

**Report of the Center for Reproductive Rights
on the Nomination of Judge Brett Kavanaugh
to be Associate Justice of the
United States Supreme Court**

August 30, 2018

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
I. BACKGROUND	3
A. Nomination	3
B. Biography	3
II. JUDGE KAVANAUGH’S REPRODUCTIVE RIGHTS RECORD	4
A. Abortion	4
1. <i>Garza v. Hargan</i> (2017)	5
a. Three-Judge Panel Decision	6
b. En Banc Decision	7
2. Writings and Speeches	10
B. Contraception	13
<i>Priests for Life v. Health & Human Services</i> (2015)	14
C. Maternal Health	17
1. <i>Seven-Sky v. Holder</i> (2011)	18
2. Writings	18
CONCLUSION	19

EXECUTIVE SUMMARY

The Center for Reproductive Rights uses the power of law to advance reproductive rights as fundamental human rights around the world. For over 25 years, our game-changing litigation and advocacy work—combined with our unparalleled expertise in the use of constitutional, international, and comparative human rights law—has transformed how reproductive rights are understood by courts, governments, and human rights bodies. Through our work on five continents, we have played a key role in securing legal victories before national courts, United Nations Committees, and regional human rights bodies on reproductive rights issues including access to life-saving obstetrics care, contraception, maternal health and safe abortion services, as well as the prevention of forced sterilization and child marriage.

In the United States, we litigate extensively in federal and state courts to ensure reproductive health services are available across the country. Since our founding, we have been involved in every major Supreme Court case on abortion rights. In 2016, we won the landmark Supreme Court case, *Whole Woman's Health v. Hellerstedt*, which was the most significant ruling on abortion in more than two decades. The decision reaffirmed a woman's constitutional right to access abortion.

On July 9, 2018, President Trump nominated Judge Brett Kavanaugh as Associate Justice to the U.S. Supreme Court to fill the vacancy created by Justice Anthony Kennedy's retirement. For the past 26 years, Justice Kennedy has been a critical vote on abortion rights. As recognized in decades of Supreme Court rulings, the right to make decisions about whether and when to have children is guaranteed by the U.S. Constitution. These important decisions are within the realm of personal liberty which the government may not enter. They are vital to the health, dignity, and equality of women in the United States, and they are at risk with this nomination.

For the first time since our founding in 1992, the Center for Reproductive Rights is opposing the confirmation of a Supreme Court nominee. Based on our in-depth analysis of Judge Kavanaugh's record, we urge members of the United States Senate to reject his nomination to serve as the next Associate Justice on the Supreme Court.

We do not make this decision lightly. The Center for Reproductive Rights wins cases before a wide range of federal judges, who have been appointed by both Republican and Democratic presidents. As an organization that litigates cases in federal courts, including in the Supreme Court, we are rigorous about factual accuracy and careful legal analysis. We are a nonpartisan, nonprofit organization that does not support or oppose political parties or candidates.

After a thorough review of Judge Kavanaugh's record, we have grave concerns about how he will rule on reproductive rights cases. We conclude that his judicial philosophy is fundamentally hostile to the protection of reproductive rights under the U.S. Constitution.

This report provides an analysis of Judge Kavanaugh’s record on reproductive rights. To prepare this report, we conducted an extensive review of Judge Kavanaugh’s judicial opinions, speeches, and writings as they impact issues such as access to abortion, contraception, and maternal health care. Not available for our review are voluminous records from Judge Kavanaugh’s tenure in the White House from 2001 through 2006, as his confirmation hearing is scheduled to go forward on September 4, 2018 without the vast majority of these documents being made available to the Senate or public.¹

As an appellate judge, Judge Kavanaugh misapplied Supreme Court precedent to allow the government to continue blocking an undocumented minor from accessing an abortion. He has praised and applied a narrow, backward-looking approach to defining the scope of individual liberty under the Constitution at odds with the Supreme Court’s jurisprudence protecting the right to abortion. In speeches, he has praised then-Justice William Rehnquist’s dissent in *Roe v. Wade* (1973) and Justice Antonin Scalia’s dissent in *Planned Parenthood v. Casey* (1992), where each justice rejected the constitutional right to abortion. He has given a high degree of deference to religiously-affiliated employers who wish to avoid “complicity” in women’s use of contraception. Finally, Judge Kavanaugh has criticized the Supreme Court’s decisions upholding the Affordable Care Act, which has provided critical maternal and reproductive health care access to millions of women. The Center for Reproductive Rights therefore opposes the confirmation of Judge Kavanaugh to the Supreme Court.

With the release of our report, we remind the Senate that the stakes of this nomination are extraordinarily high. There are dozens of cases making their way through the lower courts whose outcomes could guarantee or deny access to reproductive health care for millions of women across the United States.

¹ Judge Kavanaugh spent six years serving in the White House under President George W. Bush. Senate Judiciary Committee Chairman Charles Grassley has requested only documents from the years 2001 through 2003 when Kavanaugh served as associate White House counsel. The Chairman has requested no documents from Kavanaugh’s tenure as staff secretary from 2003 through 2006 – a period that Kavanaugh himself has described as “among the most instructive” for him as a judge. Because the National Archives indicated that it cannot disclose even Sen. Grassley’s limited document request until October, the Chairman has instead sought to obtain the documents from President George W. Bush’s presidential library—a process that is being overseen by a personal attorney of President Bush who once served as Kavanaugh’s deputy in the White House. To date, the vast majority of Kavanaugh’s total White House records have not been released to the Judiciary Committee. This limited document request and production has prevented the Senate and the public from learning about Judge Kavanaugh’s potential involvement in key reproductive rights issues that arose while he served as White House staff secretary, such as the 2003 federal abortion method ban and the appointment of federal judges who are hostile to reproductive rights. See Editorial Board, *Why Are Republicans Covering Up Brett Kavanaugh’s Past?*, N.Y. TIMES (Aug. 17, 2018), <https://www.nytimes.com/2018/08/17/opinion/republicans-brett-kavanaugh-senate.html>

I. BACKGROUND

A. Nomination

President Donald Trump took office in January 2017 after a campaign in which he promised to nominate judges who would overturn *Roe v. Wade*. “That’ll happen automatically, in my opinion, because I am putting pro-life justices on the court,” he said at the final presidential debate.² To bolster his *Roe*-reversal promise, Trump released during the campaign a list of judges from which he pledged to pick his Supreme Court nominees. For advice on assembling the list of potential Supreme Court nominees, the president relied on the Federalist Society and the Heritage Foundation.³

Judge Kavanaugh was not on the original list released during the campaign. He was added to an updated list released by the White House in November 2017, only a month after he ruled against an unaccompanied, undocumented immigrant minor seeking an abortion in a dissenting opinion in *Garza v. Hargan* (discussed below).⁴ White House Counsel Don McGahn announced the additional five judges at a Federalist Society convention, saying all “have a demonstrated commitment to originalism and textualism.” And adding, “They all have paper trails. They all are sitting judges. There’s nothing unknown about them. What you see is what you get.”⁵

B. Biography

Judge Kavanaugh is 53 years old and currently sits on the United States Court of Appeals for the District of Columbia Circuit. He was first nominated to that court by President George W. Bush in 2003 and confirmed by the Senate in 2006.

Judge Kavanaugh graduated from Yale College in 1987 and Yale Law School in 1990. He clerked for Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit in 1990-1991.⁶ He then served as a clerk for Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit in 1991-1992, and finally for Justice Kennedy on the Supreme Court in 1993-

² Irin Carmon, *2016 Debate: On Abortion, Trump and Clinton Give Passionate Answers*, NBC NEWS (Oct. 20, 2016), <https://www.nbcnews.com/storyline/2016-presidential-debates/abortion-trump-clinton-let-it-all-hang-outn669586>.

³ Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html>.

⁴ Nolan D. McCaskill, *Trump releases updated short list of potential Supreme Court nominees*, POLITICO (Nov. 11, 2017), <https://www.politico.com/story/2017/11/17/trump-supreme-court-nominees-247441>.

⁵ *Id.*

⁶ During this term, Judge Stapleton wrote the Third Circuit’s panel decision in *Casey*, upholding each of the challenged restrictions except a provision requiring women to notify their spouses before having an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff’d in part, rev’d in part*, 505 U.S. 833 (1992). Kavanaugh’s level of involvement in *Casey* is not known.

1994, a position he held at the same time as now-Justice Neil Gorsuch. From 1992 to 1993, Kavanaugh worked as an attorney in the Office of the Solicitor General of the United States.⁷

Prior to his nomination to the D.C. Circuit, Judge Kavanaugh served as an associate counsel in Ken Starr’s Office of Independent Counsel in the investigation of President Bill Clinton. There, Kavanaugh was responsible for the office’s inquiry into the death of Deputy White House Counsel Vince Foster and helped prepare the 1998 report to Congress detailing the possible grounds for impeaching President Clinton. He worked with the Bush-Cheney presidential campaign in 2000 and later assisted with the Florida ballot recount. From 2001 to 2006, Kavanaugh was associate counsel and later staff secretary to President George W. Bush, where one of his responsibilities was helping the Office of White House Counsel select and vet the administration’s nominees to the federal judiciary. He also worked in private practice at Kirkland & Ellis in Washington, D.C., from 1994 to 1998, and 1999 to 2001.⁸

II. JUDGE KAVANAUGH’S REPRODUCTIVE RIGHTS RECORD

A. Abortion

A woman’s right to end a pregnancy has been recognized and reaffirmed by the Supreme Court from *Roe* in 1973 through *Whole Woman’s Health* in 2016. These cases stand for the fundamental principle that a woman’s control over her own reproductive decisions is essential to her individual health, liberty, dignity, and autonomy. The decision about if, when, and how to have a family is critical to ensuring that women can fully realize their economic, employment, and educational opportunities.

In the United States, one in four women will have an abortion by age 45,⁹ and fifty-nine percent of women who obtain abortions have had at least one previous birth.¹⁰ Women cite a range of reasons for seeking abortion care, including responsibility to their families and existing children, finances, and education and work goals.¹¹ Some women also seek abortion due to concerns about their own health or the health of the fetus.¹² Abortion care is extremely safe, as confirmed by a comprehensive 2018 report issued by the National Academies of Science,

⁷ Brett M. Kavanaugh: *Professional Biography*, United States Court of Appeals for the District of Columbia Circuit, <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL++Judges++BMK>.

⁸ *Id.*; Edith Roberts, *Potential nominee profile: Brett Kavanaugh*, SCOTUSBLOG (June 28, 2018), <http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/>.

⁹ Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 AMER. J. PUB. HEALTH 1904 (2017).

¹⁰ Guttmacher Inst., *Induced Abortion in the United States* (Jan. 2018), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>.

¹¹ See, e.g., Antonia M. Biggs, et al., *Understanding Why Women Seek Abortions in the U.S.* 13 BMC WOMEN’S HEALTH 1 (2013); Lawrence Finer, et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110 (2005).

¹² See Biggs, *supra* note 11; Finer, *supra* note 11; Brian L. Shaffer, et al., *Variation in the Decision to Terminate Pregnancy in the Setting of Fetal Aneuploidy*, 26 PRENATAL DIAGNOSIS 667 (2006).

Engineering, and Medicine.¹³ In fact, the risk of death associated with childbirth is approximately fourteen times higher than that associated with abortion, and every pregnancy-related complication is more common among women having live births than among those having abortions.¹⁴ The negative impact of being turned away from a wanted abortion has also been rigorously documented in recent years.¹⁵ Women who are denied access to a wanted abortion and give birth instead have almost four times greater odds of living below the federal poverty line and are more likely to report an inability to cover their basic cost of living.¹⁶ Over the past several years, state legislatures have made it more difficult—and for some women impossible—to access abortion, enacting over 400 restrictions on abortion access between 2011 and 2017.¹⁷

1. *Garza v. Hargan* (2017)

Judge Kavanaugh directly addressed abortion access in *Garza v. Hargan*,¹⁸ in which he would have permitted the federal government to continue preventing a minor (known in court as “Jane Doe”) from accessing abortion because it did not want to “facilitate” such access. Kavanaugh twice determined that allowing the government to continue blocking Jane’s access to abortion did not impose an undue burden on her right to decide whether to end her pregnancy.

Garza involved an undocumented immigrant minor—Jane Doe—who entered the United States from Central America without her parents. Jane was detained and placed in a federally-funded shelter in Texas, where she discovered she was pregnant. Jane requested an abortion, but the shelter refused under direction from the Office of Refugee Resettlement, which in 2017 prohibited shelters from taking “any action that facilitates” abortion for unaccompanied minors. This policy amounts to a ban.¹⁹

Jane had obtained an order from a state court judge deeming her able to consent to the abortion for herself. Texas state law requires minors to complete a judicial process to obtain an abortion without notification and consent of a parent or guardian. As part of that process, Jane filed an application under oath, then appeared at an in-person hearing where the judge was legally obligated to consider her experience, perspective, and judgment in finding that she could

¹³ National Academies of Sciences, Engineering, and Medicine, *The Safety and Quality of Abortion Care in the United States* (Mar. 2016), <http://nationalacademies.org/hmd/reports/2018/the-safety-and-quality-of-abortion-care-in-the-united-states.aspx>.

¹⁴ Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTET. & GYNECOL.* 215 (2012).

¹⁵ Advancing New Standards in Reproductive Health, *Introduction to the Turnaway Study* (May 2018), https://www.ansirh.org/sites/default/files/publications/files/turnaway-intro_5-23-2018.pdf.

¹⁶ Diana Greene Foster, et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the United States*, 108 *AMER. J. PUB. HEALTH* 407 (2018).

¹⁷ Elizabeth Nash & Rachel Benson Gold et al., *Policy Trends in the States, 2017*, GUTTMACHER INST. (Jan. 2, 2018), <https://www.guttmacher.org/article/2018/01/policy-trends-states-2017>.

¹⁸ *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc).

¹⁹ Plaintiff’s Memorandum in Support of Her Application for a Temporary Restraining Order and Motion for a Preliminary Injunction at 3-8, *Garza*, No. 17-cv-02122 (D.D.C. Oct. 13, 2017), <https://www.aclu.org/legal-document/garza-v-hargan-plaintiffs-memorandum-support-her-application-temporary-restraining>.

consent for herself. The judge appointed a guardian ad litem, charged by law with representing Jane’s best interests in the judicial hearing; and an attorney ad litem to help her navigate the legal process. Moreover, with the assistance of her guardian and attorney ad litem, Jane had arranged for her own transportation to her doctor’s appointments and a private source of payment. The government would play no role in “facilitating” the abortion but would simply need to let her leave with her guardian to visit to a clinic.²⁰

Nevertheless, the government continued blocking her from obtaining an abortion, and took several adverse actions against Jane, including:

- forcing her to cancel multiple doctor’s appointments to prepare for and obtain an abortion.
- forcing her to attend “counseling” with a religiously-affiliated anti-abortion crisis pregnancy center, where she was forced to view a sonogram.
- overriding Jane’s wishes and contacting her mother to inform her of Jane’s pregnancy.²¹

Jane’s court-appointed guardian ad litem, represented by the ACLU, filed suit, claiming government officials violated Jane’s constitutional rights. A district court granted a temporary restraining order on October 18, 2017, prohibiting the government from preventing her abortion.²² But before Jane could obtain the abortion, the government appealed the order and sought an emergency stay before a three-judge panel that included Judge Kavanaugh.

a. Three-Judge Panel Decision

The panel heard the case when Jane was more than fifteen weeks pregnant and had already been blocked from obtaining an abortion for almost four weeks. On October 20, 2017, the panel vacated the federal district court order which would have allowed Jane to obtain an abortion.²³ The unsigned order was issued by Judge Kavanaugh and Judge Karen Henderson. Judge Henderson also wrote separately in concurrence. The third judge, Judge Patricia Millett, dissented.

The order by Judge Kavanaugh returned the case to the district court, asserting that the government’s conduct toward Jane would not constitute an undue burden on her right to abortion if it could find a sponsor who would remove her from custody and allow the abortion “expeditiously”—even though the government had already failed to find Jane a sponsor for six weeks.²⁴

²⁰ *Id.*

²¹ *Id.*

²² Temporary Restraining Order, *Garza*, No. 17-cv-02122 (D.D.C. Oct. 18, 2017), <https://www.aclu.org/legal-document/garza-v-hargan-order>.

²³ Order, *Garza*, No. 17-5236 (D.C. Cir. Oct. 20, 2017), <https://www.aclu.org/legal-document/garza-v-hargan-order-0>.

²⁴ *Id.*

Judge Kavanaugh’s order directed the district court to allow the government an additional eleven days to find such a sponsor. After eleven days, the district court could re-enter a temporary restraining order, which the circuit court order noted either party could immediately appeal.²⁵ This would have delayed Jane’s abortion at least until she was nearly seventeen weeks pregnant—and potentially indefinitely—approaching the point at which Texas bans abortion.²⁶

In a dissent issued three days later, Judge Millett criticized the order for “[f]orcing [Jane] to continue an unwanted pregnancy just in the hopes of finding a sponsor that has not been found in the past six weeks,” which she said “sacrifices [Jane’s] constitutional liberty, autonomy, and personal dignity for no justifiable governmental reason. The flat barrier that the government has interposed to her knowing and informed decision to end the pregnancy defies controlling Supreme Court precedent;”²⁷ and that “[s]etting up substantial barriers to the woman’s choice violates the Constitution. That is settled, binding Supreme Court precedent.”²⁸

b. En Banc Decision

Jane filed an emergency petition asking the full D.C. Circuit Court of Appeals to rehear the case en banc. She argued that the delay ordered by the panel imposed an undue burden on her ability to obtain an abortion.²⁹ On October 24, 2017, the full D.C. Circuit granted Jane’s petition for rehearing, vacated the three-judge panel order issued by Judge Kavanaugh, and remanded the case to the district court to issue an amended temporary restraining order instructing the government to cease interfering with Jane’s abortion.³⁰ In the en banc order, the court said that it was acting “substantially for the reasons [in the] . . . dissenting statement of Circuit Judge Millett [from the three-judge panel].”³¹

Judge Kavanaugh dissented from the en banc court’s decision, defending the panel order blocking Jane’s abortion access. Claiming to interpret precedent, he wrote: “the Supreme Court’s many precedents hold[] that the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion.”³²

²⁵ *Id.* at 2.

²⁶ Texas bans abortions after 22 weeks as measured by last menstrual period. Tex. Health & Safety Code § 171.044.

²⁷ Order at 2, *Garza*, 874 F.3d 735 (No. 17-5236) (attaching Judge Millett’s dissent), <https://www.aclu.org/legal-document/garza-v-hargan-dissent>.

²⁸ *Id.* at 3.

²⁹ Emergency Petition for Rehearing, *Garza*, 874 F.3d 735 (No. 17-5236), <https://www.aclu.org/legal-document/garza-v-hargan-emergency-petition-rehearing-en-banc>.

³⁰ *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc). The Supreme Court later granted the government’s petition for certiorari, and on June 4, 2018, vacated the en banc decision with instructions to the court of appeals to direct the district court to dismiss the individual claim for injunctive relief as moot, as Jane had already had the abortion. *Azar v. Garza*, 138 S. Ct. 1790 (2018).

³¹ *Garza*, 874 F.3d at 736.

³² *Garza*, 874 F.3d at 752 (Kavanaugh, J., dissenting).

However, Judge Kavanaugh’s recitation of the governing case law was incomplete and one-sided, failing to address the Supreme Court precedent making clear that the government must respect a woman’s constitutional right to make the ultimate decision about whether to continue or end a pregnancy. Judge Kavanaugh acknowledged that “all parties to this case recognize that *Roe v. Wade* and *Planned Parenthood v. Casey* are precedents we must follow.”³³ Yet he failed to respect that precedent: his opinion does not explain how the government’s repeated attempts to veto Jane’s choice to have an abortion were consistent with *Casey*’s holding that abortion regulations must “inform the woman’s free choice, not hinder it.”³⁴

Judge Kavanaugh rejected the majority’s conclusion that the government had imposed an undue burden on Jane’s rights, calling it “ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision.”³⁵ He cited no authority for the ability of the government to veto a woman’s decision for six weeks, as it did to Jane.³⁶ Indeed, Judge Kavanaugh insisted the delay was eleven days—ignoring the full period of time Jane had been delayed in accessing abortion.³⁷ Moreover, “abortion on demand” is a phrase commonly used by abortion rights opponents, and by Justice Scalia in his *Casey* dissent.³⁸ Kavanaugh used that phrase three separate times in his dissent.³⁹

Judge Kavanaugh did not join an opinion by Judge Henderson asserting that as an undocumented, detained immigrant, Jane had no constitutional right to an abortion.⁴⁰ Rather than affirmatively state that Jane has a right to abortion, Judge Kavanaugh instead wrote only that the government had “assumed” that she had a right to abortion. At no point did Judge Kavanaugh state that, for example, if the government failed to find Jane a sponsor after eleven more days, the government must stop blocking her access to abortion. Instead, Judge Kavanaugh left the door open to delaying Jane’s abortion even further, noting that the government might make additional arguments to resist allowing access at that time, and the court could “immediately consider [them].”⁴¹ Whether or not “existing precedent” would then permit Jane to access abortion would “depend[] on what arguments the Government can make at that point,” he

³³ *Id.* at 753.

³⁴ *Casey*, 505 U.S. at 877.

³⁵ *Garza*, 874 F.3d at 752 (Kavanaugh, J., dissenting).

³⁶ Kavanaugh did include a footnote, stating: “To be clear, under Supreme Court precedent, the Government cannot use the transfer process as some kind of ruse to unreasonably delay the abortion past the point where a safe abortion could occur.” *Id.* at 753 n.3.

³⁷ *Id.* (urging that the delay was only “7 days from now”).

³⁸ *See Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part).

³⁹ *Garza*, 874 F.3d at 752, 755, 756 (Kavanaugh, J., dissenting).

⁴⁰ Judge Henderson’s opinion faulted the government for failing to press forward this argument (although it was presented in amicus brief filed by Texas and other states). While Judge Kavanaugh did not sign her opinion, neither did he disavow that position in his opinion (whereas Judge Millett did so in ringing terms). Instead, Judge Kavanaugh said several times that the government had “assumed” that Jane Doe possessed the constitutional right, so the only inquiry before the court was whether blocking her access was an undue burden.

⁴¹ *Garza*, 874 F.3d at 754 (Kavanaugh, J., dissenting).

wrote.⁴² In practice, Judge Kavanaugh was inviting additional, potentially indefinite delay, even while Jane’s pregnancy progressed toward the state’s legal limit for abortion.

Judge Kavanaugh wrote that the government had good reason to put Jane “in a better place when deciding whether to have an abortion,” and to deny her abortion access until finding a sponsor because she lacks a “support network of friends and family” for support “through the decision and its aftermath.”⁴³ He asserted, without citation to any authority, that it was “irrelevant” that Jane had already gone through the state-mandated bypass process and been deemed by a court to be able to make the decision herself.⁴⁴

In her en banc concurrence, Judge Millett noted that Judge Kavanaugh’s view is inconsistent with controlling Supreme Court precedent. “[Jane], like other minors in the United States who satisfy state-approved procedures, is entitled under binding Supreme Court precedent to choose to terminate her pregnancy. *See, e.g., Bellotti v. Baird*, 443 U.S. 622 (1979),” wrote Judge Millett.⁴⁵ “The [en banc] opinion gives effect to that concession; it does not create a ‘radical’ ‘new right’ . . . by doing so,” she wrote, explicitly rebutting Judge Kavanaugh’s dissenting opinion.⁴⁶ Judge Millett further noted that Kavanaugh’s view that the “sufficiency of someone’s ‘network’” is constitutionally relevant—“even after compliance with all state-mandated procedures”—would “require a troubling and dramatic rewriting of Supreme Court precedent.”⁴⁷

Judge Kavanaugh did not acknowledge or distinguish *Bellotti* in his dissent—and he ignored or refused to apply several other existing Supreme Court precedents. In particular, he ignored *Bellotti*’s holding that minors must be able to complete a confidential judicial bypass with “sufficient expedition to provide an effective opportunity for an abortion to be obtained.”⁴⁸ He did not explain how the “flat prohibition” (as Judge Millett called it) imposed by the government wholly preventing Jane from accessing abortion failed to constitute an undue burden on her right to terminate a pregnancy under *Casey*.⁴⁹ Nowhere in his opinion did Judge Kavanaugh allow that the decision of whether to carry a pregnancy to term must ultimately be made by the pregnant woman herself, as required by *Casey*.⁵⁰ He did not weigh the potential harms to Jane stemming from a further delay against the purported benefits of the delay asserted

⁴² *Id.*

⁴³ *Id.* at 755.

⁴⁴ *Id.*

⁴⁵ *Garza*, 874 F.3d at 737 (Millett, J., concurring).

⁴⁶ *Id.*

⁴⁷ *Id.* at 740.

⁴⁸ *Bellotti*, 443 U.S. at 644.

⁴⁹ *Garza*, 874 F.3d at 739 (Millett, J., concurring); *see also Casey*, 505 U.S. at 877 (articulating the undue burden standard).

⁵⁰ *Casey*, 505 U.S. at 877.

by the government, as required by *Whole Woman's Health*.⁵¹ In fact, he did not cite *Whole Woman's Health* at all, even though it is the Supreme Court's most recent pronouncement on how courts should evaluate government-imposed restrictions on the right to abortion.

The day after the D.C. Circuit's en banc decision, Jane was able to have an abortion.⁵² Less than a month after issuing his opinion that would have forced Jane to continue her pregnancy, Judge Kavanaugh was added to President Trump's public list of candidates to fill the next vacancy on the Supreme Court.⁵³

2. Writings and Speeches

Roe and the right to abortion rest on a foundation of individual liberty guaranteed by the Constitution.⁵⁴ The Supreme Court has applied the constitutional principle of liberty to fit the context of modern society, yielding greater protection for individual dignity and self-autonomy from government intrusion. This approach builds on and updates the principle of liberty that the Framers embedded in our Constitution and does not chain its meaning to the eighteenth and nineteenth centuries.

Beyond the right to abortion, this approach has produced landmark decisions protecting a sphere of personal and intimate decision-making, such as the right of parents to direct the education and upbringing of their children,⁵⁵ the right to use contraception,⁵⁶ and the right of same-sex couples to marry.⁵⁷ Modeling this approach, Justice Anthony Kennedy wrote for the Court in *Obergefell v. Hodges* recognizing a constitutional right to marriage equality. He rejected a history-bound method for identifying liberty rights, asserting that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries,” because “[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”⁵⁸

⁵¹ 136 S. Ct. at 2309 (“The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”); see also *id.* at 2318 (noting that the effects of Texas’s regulations of abortion providers could harm women’s health).

⁵² Press Release, *After A Month of Obstruction by the Trump Administration, Jane Doe Gets Her Abortion*, ACLU (Oct. 25, 2017), <https://www.aclu.org/news/after-month-obstruction-trump-administration-jane-doe-gets-her-abortion>.

⁵³ Nolan D. McCaskill, *Trump Releases Updated Short List of Potential Supreme Court Nominees*, POLITICO (Nov. 11, 2017), <https://www.politico.com/story/2017/11/17/trump-supreme-court-nominees-247441>.

⁵⁴ See Amy Myrick, *Roe and Intersectional Liberty Doctrine*, CTR. FOR REPROD. RIGHTS (2018), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Liberty-Roe-Timeline-spread-for-web.pdf>.

⁵⁵ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

⁵⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁵⁸ *Id.* at 2598, 2602.

However, some jurists and legal thinkers have argued against broadening the scope of individual liberty, advocating for limiting constitutionally-protected liberties to only those “deeply rooted in the Nation’s history and tradition.”⁵⁹ This narrower approach has been used to reject a right to a dignified death⁶⁰ and to reject a right to sexual intimacy for LGBT people⁶¹ (a decision later overturned by the 2003 case *Lawrence v. Texas*⁶²).

The narrow “history and tradition” approach to liberty has often been invoked by Supreme Court justices who disagreed with the Court’s rulings upholding the right to abortion. For instance, in his dissenting opinion in *Roe*, then-Justice William Rehnquist wrote, “the asserted right to an abortion is not so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁶³ When the Court reaffirmed *Roe*’s core holding nearly two decades later in *Casey*, Rehnquist again dissented, maintaining that “it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as ‘fundamental.’”⁶⁴ Also in *Casey*, Justice Antonin Scalia argued in dissent that there is no right to “abortion on demand” because “(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.”⁶⁵

On the question of how to evaluate the scope of liberty, Judge Kavanaugh has made it clear where he stands. Rather than continue the tradition of a robust and evolving liberty espoused by Justice Kennedy and others, Judge Kavanaugh, in both word and deed, has instead firmly sided with the cramped view of liberty endorsed by Chief Justice Rehnquist and Justice Scalia. In fact, he has repeatedly praised both of these justices for tying liberty to only those rights “deeply rooted in this Nation’s history and tradition”—singling out their dissenting opinions in *Roe* and *Casey* for particular acclaim.

In public speeches, Judge Kavanaugh has embraced an analytical method that looks to “history and tradition” to narrowly define liberty rights, specifically reproductive rights. In a speech he delivered at the American Enterprise Institute in September 2017,⁶⁶ Judge Kavanaugh praised then-Justice Rehnquist’s dissenting opinion in *Roe*, in which Rehnquist wrote that the Constitution does not protect abortion as a fundamental right. Calling Chief Justice Rehnquist his “first judicial hero,”⁶⁷ Judge Kavanaugh recounted Rehnquist’s view that “any such unenumerated right had to be rooted in the traditions and conscience of our people,” saying that

⁵⁹ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

⁶⁰ *Id.* at 720.

⁶¹ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

⁶² *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁶³ *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

⁶⁴ *Casey*, 505 U.S. at 952-53 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

⁶⁵ *Id.* at 979-80 (Scalia, J., concurring in the judgment in part and dissenting in part).

⁶⁶ *From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist* at the American Enterprise Institute (Sept. 18, 2017), <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.

⁶⁷ *Id.* at 6, 21.

while Rehnquist could not convince the other justices that he was correct in *Roe* or later cases such as *Casey*, “he was successful in stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.”⁶⁸ Kavanaugh strongly implied his agreement with Chief Justice Rehnquist, saying that Rehnquist “righted the ship of constitutional jurisprudence.”⁶⁹

In a speech that he delivered at the University of Notre Dame in 2017, Judge Kavanaugh similarly recalled Justice Scalia’s advice: “don’t make up new constitutional rights that are not in the text of the Constitution.”⁷⁰ In particular, Judge Kavanaugh remarked that Justice Scalia rejected “balancing tests” to decide constitutional cases, instead favoring an approach that looked to “history and tradition.”⁷¹ Judge Kavanaugh noted that Justice Stephen Breyer had applied a balancing test to decide whether the abortion restrictions in *Whole Woman’s Health* imposed an undue burden. Judge Kavanaugh said that Justice Scalia’s call for “judges to focus on history and tradition” might better guide their decision-making on constitutional rights. Kavanaugh said that “balancing tests . . . could be used by judges to make it up as they go along,” calling the rejection of those tests a defining feature of Justice Scalia’s jurisprudence.⁷²

In a speech delivered at George Mason University School of Law in 2016, Judge Kavanaugh analyzed Justice Scalia’s legacy.⁷³ Kavanaugh described Justice Scalia’s refusal to recognize “new” constitutional rights, which Scalia thought was outside the proper role of the courts, and not permitted by the Constitution.⁷⁴

Judge Kavanaugh picked two examples to illustrate that approach: Justice Scalia’s dissents in *Casey* and *Obergefell*.⁷⁵ Judge Kavanaugh noted that “courts have no legitimate role, Justice Scalia would say, in creating new rights not spelled out in the Constitution. . . . For Justice Scalia, it was not the Court’s job to improve on or update the Constitution to create new rights.”⁷⁶ Judge Kavanaugh said that Justice Scalia recognized that the determination of whether to recognize an individual liberty right depended on the “text and history of the constitutional . . . provision in question.”⁷⁷ Judge Kavanaugh signaled his agreement with Justice Scalia’s dissents in *Casey* and *Obergefell*, saying that Scalia deferred to legislatures (by refusing to recognize new

⁶⁸ *Id.* at 16.

⁶⁹ *Id.* at 6. Kavanaugh also said of Rehnquist’s 1976 law review article “*The Notion of a Living Constitution*”—which criticized the so-called judicial activism of the federal judiciary—“it’s impossible to overstate its significance to me and how I first came to understand the role of a judge in our constitutional system.” *Id.* at 9.

⁷⁰ Brett Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1909 (2017).

⁷¹ *Id.* at 1916.

⁷² *Id.* at 1909.

⁷³ *Keynote Address: Justice Scalia and Deference*, VIMEO (June 2, 2106), <https://vimeo.com/169758593>.

⁷⁴ *Id.*

⁷⁵ 135 S. Ct. 2584 (2015) (recognizing marriage equality as a constitutional right).

⁷⁶ *Keynote Address: Justice Scalia and Deference*, *supra*, note 73.

⁷⁷ *Id.*

constitutional rights) “*when the Constitution . . . called for deference,*” based on its “text and history.”⁷⁸

In addition to praising the narrow “history and tradition” approach to individual liberty, Judge Kavanaugh applied that approach in a 2007 case (*Doe ex rel. Tarlow v. District of Columbia*) involving the extent to which people with intellectual disabilities have a liberty right to have their wishes considered about their own health care.⁷⁹

Judge Kavanaugh authored the D.C. Circuit panel opinion reversing the district court and upholding the District of Columbia’s policy under which it did not need to “consider the health wishes of intellectually disabled patients” who had not been competent to consent to health care.⁸⁰ Judge Kavanaugh said that such individuals’ liberty to inform decision-making about their own medical care was “not . . . deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.”⁸¹ He held that the plaintiffs’ liberty claims were therefore “meritless”⁸²—a conclusion deeply at odds with modern notions of human dignity and self-autonomy. As the Bazelon Center for Mental Health Law has explained, Judge Kavanaugh’s decision runs contrary to the basic principle that “[I]ike all people, the decisions of people with disabilities, including their choices about the medical care they receive, should be respected to the maximum extent possible.”⁸³

Judge Kavanaugh’s praise and application of the limited approach to individual liberty grounded in “history and tradition” suggests that he is hostile to the foundations of the right to abortion and other essential liberty rights. By siding with the dissenters’ approach in *Roe* and *Casey*, Judge Kavanaugh has strongly signaled that he disagrees with the judicial philosophy surrounding liberty underpinning those landmark cases.

B. Contraception

The Supreme Court first addressed the constitutional right to contraception in a series of cases stretching back over fifty years ago.⁸⁴ As the Court has stated: “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.”⁸⁵ The Centers for Disease Control (“CDC”) named

⁷⁸ *Id.* (emphasis added).

⁷⁹ 489 F.3d 376 (D.C. Cir. 2007).

⁸⁰ 489 F.3d at 380.

⁸¹ *Id.* at 383.

⁸² *Id.* at 384.

⁸³ *Self-Determination: Review of Disability-Related Cases Involving Judge Brett Kavanaugh*, BAZELON CTR. FOR MENTAL HEALTH, <http://www.bazelon.org/wp-content/uploads/2018/08/Self-Determination-Bazelon-One-Pager.pdf>

⁸⁴ See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁸⁵ *Casey*, 505 U.S. at 856. The American College of Obstetricians and Gynecologists (“ACOG”) further recognizes the wide range of benefits including “female engagement in the work force, and economic self-sufficiency for women.” See Amer. Coll. of Obstet. & Gynecol., Committee Opinion 615, Access to Contraception, 125 Obstet. &

contraception one of the ten great public health achievements of the twentieth century.⁸⁶ Women in the United States spend an average of thirty years trying to prevent pregnancy and ninety-nine percent of women who have ever had sexual intercourse have used some form of contraception, including women from every ethnic, racial, religious, and geographic background.⁸⁷ The Affordable Care Act (“ACA”) was a significant advance in women’s health. It requires most employers to provide insurance coverage for women’s preventive health services, including contraception, at no cost. The ACA has helped guarantee no-cost contraceptive access for more than 60 million women.⁸⁸

Priests for Life v. Health & Human Services (2015)

Judge Kavanaugh has addressed issues of contraceptive access in the ACA context. In *Priests for Life v. Health & Human Services*,⁸⁹ Judge Kavanaugh would have invalidated the ACA’s contraception coverage accommodation that preserved coverage for employees at religiously-affiliated organizations. He believed that the accommodation substantially burdened the religious exercise of employers, taking a sweeping view of what it means for an employer to be “complicit” in women’s use of contraception.

Priests for Life involved challenges brought by several religiously-affiliated employers to the ACA accommodation. Under the accommodation, religiously-affiliated nonprofit organizations can opt out of covering contraception by filing a simple two-page form with their insurer. Their insurer then provides coverage directly, preserving seamless access for employees without involving their employers.

The plaintiffs in *Priests for Life* argued that filing the required form to opt out of providing contraception coverage violated their rights under the Religious Freedom Restoration Act (“RFRA”).⁹⁰ D.C. District Court judges ruled against the employers on almost all of their claims. After the employers appealed, the D.C. Circuit Court of Appeals affirmed the district

Gynecol. 250 (2015); Amer. Coll. Of Obstet. & Gynecol., Committee Opinion No. 516, Health Care Systems for Underserved Women (2012).

⁸⁶ Ctrs. For Disease Control & Prevention, Ten Great Public Health Achievements – United States, 1990-1999 (Apr. 2, 1999), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm>.

⁸⁷ Kimberly Daniels, et al., *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, 62 NAT’L HEALTH STATISTICS REPORTS 1 (Feb. 14 2013), <https://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf>; JO JONES ET AL., *Current Contraceptive Use in the United States, 2006–2010, and Changes in Patterns of Use Since 1995*, 60 NAT’L HEALTH STATISTICS REPORTS 1 (Oct. 18, 2012); Rachel K. Jones & Joerg Dreweke, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use*, GUTTMACHER INST. (Apr. 2011), https://www.guttmacher.org/sites/default/files/report_pdf/religion-and-contraceptive-use.pdf.

⁸⁸ *New Data Estimates 62.4 Million Women Have Coverage of Birth Control Without Out-of-Pocket Costs*, NAT’L WOMEN’S LAW CTR. (Sept. 25, 2017), <https://nwlc.org/resources/new-data-estimate-62-4-million-women-have-coverage-of-birth-control-without-out-of-pocket-costs/>.

⁸⁹ 808 F.3d 1 (D.C. Cir. 2015) (en banc).

⁹⁰ Plaintiffs also claimed that the accommodation violated their First Amendment rights.

court decisions, partly on the grounds that filing the form imposed only a de minimis burden on religion.⁹¹ The plaintiffs sought rehearing from an en banc panel, which the appeals court denied.

Judge Kavanaugh authored a lengthy dissent from the denial of rehearing.⁹² He would have held that the accommodation burdened the employers' free exercise of religion in violation of RFRA. First, he significantly expanded the Supreme Court's decision in *Burwell v. Hobby Lobby*,⁹³ finding that the accommodation substantially burdened religion. In *Hobby Lobby*, however, employers were required to provide contraception coverage and did not have the option of accepting an accommodation, unlike the employers in *Priests for Life*.⁹⁴ Nonetheless, Judge Kavanaugh gave a high degree of deference to the religious employers, writing that "if the Government requires someone (under threat of incurring monetary sanctions or punishment, or of having a benefit denied) to act or to refrain from acting in violation of his or her sincere religious beliefs, that constitutes a substantial burden on the exercise of religion."⁹⁵ He asserted that courts could not question the "correctness or reasonableness" of a religious belief, only its sincerity.⁹⁶ The consequence of Judge Kavanaugh's substantial burden analysis was to privilege the interests of religiously-affiliated employers over the interests of employees seeking contraception access.

Validating the plaintiffs' claim that the accommodation infringed upon their religious exercise, Judge Kavanaugh equated the filing of the two-page form with other types of religious burdens, including: a Muslim prisoner being forced to shave his beard; Amish parents being forced to send their children to high school; and Seventh-Day Adventists being forced to work on the Sabbath.⁹⁷ In these examples, however, individuals were required to directly violate their religious practices. There is no direct violation of religious practice from filing a two-page form.

In a concurrence to the court's decision denying rehearing that responded to Judge Kavanaugh's dissent, Judge Nina Pillard declined to defer to the employers' argument that by providing notice to their insurer, they were forced to trigger contraceptive coverage for their employees. She noted that they simply mischaracterized the accommodation process. "[T]he dissenters," Judge Pillard wrote, "perceive in *Hobby Lobby* a potentially sweeping, new RFRA prerogative for religious adherents to make substantial-burden claims based on sincere but erroneous assertions about how federal law works."⁹⁸

⁹¹ *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 249 (D.C. Cir. 2014).

⁹² *Priests for Life*, 808 F.3d 14 (Kavanaugh, J., dissenting).

⁹³ 134 S. Ct. 2751 (2014) (invalidating the requirement that closely-held, for-profit businesses with religious objections to contraception nonetheless must buy health-insurance coverage for their employees that pays for contraception, or else face taxes or penalties).

⁹⁴ *Id.*

⁹⁵ *Priests for Life*, 808 F.3d at 16 (Kavanaugh, J., dissenting)

⁹⁶ *Id.* at 17.

⁹⁷ *Id.* at 20.

⁹⁸ *Id.* at 2 (majority opinion).

Indeed, Judge Kavanaugh acknowledged that under the Supreme Court’s opinions in *Hobby Lobby*, the government had a compelling interest in ensuring broad access to contraception, writing, “It is not difficult to comprehend why a majority of the Justices in *Hobby Lobby* . . . would suggest that the Government has a compelling interest in facilitating women’s access to contraception.”⁹⁹ Identifying the “numerous benefits that would follow from reducing the number of unintended pregnancies” by expanding access to contraception, he wrote: “It is commonly accepted that reducing the number of unintended pregnancies would further women’s health, advance women’s personal and professional opportunities, reduce the number of abortions, and help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant unintentionally at a young age.”¹⁰⁰

But, having already found that filing out a two-page form imposed a substantial burden, and acknowledging a compelling interest in ensuring access to contraception, Judge Kavanaugh insisted that the government find less restrictive means to ensure that employees did not lose their contraceptive coverage. He wrote that the government had a different notice available that employers could file indicating that they would not cover contraception, which would allow the government to then independently identify their insurers to arrange for alternative coverage.¹⁰¹ Judge Kavanaugh wrote that plaintiffs had stated that the alternative notice would “lessen[] the religious organizations’ degree of complicity[.]”¹⁰²

Judge Kavanaugh put weight on the fact that this alternative notice would not harm employees. “[A]ccommodating the religious organizations by allowing them to use the [alternative] notice would not . . . ‘unduly restrict’ third parties,” he wrote.¹⁰³ He cited a law review article that interpreted Supreme Court precedent on the ACA’s contraception benefit as “‘appear[ing] to tie accommodation to the fact that the government has other ways of providing for the statute’s intended beneficiaries so that no third-party harm would result from the accommodation.’”¹⁰⁴

The Supreme Court ultimately heard *Priests for Life* and other consolidated cases in the 2016 case *Zubik v. Burwell*. An eight-member Court did not reach the merits, instead remanding

⁹⁹ *Id.* at 22 (Kavanaugh, J., dissenting).

¹⁰⁰ *Id.* at 22-23. However, in a footnote, Judge Kavanaugh qualified this holding, noting that Justice Kennedy’s *Hobby Lobby* opinion addressing the government’s compelling interest “did not expressly discuss” whether that 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.” *Id.* at 23 n.10.

¹⁰¹ Judge Kavanaugh relied on the Supreme Court’s orders in non-merits rulings in *Little Sisters of the Poor v. Sebelius*, 571 U.S. 1171 (2014) and *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), writing that the Court had previously identified a process in which religious employers could submit a less restrictive notification (not an opt-out form) about their religious status directly to the government.

¹⁰² *Priests for Life*, 808 F.3d. at 24 (Kavanaugh, J., dissenting).

¹⁰³ *Id.* at 25.

¹⁰⁴ *Id.* (quoting Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2532 (2015)).

the cases to the courts of appeals for the parties to try to reach a compromise solution.¹⁰⁵ No compromise was reached, and the Trump administration later issued interim final rules creating broad exemptions from contraceptive coverage for employers and universities with religious or moral objections.

These rules are currently enjoined, and litigation challenging them (including a suit brought by the Center) could reach the Supreme Court.¹⁰⁶ These cases and others could be affected by Judge Kavanaugh's expansive deference to religious employers that object to being made "complicit" in conduct they oppose. On the Supreme Court, Judge Kavanaugh could also confront litigation raising similar issues around other regulations issued by the current administration that grant broad religious exemptions.¹⁰⁷

C. Maternal Health

The ACA was also critical to expanding access to maternal health care. Previously, many individual health plans did not cover maternity care. In addition, many insurance companies treated pregnancy or past pregnancy-related procedures like C-sections as pre-existing conditions, which could be grounds for denying maternity coverage.¹⁰⁸ The ACA eliminated coverage denials based on pre-existing conditions and included maternity care as an essential health benefit that must be part of any health insurance plan.¹⁰⁹ Overall, the ACA has extended health care coverage, including for reproductive health care, to nearly 20 million people.¹¹⁰ The ACA has been a frequent subject of litigation, with challenges repeatedly arising before the Supreme Court, which has largely sustained the law.¹¹¹

¹⁰⁵ 136 S. Ct. 1557 (2016).

¹⁰⁶ *California et al. v. Health & Human Servs. et al.*, 281 F. Supp. 3d 806 (N.D. Cal. Dec. 21, 2017), *appeal filed*, No. 18-15255 (9th Cir. Feb. 16, 2018); *Pennsylvania v. Trump et al.*, 281 F. Supp. 3d 553 (E.D. Pa. Dec. 15, 2017), *appeal filed*, No. 18-1253 (3d Cir. Feb. 15, 2018); *see also Irish 4 Reproductive Health et al. v. Health & Human Servs.*, No. 3:18-cv-00491 (N.D. Ind. filed June 26, 2018).

¹⁰⁷ *See, e.g., Juliet Eilperin & Ariana Eunjung Cha, New HHS Civil Rights Division to Shield Health Workers with Moral or Religious Objections*, WASH. POST (Jan. 17, 2018), https://www.washingtonpost.com/national/health-science/trump-administration-creating-civil-rights-division-to-shield-health-workers-with-moral-or-religious-objections/2018/01/17/5663d1c0-fbe2-11e7-8f66-2df0b94bb98a_story.html?utm_term=.41fbbcc66529.

¹⁰⁸ *See* Danielle Garrett, *Turning to Fairness*, NAT'L WOMEN'S LAW CTR. (2012), https://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf.

¹⁰⁹ *See* 42 U.S.C. § 18022(b)(1)(D). Research shows that uninsured pregnant women receive fewer prenatal care services, and are more likely to experience pregnancy related complications and adverse birth outcomes whereas increased access to care and services improves outcomes for both mothers and their children. *See, e.g., Amer. Coll. of Obstet. & Gynecol., Committee Opinion No. 552: Benefits to Women of Medicaid Expansion Through the Affordable Care Act*, 121 OBSTET. & GYNECOL. 223 (2013).

¹¹⁰ Nicholas Bakalar, *Nearly 20 Million Have Gained Health Insurance Since 2010*, N.Y. TIMES (May 22, 2017), <https://www.nytimes.com/2017/05/22/health/obamacare-health-insurance-numbers-nchs.html>.

¹¹¹ *See NFIB v. Sebelius*, 567 U.S. 519 (2012) (holding that the law's requirement that individuals purchase health insurance or pay a tax was a valid exercise of Congress's taxing power); *King v. Burwell*, 135 S. Ct. 435 (2015) (rejecting a challenge to the law's tax credit subsidies for individuals purchasing health insurance). The ACA also expanded eligibility for Medicaid. However, as a result of the Supreme Court's decision in *NFIB*, which effectively made the Medicaid expansion optional for states, 567 U.S. at 580-88, many states with the worst health disparities have refused to expand Medicaid, resulting in coverage gaps that impact health care overall, including before,

1. *Seven-Sky v. Holder* (2011)

In 2011, Judge Kavanaugh was part of a three-judge panel that heard a challenge to the ACA’s requirement that individuals purchase health insurance (the “individual mandate”). The outcome of the case had the potential to roll back the ACA’s coverage expansion, jeopardizing reproductive health care, including maternal health care, for millions of women. While Judge Kavanaugh did not address the substantive merits of the ACA in his *Seven-Sky* opinion, his analysis largely disregarded the substantial practical impact that undermining the law would have for millions of people.

The panel majority held that the mandate was constitutional pursuant to Congress’s commerce clause authority.¹¹² Judge Kavanaugh dissented from the panel decision.¹¹³ He would have held that the court lacked jurisdiction to reach the merits because the individual mandate’s tax penalty had not yet taken effect.¹¹⁴ Though he withheld judgment on the ACA’s ultimate constitutionality, Judge Kavanaugh characterized the law as a significant expansion of federal power, calling it “unprecedented on the federal level in American history”¹¹⁵—a comment that was not necessary to his disposition of the case.

2. Writings

In a 2014 law review article, Judge Kavanaugh discussed the Supreme Court’s recent health care cases. He criticized Chief Justice Roberts’s decision upholding the ACA’s individual mandate in *NFIB v. Sebelius*.¹¹⁶ Judge Kavanaugh noted that Chief Justice Roberts “*agreed* with the four dissenters (Justices Scalia, Kennedy, Thomas, and Alito) on all of the key constitutional and statutory issues raised about the individual mandate.”¹¹⁷ However, Chief Justice Roberts held that the Court should find a way to avoid invalidating the mandate. Roberts did so by construing the individual mandate as an allowable exercise of Congress’s taxing power (after determining that it exceeded Congress’s authority to regulate interstate commerce).¹¹⁸ In response to Chief Justice Roberts’s opinion, Judge Kavanaugh argued that the method of statutory construction that Roberts used to save the ACA should be “jettisoned.”¹¹⁹ Nowhere in his article does Judge Kavanaugh discuss the fact that had that interpretive tool not been available to Chief Justice Roberts, millions of Americans stood to lose access to health care coverage.

during, and after pregnancy. See Rachel Garfield, et al., *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAMILY FOUND. (2018), <https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/>.

¹¹² *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

¹¹³ Judge Kavanaugh would have ruled that the court lacked jurisdictional grounds to reach the merits.

¹¹⁴ *Id.* at 45-46.

¹¹⁵ *Id.* at 51.

¹¹⁶ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016).

¹¹⁷ *Id.* at 2147 (i.e., about limits on the scope of the Commerce, Necessary and Proper, and Taxing Clauses, and that the provision was best read to impose a mandate rather than a tax).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2148.

In the same article, Judge Kavanaugh discussed *King v. Burwell*,¹²⁰ where the Supreme Court held that individuals who purchase health insurance policies on the federal health exchange are entitled to tax credit subsidies under the ACA. He criticized the decision in *King* for allegedly stretching the text of the ACA such “that the words in question did not *mean* what they *said*.”¹²¹ Under Judge Kavanaugh’s strict reading of the law, more than 6 million people in 34 states would be cut off from financial assistance in paying for health insurance.¹²²

With ongoing litigation against the ACA, there is reason to expect the Court to continue to shape the legal foundations of health reform over the coming years.¹²³

CONCLUSION

After a thorough review of Judge Kavanaugh’s judicial opinions, speeches, and writings, we have grave concerns about how he will rule on reproductive rights cases. His judicial philosophy is fundamentally hostile to the protection of reproductive rights under the U.S. Constitution. **Therefore, the Center for Reproductive Rights strongly recommends that the Senate reject the nomination of Judge Brett Kavanaugh to the Supreme Court.**

¹²⁰ 135 S. Ct. 2480 (2015).

¹²¹ Kavanaugh, *supra* note 116, at 2159 (emphasis in original).

¹²² *State-by-State Effects of a Ruling for the Challengers in King v. Burwell*, KAISER FAMILY FOUND. (June 2, 2015), <https://www.kff.org/interactive/king-v-burwell-effects/>.

¹²³ For example, in *Texas v. United States*, No. 4:18-cv-00167 (N.D. Tex., filed Feb. 2018), the Department of Justice has declined to defend the ACA against challenges that it is unconstitutional.