to the LGBT cases that were built upon *Roe*’s foundation.

Amy Coney Barrett

During his confirmation hearing in 1957, Justice William Brennan was asked about his understanding of the judicial oath in cases where “matters of faith and morals” interact with “matters of law and justice.” Rather than treating the question as anti-Catholic, Justice Brennan made clear that judges presiding over cases must be guided by the law rather than their own religious beliefs.¹⁹ While Professor Barrett has cited Justice Brennan’s view in her academic writing, she has neither adopted nor defended such a position. Accordingly, the Committee was correct to press her, in light of her scholarship on law and religion, on the question of whether she would be guided by the law or by her personal religious beliefs as a judge. In light of her responses, we remain concerned about how her religiously-infused moral beliefs would inform her judicial decision-making about issues of concern to the communities that our organizations serve, particularly where personal moral beliefs differ from the requirements of law. Professor Barrett is entitled to her religious beliefs, as are we all; she is not entitled to enforce them against our communities to the derogation of our nation’s laws.

We remain concerned because it is far from clear how Professor Barrett, sitting as a federal judge, would reconcile her publicly avowed views about “marriage and family founded on the indissoluble commitment of a man and a woman”²⁰ with the Supreme Court’s decision in *Obergefell v. Hodges*, which recognized the constitutional right to marriage equality; or her views about “the significance of sexual difference and the complementarity of men and women”²¹ with the Supreme

¹⁷ *Nomination of Joan Larsen to the U.S. Court of Appeals for the Sixth Circuit, Questions for the Record Submitted September 13, 2017—Questions from Senator Whitehouse* at 2, available at <https://www.judiciary.senate.gov/imo/media/doc/Larson%20Responses%20to%20Whitehouse%20QFRs.pdf>.

¹⁸ *Suspension of disbelief*, Dictionary.com, available at <http://www.dictionary.com/browse/suspension-of-disbelief>.

¹⁹ Justice Brennan responded: “Senator, [I took my] oath just as unreservedly as I know you did ... And ... there isn’t any obligation of our faith superior to that. [In my service on the Court] what shall control me is the oath that I took to support the Constitution and laws of the United States and [I shall] so act upon the cases that come before me for decision that it is that oath and that alone which governs.”

²⁰ *Letter to Synod Fathers from Catholic Women* (Oct. 1, 2015), available at <https://eppc.org/synodletter/>.

²¹ *Id.*

Court’s decision in *Price Waterhouse v. Hopkins*, which ruled that Title VII’s prohibition on sex discrimination also prohibits an employer from discriminating due to gender-based stereotypes about how men and women are supposed to act. Simply repeating that she would be bound by Supreme Court precedent does not illuminate—indeed, it obfuscates—how Professor Barrett would interpret and apply precedent when faced with the sorts of dilemmas that, in her view, “put Catholic judges in a bind.”²²

In her 2017 article, *Congressional Originalism*, Professor Barrett “adopts the position that the original public meaning of the Constitution is the law.”²³ She states that “[a]dherence to originalism arguably requires, for example, the dismantling of the administrative state, the invalidation of paper money, and the reversal of *Brown v. Board of Education*.”²⁴ In the same article, she describes “super precedents” as “decisions that no serious person would propose to undo even if they are wrong.”²⁵

When asked whether she would describe any of the landmark LGBT rights decisions as superprecedents, Professor Barrett equivocated that she has “not undertaken an independent analysis of whether any particular case qualifies as a superprecedent.”²⁶ Such a response is confounding when it comes from a legal scholar who has devoted over 200 pages of writing on stare decisis, including an examination of how “originalist” justices and legislators can “correct” the “constitutional error” created by “non-originalist” precedent.²⁷ But even more than that, her refusal to recognize the pillars of LGBT rights jurisprudence as superprecedents is alarming at a moment when the Trump administration and certain states are trying to roll back LGBT rights.

Finally, Professor Barrett has demonstrated a profound lack of judgment by delivering a lecture paid for by the Alliance Defending Freedom (ADF), arguably the most extreme anti-LGBT legal organization in the United States. While she first defended her decision to speak by insisting that she had not vetted the group, which is troubling in itself, she later elaborated that she “was generally aware that the program supported a traditional view of marriage” but that she did not inquire into whether the ADF was working to end same-sex marriage or re-criminalize homosexuality abroad. Demonstrating a disregard and lack of empathy for LGBT people who are harmed by groups like the ADF, Professor Barrett now appears to call into question whether the ADF really is an anti-LGBT group by depicting its hateful record and reputation, well-known to the LGBT and civil rights communities, as a matter of “public controversy.”²⁸ LGBT people cannot put their faith in the courts when the judge before them refuses to even recognize a brazenly anti-LGBT group as what it is.

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²² Amy V. Coney & John H. Garvey, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 305 (1998).

²³ Amy C. Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. Penn. J. of Const. L. (2017).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Nomination of Amy Coney Barrett to the U.S. Court of Appeals for the Seventh Circuit, Questions for the Record Submitted September 13, 2017—Questions from Senator Whitehouse at 5*, available at <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Whitehouse%20QFRs.pdf>.

²⁷ See Barrett & Nagle, *supra* note 23.

²⁸ *Nomination of Amy Coney Barrett to the U.S. Court of Appeals for the Seventh Circuit, Questions for the Record Submitted September 13, 2017—Questions from Senator Whitehouse at 5*, available at <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Whitehouse%20QFRs.pdf>.



While the above examples focus on the threat that Justice Larsen and Professor Barrett pose to the LGBT community, we share the concerns expressed by the Leadership Conference on Civil and Human Rights and others about their approaches to civil rights generally. The records of Justice Larsen and Professor Barrett demonstrate that their appointment to the federal bench stands to cause grave harm to the LGBT community, as well as many other communities who rely on the federal judiciary to administer fair and impartial justice. We urge you to reject their respective nominations.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sharon McGowan, Director of Strategy for Lambda Legal, at smcgowan@lambdalegal.org.

Very truly yours,

Lambda Legal
BiNet USA
CenterLink: The Community of LGBT Centers
COLAGE
Equality California
Family Equality Council
FORGE, Inc.
GLBTQ Legal Advocates & Defenders (GLAD)
GLSEN
Immigration Equality Action Fund
Los Angeles LGBT Center
Mazzoni Center
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition for LGBT Health
National LGBT Bar Association
National LGBTQ Task Force Action Fund
NEAT – the National Equality Action Team
OutServe-SLDN
PFLAG National
Pride at Work
Sexuality Information and Education Council of the United States
Transgender Law Center
Transgender Legal Defense & Education Fund
URGE: Unite for Reproductive & Gender Equity
Whitman-Walker Health

cc: United States Senate Judiciary Committee Members