

August 29, 2018

Senator Susan Collins
413 Dirksen Senate Office Building
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Senator Lisa Murkowski
522 Hart Senate Office Building
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Re: Nomination of Judge Brett Kavanaugh
Associate Justice of the Supreme Court Hearing,
September 4, 2018

Dear Senators Collins and Murkowski:

As law professors concerned about reproductive rights and justice, we applaud your past statements in support of *Roe v. Wade*. The 336 of us write now because, with the nomination of Judge Brett Kavanaugh to the Supreme Court, we believe you are possibly all that stands between an America in which abortion is safe, accessible, and legal, and an America in which women are threatened with criminal punishment for seeking reproductive health care.

President Donald Trump has promised repeatedly that he would appoint Justices to overturn *Roe v. Wade*.¹ By nominating Judge Kavanaugh, President Trump has lived up to that promise, potentially providing the critical fifth vote to the anti-*Roe* wing of the Court. Ever since Justice Anthony Kennedy announced his retirement, there has been much debate about the future of *Roe*. We are writing to confirm that, with the nomination of Judge Kavanaugh, **the threat to *Roe* is imminent and real.**

As you know, in *Planned Parenthood v. Casey*, in 1992, Justice Kennedy was a key vote to preserve *Roe v. Wade*. More recently, in the 2016 case of *Whole Woman's Health v. Hellerstedt*, Justice Kennedy's vote was critical to the five-justice majority again affirming the right to choose as fundamental. In contrast to Justice Kennedy, we know that Judge Kavanaugh disagrees with *Roe* and with *Whole Woman's Health*. Just last September, Judge Kavanaugh gave a speech in which he lavished praise on Chief Justice William Rehnquist's opinions, singling out for extended praise then-Justice Rehnquist's dissent in *Roe*.² Also last year, Judge Kavanaugh dissented in an important abortion rights case, arguing that forcing an immigrant minor to remain pregnant was not an undue burden.³

Although Judge Kavanaugh has described *Roe* as settled precedent, the doctrine of *stare decisis* and Judge Kavanaugh's purported commitment to precedent are not likely to save *Roe*. It is standard practice for Supreme Court nominees to publicly embrace precedent and the principle

¹ Mark Berman, *Trump Promised Judges Who Would Overturn Roe v. Wade*, Wash. Post, Mar. 21, 2017.

² David Savage, *Supreme Court Nominee Brett Kavanaugh Lauded Late Chief Justice Rehnquist for Dissenting in Roe v. Wade and Supporting School Prayer*, L.A. Times, Jul. 11, 2018.

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

of *stare decisis*.⁴ Even Justice Scalia, one of the Court's most vocal critics of *Roe*, promised to respect precedent during his confirmation hearings.⁵

It is clear that professed allegiance to precedent during the confirmation process does not translate to any meaningful allegiance as a Justice. For instance, Chief Justice Roberts (together with Justices Kennedy, Thomas, Alito, and Gorsuch) voted last month in *Janus v. AFSCME* to overturn a forty-year old precedent validating service fees paid by union-represented employees. Justice Gorsuch, in particular, has been skeptical of precedent, voting to overturn two well-established precedents in *South Dakota v. Wayfair* and advocating in many other cases to overturn or re-visit long-standing caselaw, including the half-century-old *Katz* standard for the Fourth Amendment⁶ and the entire area of Contracts Clause doctrine.⁷

There are numerous cases already pending in the federal courts that could become the vehicle for the Supreme Court to eviscerate *Roe*. For example, the newly-composed Supreme Court could decide to take up the constitutionality of Indiana's pre-viability ban on seeking abortion for certain reasons. The law has been enjoined based on *Roe* and *Casey* and is now just a step away from the Supreme Court.⁸ A newly-composed Court could decide to hear this or any number of other abortion cases and then uphold those laws on the ground that *Roe* was incorrect and a new legal standard should apply to abortion restrictions. Or it could read *Roe* and its progeny narrowly to provide almost no protection against the most severe abortion restrictions — a result which was one vote from reality in *Whole Woman's Health*. Just months from today, *Roe v. Wade* could be dismantled entirely or rendered essentially meaningless.

If that were to happen, the effects would be devastating. Returning to a world where states can make abortion illegal or extremely difficult to access will harm women's health, particularly for poor women, rural women, and women of color. We know from the pre-*Roe* era that women will resort to desperate measures when facing an unplanned pregnancy. In 1965, illegal abortion in the United States accounted for 17% of all deaths attributed to pregnancy and childbirth that year. These are officially reported numbers; the actual number of deaths was likely much higher. Poor women and their families were in the past and will be in the future disproportionately impacted, as wealthier women possess the means to travel to access legal abortion care.

Overturning or completely gutting *Roe* would also have racially disparate effects. Racial disparities were evident in the pre-*Roe* two-tiered system of access to care. The mortality rate due to illegal abortion for nonwhite women was twelve times higher than that for white women. Racially disparate access to reproductive health care is a pattern that continues in the U.S. and would be exacerbated if abortion became illegal (for example, in the U.S. today the maternal mortality rate for black women is three to four times that of white women). Moreover, we will likely see racially disparate prosecutions of women for obtaining illegal abortions and, as a

⁴ See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 144 (2005).

⁵ See *Scalia Denies Taking Aim at Abortion*, Orlando Sentinel, August 6, 1986, at A3.

⁶ *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

⁷ *Sveen v. Mellin*, 138 S. Ct. 1815 (2018).

⁸ *Planned Parenthood of Indiana & Kentucky v. Indiana State Department of Health*, 888 F.3d 300 (7th Cir. 2018).

result, women being deterred from seeking life-saving health care for fear of criminal prosecution.

Roe dramatically improved health for all women, and allowed women to have abortions earlier in pregnancy when the procedure is safest. If the Supreme Court restricts the constitutional right to abortion, we will witness devastating public health consequences, with poor women, rural women, and women of color disproportionately dying or suffering serious health injuries from illegal abortion. Women in states like Maine and Alaska in particular could be among the most affected, as they are both geographically large states with widely dispersed populations, creating challenges for health care access.

In addition to endangering women's lives, overturning *Roe* would undercut women's pursuit of economic equality and their ability to keep their families out of poverty. Sixty percent of women seeking abortion care in the United States are already mothers, and seventy-five percent of women seeking abortion care are poor or low income. Volumes of evidence indicate that the socioeconomic consequences for women denied abortion care are substantial, with women denied care being more likely to receive public assistance and to live below the federal poverty level than women who received abortion care.⁹ As the Supreme Court declared in *Casey*, "The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives."

Finally, beyond imperiling the life and liberty of millions of women, overturning *Roe* will threaten the jurisprudence of liberty and equality that follows from them. Notably, from *Roe* and *Casey* flow the critically important line of cases establishing and defending gay rights. In *Lawrence v. Texas*, the Court relied on *Casey* in holding that the Constitution protects gay people from the stigma of criminality because intimate adult consensual relationships are protected like other deeply rooted privacy rights "relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Obergefell v. Hodges*, the Court's decision that announced the right of all adults to marry irrespective of sexual orientation, also relied on the substantive due process doctrine that undergirds *Casey* and *Roe*.

If *Casey* and *Roe* were to be weakened or overturned, the principle that both cases have cemented into our nation — that "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment" — could be undermined not just for abortion but also for the lives, dignity, and autonomy of our gay brothers and sisters (and their children). No less than fundamental liberty for all is at stake.

Roe was decided 45 years ago, and *Casey* 26. Recognition of the importance of abortion to women's freedom and equality has only grown stronger since both were decided. Women rely on *Roe* and *Casey* to exercise control over their bodies as full citizens under the Constitution, as do all people who seek the liberties of "marriage, contraception, parental rights, and consensual sexual intimacy," all deriving from the reasoning of *Roe* and *Casey*. The Court's "obligation is to define the liberty of all, not to mandate [its] own moral code." Judge Kavanaugh's record

⁹ ANSIRH, *Introduction to the Turnaway Study*, available at https://www.ansirh.org/sites/default/files/publications/files/turnaway-intro_5-23-2018.pdf

demonstrates that he will very likely ignore this wise precedent that promises women and the LGBT community — and all of us — freedom and equality.

As law professors who understand the law of abortion and reproductive rights, the 336 of us **strongly urge you to vote against Judge Kavanaugh**. A “no” vote is necessary to protect women and families throughout this country. We urge you, as Senators who have long supported the right to choose, to make your legacy the protection of these fundamental constitutional rights for generations to come.

Respectfully yours,¹⁰

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