

# **An Analysis of the Testimony of Judge Brett Kavanaugh on Issues Relating to Reproductive Rights Before the Senate Judiciary Committee**

**September 10, 2018**

Judge Brett Kavanaugh testified before the Senate Judiciary Committee from September 4-6, 2018, providing an opening statement and testifying in response to questions for two days. His record going into the hearing raised grave concerns about how he would rule in reproductive rights cases. His opinions, speeches and writings evince a judicial philosophy fundamentally hostile to reproductive rights. His testimony heightens those concerns.

As an appellate judge, Judge Kavanaugh ignored and misapplied Supreme Court precedent to allow the government to continue blocking an undocumented minor from accessing an abortion. He has voiced support for a narrow, backward-looking approach to the scope of individual liberty rights contrary to the foundations of 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.<sup>1</sup>

During the confirmation hearing, Judge Kavanaugh faced extensive questioning about his views on reproductive rights and related issues. This report analyzes his responses and how he failed to meaningfully answer those questions. In the Appendix, we have set forth those questions and answers in detail. Judge Kavanaugh repeatedly declined to answer whether he believes that *Roe* and *Casey* were correctly decided. When asked about the Supreme Court's cases on the constitutional right to contraception, he chose to agree only with a narrow concurring opinion authored by Justice Byron White, who would later dissent in *Roe* and subsequently called for its overruling.

In sum, Judge Kavanaugh's testimony yielded scant new information about his views and in no way rebutted the evidence in his record that he does not support the nearly half-century of Supreme Court jurisprudence supporting women's reproductive rights.

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<sup>1</sup> For a full discussion of Judge Kavanaugh's record, see The 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), available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/PublicReportonJudgeBrettKavanaugh.pdf>.

## I. **Abortion**

### **A. Judge Kavanaugh refused to answer whether *Roe v. Wade* and its progeny were correctly decided.**

Judge Kavanaugh was asked on at least fifteen separate occasions to explain his views on *Roe v. Wade* (1973) and its progeny cases. Citing “nominee precedent” set by previous Supreme Court nominees, he consistently declined to discuss whether he agrees or disagrees with the decisions finding that the Constitution guarantees a right to abortion.<sup>2</sup> He instead summarized the state of the jurisprudence, unremarkably calling *Roe* “settled as a precedent of the Supreme Court entitled the respect under principles stare decisis.”<sup>3</sup> He also testified that *Planned Parenthood v. Casey* (1992) was “precedent on precedent.”<sup>4</sup>

Judge Kavanaugh’s testimony is best read as simply describing the history of Supreme Court rulings on abortion rights – not as any reassurance of whether he would ultimately uphold *Roe* and *Casey*. Indeed, “nominee precedent” refers to strikingly similar recitations that have been made by justices who have gone on to rule against abortion rights or call for the reversal of *Roe* once on the Court.

When Chief Justice John Roberts was asked at his confirmation hearing to explain what he meant when he previously called *Roe* “the settled law of the land,” he offered an indisputable fact: that *Roe* is “settled as a precedent of the Court, entitled to respect under principles of stare

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<sup>2</sup> September 5, 2018 p.m. (See Appendix at A-4).

<sup>3</sup> September 5, 2018 a.m. (See Appendix at A-1).

<sup>4</sup> September 5, 2018 a.m. (See Appendix at A-2). In failing to answer whether he agrees with decades-old decisions, Judge Kavanaugh testified that he would follow the “nominee precedent” of the eight current justices on the Supreme Court, who he characterized as not answering whether they agreed or disagreed with specific cases. Judge Kavanaugh did testify about his agreement with a few “older cases.” He testified that *United States v. Nixon*, 418 U.S. 683 (1974) was a “correct decision” and that its “holding is one of the four greatest moments in Supreme Court history.” (September 6, 2018 p.m.) Yet, he declined to discuss the merits of *Roe*, even though it was decided a year after *Nixon*. Judge Kavanaugh also testified that *Brown v. Board of Education*, 347 U.S. 483 (1954) was correctly decided. When asked why he was able to comment on *Brown* but not *Roe*, Judge Kavanaugh testified that *Brown* was among a group of “historical cases where there is no prospect of coming back” before the Court, unlike *Roe*. (September 6, 2018 p.m.) However, the Supreme Court heard a school desegregation case only eleven years ago in *Parents Involved v. Seattle*, 551 U.S. 701 (2007).

“Nominee precedent” was a new term in this confirmation hearing which replaced the so-called “Ginsburg standard” invoked by previous nominees. This switch in terminology may be because Justice Ruth Bader Ginsburg did testify about her agreement that the Constitution protects a woman’s “right to decide whether or not to bear a child,” which she testified was “central to a woman’s life [and] to her dignity.” *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 482, 207 (1993). When asked whether he agreed with this statement by Justice Ginsburg, Judge Kavanaugh declined to answer, saying that “Justice Ginsburg was talking about something she had previously written.” (September 5, 2018 p.m. (See Appendix at A-3).) Senator Harris pointed out that Judge Kavanaugh too had previously written and given speeches about *Roe* and the right to abortion.

decisis.”<sup>5</sup> Similarly, at his confirmation in 2006, Justice Samuel Alito testified that *Roe* is “an important precedent of the Supreme Court,” and “a precedent that is entitled to respect.”<sup>6</sup>

After their confirmations, Chief Justice Roberts and Justice Alito ruled against abortion rights both times that they had the opportunity. In 2007, both upheld a federal criminal law banning a safe second trimester procedure.<sup>7</sup> And in 2016, both voted to uphold sham regulations that would have shut down more than 75 percent of the abortion clinics in Texas — a position that would have gutted *Roe* and *Casey* if it had been adopted by the majority, such that virtually any abortion restriction thereafter would stand.<sup>8</sup>

Another striking example of why discussions of precedent are no replacement for a nominee’s straight up answer to these questions is the confirmation hearing of Justice Clarence Thomas in 1991. When asked about *Roe*, Thomas gave a descriptive answer, saying, “The Supreme Court, of course, in the case *Roe v. Wade* has found . . . as a fundamental interest a woman’s right to terminate a pregnancy.”<sup>9</sup> Yet less than a year after joining the Court, Justice Thomas joined a dissent in *Casey*, which argued: “We believe that *Roe* was wrongly decided, and that it can and should be overruled.”<sup>10</sup>

**B. Judge Kavanaugh’s 2003 email stating not all legal scholars view *Roe* as “settled law.”**

Judge Kavanaugh was also asked about a March 24, 2003 email that he sent while working on judicial nominations in the Bush White House. He was commenting on a draft op-ed which said that legal scholars accept that *Roe* and its progeny are settled law. Kavanaugh responded that not all legal scholars refer to *Roe* as “settled law” since the “Court can always overrule its precedent, and three current Justices on the Court would do so.”<sup>11</sup> He was referring to Chief Justice Rehnquist and Justices Scalia and Thomas, who had ruled that *Roe* was wrongly decided and should be overturned.<sup>12</sup> When questioned about his email, Judge Kavanaugh said he was describing the state of scholarship for accuracy.<sup>13</sup> The email, however, makes clear that

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<sup>5</sup> *Nomination of John G. Roberts, Jr., to be Chief Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 158, 145 (2005), <https://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf>.

<sup>6</sup> *Nomination of Samuel A. Alito, Jr., to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 277, 455 (2006), <https://www.gpo.gov/fdsys/pkg/GPO-CHRG-ALITO/pdf/GPO-CHRG-ALITO.pdf>.

<sup>7</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007).

<sup>8</sup> *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting, joined by Roberts, C.J., and Thomas, J.).

<sup>9</sup> *Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 1084, 127 (1991).

<sup>10</sup> *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting, joined by White, J., Scalia, J., and Thomas, J.).

<sup>11</sup> See Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html>.

<sup>12</sup> See *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting, joined by White, J., Scalia, J., and Thomas, J.).

<sup>13</sup> September 6, 2018 a.m. (Appendix at A-10).

Judge Kavanaugh is aware of the obvious: the Supreme Court can gut or overturn precedent when given the opportunity and underscores the empty assurance of Judge Kavanaugh’s description of *Roe* and *Casey* as precedent.

### C. Judge Kavanaugh’s dissent in *Garza v. Hargan*.

Judge Kavanaugh was questioned extensively about his 2017 dissenting opinion in *Garza v. Hargan*. *Garza* involved an undocumented immigrant minor, known in court as “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 that she was pregnant and decided to have an abortion. With the assistance of a guardian ad litem and an attorney ad litem, Jane obtained an order from a state-court judge that she had the maturity to make the abortion decision for herself as a minor. However, acting under government directive,<sup>14</sup> the shelter refused to release Jane to her guardian ad litem to go to the clinic for the abortion.

When Jane challenged this policy in court, Judge Kavanaugh issued an order allowing the government to continue blocking her abortion. When his order was reversed by the full U.S. Court of Appeals for the D.C. Circuit, he dissented.

During his confirmation hearing, Judge Kavanaugh was asked several times to explain his reasoning for continuing to block Jane’s abortion. He told the Senate that *Garza* was unique because it involved a minor alone in the United States, and that he applied precedent, including the Supreme Court’s precedents on parental consent.<sup>15</sup>

This argument, however, fails to justify continuing to block Jane’s abortion. Jane had already obtained a state court order deeming her capable of choosing to have an abortion. At that point, she was constitutionally entitled to have the procedure without further obstruction. While Judge Kavanaugh claimed to be applying Supreme Court precedent, he failed to cite *Bellotti v. Baird* (1979), which held 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.”<sup>16</sup> In her en banc concurrence in *Garza*, Judge Patricia Millett noted that Judge Kavanaugh’s view was 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).” She explained, “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.<sup>17</sup>

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<sup>14</sup> In 2017, the Office of Refugee Resettlement prohibited shelters from taking “any action that facilitates” abortion for unaccompanied minors.

<sup>15</sup> September 5, 2018 p.m. (See Appendix at A-11).

<sup>16</sup> 443 U.S. 622, 644 (1979).

<sup>17</sup> *Garza v. Hargan*, 874 F.3d 735, 737 (D.C. Cir. 2017) (en banc) (Millett, J., concurring).

Judge Kavanaugh also failed to cite or apply the Supreme Court’s most recent abortion rights case, *Whole Woman’s Health v. Hellerstedt* (2016).<sup>18</sup> That ruling necessitated that the court weigh the potential harms to Jane stemming from a further delay against the purported benefits of the delay. Judge Millett’s en banc concurrence, on the other hand, correctly recognized that *Whole Woman’s Health* is part of a line of Supreme Court cases “establish[ing] that the government may not put substantial and unjustified obstacles in the way of a woman’s exercise of her right to an abortion pre-viability.”<sup>19</sup>

Judge Kavanaugh further testified that, at the time of his decision, Jane was “still several weeks away” from Texas’ twenty-week limit on abortion.<sup>20</sup> However, Judge Kavanaugh’s order allowing the government to block Jane’s abortion and granting eleven more days for the government to find a sponsor (after already failing to do so after several weeks) would have delayed Jane until she was between 16 and 17 weeks pregnant, leaving her with three weeks or less to obtain an abortion in Texas. After the eleven days, Judge Kavanaugh would not have required that Jane be permitted to immediately access an abortion, but rather he would have required that Jane go back into court to request another order which the government could appeal—in other words, she could start her case all over again.

Judge Kavanaugh also testified that he “did not join the separate opinion of another dissenter who said that there was no constitutional right at all for the minor,” issued by D.C. Circuit Judge Karen Henderson.<sup>21</sup> That he did not join an extreme opinion does not negate the fact that he misapplied precedent and blocked Jane’s abortion.<sup>22</sup> Furthermore, unlike Judge Millett, Kavanaugh did not explicitly disavow Judge Henderson’s opinion in his dissent.

Senator Blumenthal noted that in his *Garza* dissent, Judge Kavanaugh referred to *Roe v. Wade* as “existing Supreme Court precedent.” (Emphasis added) Senator Blumenthal pointed out that this was an unusual way for an appellate judge to describe precedent, unless he was “opening the possibility of overturning that precedent.” Senator Blumenthal compared it to “somebody introducing his wife to you as my current wife.”<sup>23</sup>

## II. Contraception

### A. Judge Kavanaugh limited his agreement with *Griswold v. Connecticut* (1965) to Justice White’s narrow concurrence.

Judge Kavanaugh initially declined to answer questions about whether he agreed with two Supreme Court cases that recognized a constitutional right to access contraception. In

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<sup>18</sup> 136 S. Ct. 2292 (2016).

<sup>19</sup> *Garza*, 874 F.3d at 737.

<sup>20</sup> September 5, 2018 p.m. (See Appendix at A-12).

<sup>21</sup> September 5, 2018 p.m. (See Appendix at A-13).

<sup>22</sup> Judge Henderson’s dissent argued that undocumented immigrants like Jane Doe do not receive any liberty protection under the Constitution. Judge Henderson’s position is flatly contradicted by Supreme Court precedent stating that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

<sup>23</sup> September 5, 2018 p.m. (See Appendix at A-13).

*Griswold v. Connecticut* (1965),<sup>24</sup> the Supreme Court held that the Constitution’s liberty guarantee protected the right of married couples to use and obtain contraception. In *Eisenstadt v. Baird* (1972),<sup>25</sup> the Court extended this right to unmarried adults, explaining that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>26</sup>

When pressed on whether he believed the contraceptive cases were correctly decided, Justice Kavanaugh’s answer was telling: he testified only to agreement with Justice White’s concurrence, which he found “is a persuasive application” that he has “no quarrel with.”<sup>27</sup>

Justice White’s concurrence in *Griswold* was limited to a right of marital privacy. Indeed, he found the government’s goal of deterring “promiscuous or illicit sexual relationship” to be “concededly a permissible and legitimate government goal.”<sup>28</sup> Justice White made clear how narrow he viewed the *Griswold* decision by not joining the Court’s opinion in *Eisenstadt*—which extended the right to contraception to non-married people—and limiting his concurrence to the right of married couples.<sup>29</sup> Significantly, Justice White dissented in *Roe*, finding “nothing in the language or history of the Constitution” to support it.<sup>30</sup> Over the next two decades, even as he acknowledged the importance of stare decisis,<sup>31</sup> Justice White’s subsequently called on the Supreme Court to overrule *Roe*.<sup>32</sup>

## **B. Judge Kavanaugh’s Dissent in *Priests for Life***

Judge Kavanaugh was also asked at least twice about his opinion dissenting from a denial of rehearing en banc in *Priests for Life v. Health & Human Services*.<sup>33</sup> In this case, non-profit employers with religious objections to the Affordable Care Act’s contraceptive coverage benefit challenged the accommodation granted to such employers. The accommodation enables employers to opt out of providing coverage by filling out a two-page form while preserving employees’ access to contraception directly from the health insurer.

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<sup>24</sup> 381 U.S. 479 (1965).

<sup>25</sup> 405 U.S. 438 (1972).

<sup>26</sup> *Id.* at 453.

<sup>27</sup> September 5, 2018 p.m. (See Appendix at A-15).

<sup>28</sup> *Griswold v. Connecticut*, 381 U.S. 479, 505 (1965) (White, J., concurring) (finding “no reason for reaching the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried”).

<sup>29</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 465 (1972) (White, J., concurring).

<sup>30</sup> *Roe v. Wade*, 410 U.S. 179, 221 (1973) (White, J., dissenting, joined by Rehnquist, J.). Justice White also authored the majority opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which rejected a right to sexual intimacy for LGBT people (a decision later overturned by *Lawrence v. Texas*, 539 U.S. 558 (2003)).

<sup>31</sup> *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 786 (1986) (White, J., dissenting, joined by Rehnquist, J.).

<sup>32</sup> See *id.*; *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., White, J., and Thomas, J.).

<sup>33</sup> 808 F.3d 14 (D.C. Cir. 2014).

In his testimony, Judge Kavanaugh said that the contraceptive accommodation was “quite clearly” a substantial burden on the religiously-affiliated employers’ religious exercise.<sup>34</sup> He described the case as a challenge to the two-page form that the employers believed “would make them complicit in the provision of the *abortion-inducing drugs* that they . . . – as a religious matter, objected to.”<sup>35</sup> (Emphasis added) Notably, the case involved only FDA-approved methods of contraception, not “abortion-inducing drugs.” Judge Kavanaugh’s adoption in his testimony of the objecting employers’ inaccurate factual claim is consistent with the high degree of deference he gave to the employers in his dissent, where he asserted that courts could not question the “correctness or reasonableness” of a religious belief, only its sincerity.<sup>36</sup>

During his testimony, Judge Kavanaugh also said that his finding of a substantial burden in *Priests for Life* was “based on the [*Burwell v. Hobby Lobby* precedent]<sup>37</sup> which I was bound to follow.”<sup>38</sup> However, his opinion extended *Hobby Lobby*; it did not merely apply it. In *Hobby Lobby*, for-profit employers would have been required to provide contraception coverage without being afforded an accommodation, and the Supreme Court held the accommodation was an alternative that could be made available to for-profit employers under the Religious Freedom Restoration Act (“RFRA”). The non-profit employers in *Priests for Life* challenged the accommodation itself, and Judge Kavanaugh would have held it violated RFRA.<sup>39</sup>

### **III. Judge Kavanaugh repeated his praise for a narrow, backward-looking approach to defining the scope of individual liberty under the Constitution.**

Judge Kavanaugh received several questions about his 2017 speech praising Chief Justice Rehnquist’s dissents in *Roe* and *Casey*, which reject a constitutional right to abortion. Kavanaugh particularly had praised Rehnquist’s application of a standard limiting constitutionally-protected liberties to only those “deeply rooted in the Nation’s history and tradition.”<sup>40</sup>

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<sup>34</sup> September 6, 2018 p.m. (See Appendix at A-16).

<sup>35</sup> *Id.*

<sup>36</sup> *Priests for Life*, 808 F.3d at 17 (Kavanaugh, J., dissenting).

<sup>37</sup> See 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).

<sup>38</sup> September 6, 2018 p.m. (See Appendix at A-17).

<sup>39</sup> Judge Kavanaugh did confirm in his testimony that in *Priests for Life*, he “did find a compelling interest for the government in ensuring access.” However, in his opinion, he left open the question of whether there would be a compelling state interest for government to facilitate access to contraceptives that some would consider to be “abortifacients.” *Priests for Life*, 808 F.3d at 23 n.10. His use of the term “abortifacients” in his dissent is similar to his use of “abortion-inducing drugs” in his testimony in that it adopts anti-abortion groups’ inaccurate and unscientific description of contraception.

<sup>40</sup> *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>. For further information, see our report of August 30, 2018 at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/PublicReportonJudgeBrettKavanaugh.pdf>.

In his testimony, Judge Kavanaugh reiterated his support for the “history and tradition” approach to defining individual liberty, relying on the Supreme Court’s decision in *Washington v. Glucksberg* (1997),<sup>41</sup> which rejected a constitutional right to assisted suicide for the terminally ill. Kavanaugh testified: “All roads lead to the *Glucksberg* test as the test that the Supreme Court has settled on as the proper test” for determining the scope of individual liberty.<sup>42</sup>

Justice Kavanaugh’s reliance on *Glucksberg* is telling. Less than a year ago, he said: “[E]ven a first-year law student could tell you that the *Glucksberg* approach to unenumerated rights was not consistent with the approach of the abortion cases such as *Roe v. Wade* in 1973— as well as the 1992 decision reaffirming *Roe*, known as *Planned Parenthood v. Casey*.”<sup>43</sup>

Moreover, Judge Kavanaugh is incorrect to say that the Supreme Court has “settled” on *Glucksberg*’s history and tradition test. In *Obergefell v. Hodges* (2015), which held that same-sex couples have a constitutional right to marry, Justice Kennedy wrote for the Court 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.”<sup>44</sup>

Judge Kavanaugh also testified that Justice Elena Kagan said during her confirmation hearing that *Glucksberg*’s “history and tradition” approach was the standard for defining liberty rights.<sup>45</sup> However, in a written response to a question submitted by Senator John Cornyn, Justice Kagan made clear that the *Glucksberg* test is merely the “starting point for any consideration of a due process liberty claim.”<sup>46</sup> (Emphasis added)

Judge Kavanaugh was also asked about a portion of his 2017 speech that criticized the Warren Court for “enshrining its policy views into the Constitution.”<sup>47</sup> When asked which cases he had in mind for this criticism, Judge Kavanaugh said “I referred to them in the speech.”<sup>48</sup> The speech specifically referred to *Roe*, praising Chief Justice Rehnquist’s dissenting opinion, which rejected a constitutional right to abortion.<sup>49</sup>

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<sup>41</sup> 521 U.S. 702 (1997).

<sup>42</sup> September 5, 2018 p.m. (See Appendix at A-18).

<sup>43</sup> *From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist* at the American Enterprise Institute at 16 (Sept. 18, 2017), <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.

<sup>44</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598, 2602 (2015).

<sup>45</sup> September 6, 2018 p.m. (See Appendix at A-18, A-19).

<sup>46</sup> *Nomination of Elena Kagan to be Associate Justice of the Supreme Court of the United States: Responses to Supplemental Questions from Senators Jeff Sessions, Orrin Hatch, Charles Grassley, Jon Kyl, Lindsey Graham, John Cornyn, and Tom Coburn* (July 2, 2010), <https://www.judiciary.senate.gov/imo/media/doc/ElenaKagan-QFRs.pdf>.

<sup>47</sup> *From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist* at the American Enterprise Institute at 5 (Sept. 18, 2017), <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.

<sup>48</sup> September 6, 2018 p.m. (See Appendix at A-18).

<sup>49</sup> *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) (“[T]he asserted right to an abortion is not so rooted in the traditions and conscience of our people as to be ranked as fundamental”).

## **Conclusion**

Judge Kavanaugh's writings, speeches, opinions, and testimony evince a judicial philosophy fundamentally hostile to the protection of reproductive rights under the U.S. Constitution. All Senators who care about ensuring that the Supreme Court uphold the constitutional protections for women's reproductive rights should oppose his confirmation.

**APPENDIX:  
SUMMARY OF JUDGE KAVANAUGH’S TESTIMONY  
RELATED TO REPRODUCTIVE RIGHTS<sup>50</sup>**

**The right to abortion under *Roe v. Wade* and its progeny**

SENATOR FEINSTEIN: Let me give you a couple of other quotes, because I’m going to change the subject. Do you agree with Justice O’Connor, that a woman’s right to control her reproductive life impacts her ability to, quote, “participate equally in the economic and social life of the nation,” end quote?

JUDGE KAVANAUGH: Well, as a general proposition, I understand the importance of the precedent set forth in *Roe v. Wade*. So *Roe v. Wade* held, of course, and it reaffirmed in *Planned Parenthood v. Casey*, that a woman has a constitutional right to obtain an abortion before viability subject to reasonable regulation by the state up to the point where that regulation constitutes an undue burden on the woman’s right to obtain an abortion.

(September 5, 2018 a.m.)

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SENATOR FEINSTEIN: It’s been reported that you have said *Roe* is now settled law. The first question I have of you is what do you mean by settled law? I tried to ask earlier do you believe that it’s correct law? Have your views on whether *Roe* is settled precedent or could be overturned, and has your views changed since you were in the Bush White House?

JUDGE KAVANAUGH: Senator, I said that it’s settled as a precedent of the Supreme Court entitled the respect under principles stare decisis. And one of the important things to keep in mind about *Roe v. Wade* is that it has been reaffirmed many times over the past 45 years, as you know, and most prominently, most importantly reaffirmed in *Planned Parenthood v. Casey* in 1992.

(September 5, 2018 a.m.)

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SENATOR FEINSTEIN: But I want to switch subjects and one last question. What would you say your position today is on a woman’s right to choose?

JUDGE KAVANAUGH: As a judge...

SENATOR FEINSTEIN: As a judge.

JUDGE KAVANAUGH: As a judge, it is an important precedent of the Supreme Court. By it I mean *Roe v. Wade* and *Planned Parenthood v. Casey*; been reaffirmed many times. *Casey* is

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<sup>50</sup> These excerpts are from transcripts published by Bloomberg Government as of September 8, 2018, available at <https://www.bgov.com/core/search/transcripts/> (subscription required).

precedent on precedent, which itself is an important factor to remember. And I understand the significance of the issue, the jurisprudential issue and I understand the significance, as best I can -- I always try and I do here -- of the real world effects of that decision, as I try to do of all the decisions of my court and of the Supreme Court.

(September 5, 2018 a.m.)

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SENATOR GRAHAM: Yeah. Can you, in 30 seconds, give me the general holding of *Roe v. Wade*?

JUDGE KAVANAUGH: As elaborated upon in *Planned Parenthood vs. Casey*, a woman has a Constitutional right, as interpreted by the Supreme Court, in the Constitution to obtain an abortion up to the point of viability, subject to reasonable regulations by the state, so long as those reasonable regulations do not constitute an undue burden on the woman's right.

SENATOR GRAHAM: OK. As to how the system works, can you sit down with five -- you and four other judges, and overrule *Roe v. Wade* just because you want to?

JUDGE KAVANAUGH: Senator, *Roe v. Wade*'s an important precedent of the Supreme Court; been reaffirmed...

(September 5, 2018 a.m.)

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SENATOR GRAHAM: When it comes to overruling a long-standing precedent of the court, is there a formula that you use?

[. . .]

JUDGE KAVANAUGH: So first of all, you start with the notion of precedent and as I've said to Senator Feinstein in this context, this is a precedent that's been re-affirmed many times over 45 years, including in *Planned Parenthood v. Casey*, where they specifically consider whether to overrule and reaffirmed and applied all of the stare decisis factors that importantly became precedent on precedent in this -- this context.

But you look at -- there are factors you look at whenever you are considering any precedent.

(September 5, 2018 a.m.)

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SENATOR BLUMENTHAL: Well, let me just ask you then, can you commit, sitting here today, that you would never overturn *Roe v. Wade*?

JUDGE KAVANAUGH: So Senator, each of the eight justices currently on the Supreme Court, when they were in this seat, declined to answer that question.

(September 5, 2018 p.m.)

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SENATOR HARRIS: Do you believe the right to privacy protects a woman's choice to terminate a pregnancy?

JUDGE KAVANAUGH: That is a question that, of course, implicates *Roe v. Wade*. And following the lead of the nominees for the Supreme Court, all eight current -- sitting justices of the Supreme Court have recognized that two principles that are important. One, we shouldn't talk about in this position cases or issues that are likely to come before the Supreme Court or could come before the Supreme Court. And secondly, I think Justice Kagan provided the best articulation of commenting on precedent. She said we shouldn't give a thumbs up or thumbs down.

SENATOR HARRIS: I appreciate that. And I did hear you make reference to that, that perspective earlier. But you also, I'm sure, know that Justice Ginsburg at her confirmation hearing said, quote, this is -- on this topic of *Roe* -- quote, "This is something central to a woman's life, to her dignity. It's a decision she must make for herself. And when government controls that decision for her, she's being treated as less than a fully adult human responsible for her own choices." Do you agree with the statement that Justice Ginsburg made?

JUDGE KAVANAUGH: So Justice Ginsburg I think there was talking about something she had previously written about *Roe v. Wade*. The other seven justices currently on the Supreme Court have been asked about that and have respectfully declined to answer about that or many other preferences, all the -- whether it was Justice Marshall about *Miranda* or about *Heller* or *Citizens United*.

[. . .]

SENATOR HARRIS: No, I appreciate that. But on -- but I'm glad you mentioned that Justice Ginsburg had written about it before, because you also have written about *Roe* when you praised Justice Rehnquist's *Roe* dissent. So in that way, you and Justice Ginsburg are actually quite similar, that you both have previously written about *Roe*.

So my question is, do you agree with her statement? Or in the alternative, can you respond to the question of whether you believe a right to privacy protects a woman's choice to terminate her pregnancy?

JUDGE KAVANAUGH: So I have not articulated a position on that. And consistent with the principle articulated, the nominee precedent that I feel duty-bound to follow as a matter of judicial independence, none of the seven other justices of -- when they were nominees -- have talked about that, nor about *Heller*, nor about *Citizens United*, nor about *Lopez v. United States*, Thurgood Marshall, about *Miranda*, Justice Brennan asked about...

SENATOR HARRIS: Respectfully judge, as it relates to this hearing, you're not answering that question, and we can move on.

Can you think of any laws that give government the power to make decisions about the male body?

JUDGE KAVANAUGH: I'm happy to answer a more specific question. But...

SENATOR HARRIS: Male versus female.

JUDGE KAVANAUGH: There are medical procedures.

SENATOR HARRIS: That the government -- that the government has the power to make a decision about a man's body?

JUDGE KAVANAUGH: Thought you were asking about medical procedures that are unique to men.

SENATOR HARRIS: I'll repeat the question. Can you think of any laws that give the government the power to make decisions about the male body?

JUDGE KAVANAUGH: I'm not -- I'm not -- I'm not thinking of any right now, Senator.

SENATOR HARRIS: When referring to cases as settled law, you have described them as precedent and, quote, "precedent on precedent." You've mentioned that a number of times today and through the course of the hearing. As a factual matter, can five Supreme Court justices overturn any precedent at any time if a case comes before them on that issue?

JUDGE KAVANAUGH: You start with the system of precedent that's rooted in the Constitution.

SENATOR HARRIS: I know, but just as a factual matter, five justices, if an agreement can overturn any precedent, wouldn't you agree?

JUDGE KAVANAUGH: Senator, there's a reason why the Supreme Court doesn't do that.

SENATOR HARRIS: But do you agree that it can do that?

JUDGE KAVANAUGH: Well, it has overruled precedent at various times in our history, the most prominent example being *Brown v. Board of Education*, the *Erie* case, which overruled *Swift v. Tyson*. There are tons.

SENATOR HARRIS: So we both agree. We both agree the court has done it and can do it.

JUDGE KAVANAUGH: There are times, but there's a series of conditions, important conditions that, if faithfully applied, make it rare. And the system of precedents rooted in the Constitution, it's not a matter of policy to be discarded at whim.

(September 5, 2018 p.m.)

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SENATOR FEINSTEIN: During your service at the White House, . . . 2001 to 2006, did you work on any issues related to women's reproductive health or choice?

JUDGE KAVANAUGH: There -- President Bush was a pro-life president. And so, his policy was pro-life, and those who worked for him, therefore, had to assist him, of course, in pursuing those policies whether they were regulatory. There was partial birth legislation that was passed as well.

And some of those things might have crossed my desk.

(September 6, 2018 a.m.)

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SENATOR GRAHAM: Now, there are a lot of people that like it, a lot of people don't. It's an emotional debate in the country. The -- is there anything in the Constitution about a right to abortion, is anything written in the document?

JUDGE KAVANAUGH: Senator, the Supreme Court has recognized to right to abortion since the 1973 *Roe v. Wade* case...

[ . . . ]

SENATOR GRAHAM: ... but my question is, did they find a phrase in the Constitution that said that the state cannot interfere with a woman's right to choose until medical viability occurs? Is that in the Constitution?

JUDGE KAVANAUGH: The Supreme Court applying the liberty...

SENATOR GRAHAM: It's a pretty simple, no, it's not, Senator Graham.

JUDGE KAVANAUGH: ... Well, the - I want to just be...

SENATOR GRAHAM: But those words.

JUDGE KAVANAUGH: ... I want to be very careful because this is a...

SENATOR GRAHAM: OK.

JUDGE KAVANAUGH: ... topic, on which...

SENATOR GRAHAM: No, if you'll just follow me, I'll let you talk. But the point is, will you tell me, yes or no, is there anything in the document itself talking about limiting the state's ability to protect the unborn before viability? Is there any phrase in the Constitution about abortion?

JUDGE KAVANAUGH: The Supreme Court has found it under the liberty clause, but you're right that specific...

SENATOR GRAHAM: Was there anything in the liberty clause talking about abortion?

JUDGE KAVANAUGH: ... The liberty clause refers to liberty, but not --

SENATOR GRAHAM: OK. Well, the last time I checked, liberty...

JUDGE KAVANAUGH: Yes.

SENATOR GRAHAM: ... didn't equate to abortion, I - the Supreme Court said it did. But here's the point, what are the limits on this concept? You had five, six, seven, eight or nine judges. What are the limits on the ability of the court to find a penumbra of rights that apply to a particular situation?

What are the checks and balances of the people in your business? If you can find five people who agree with you to confer a right, whether the public likes it or not, based on this concept on a penumbra of rights? What are the outer limits to this?

JUDGE KAVANAUGH: The Supreme Court in the *Glucksberg* case, which was in the late '90s -- and, Justice Kagan talked about this at her hearing -- is the -- the test that the Supreme Court uses to find unenumerated rights under the liberty clause of the Due Process Clause of the 14th Amendment. And that refers to rights rooted in the history and tradition of the -- of the country, so as to prevent...

SENATOR GRAHAM: So let me ask you this. Is there any right rooted into history and traditions of the country, where legislative bodies could not intercede on the behalf of the unborn before medical viability? Is that part of our history?

JUDGE KAVANAUGH: The Supreme Court precedent has recognized the right to abortion. I'm...

SENATOR GRAHAM: I'm just saying, what part of the history of our -- I don't think our founding fathers -- people mentioned our founding fathers, I don't remember that being part of American history. So how did the court determine that it was?

JUDGE KAVANAUGH: The court applied the precedent that existed. And found, in 1973, that under the liberty clause...

SENATOR GRAHAM: Yes, but before 1970 -- I mean, when you talk about the history of the United States, the court has found that part of our history is for the legislative bodies not to have a say about protecting the unborn until medical viability.

I don't - I haven't - whether you agree with it or not, I don't think that's part of our history. So fill in the blank. What are the limits of people in your business applying that concept to almost anything that you think to be liberty?

JUDGE KAVANAUGH: And that -- that is the concern that some have expressed about the concept of unenumerated rights.

(September 6, 2018 a.m.)

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SENATOR HARRIS: In 2016, *Whole Woman's Health* was decided wherein the Supreme Court invalidated the Texas restrictions. Was *Whole Woman's Health* correctly decided, yes or no? And we can keep it short and move on.

JUDGE KAVANAUGH: Senator, consistent with the approach of nominee...

SENATOR HARRIS: You will not be answering that.

JUDGE KAVANAUGH: ... following that nominee precedent.

SENATOR HARRIS: OK. I'd like to ask you another question, which I believe you can answer. You've said repeatedly that *Roe v. Wade* is an important precedent. I'd like to understand what that really means for the lives of women. We've had a lot of conversations about how the discussion we're having in this room will impact real people out there.

And so my question is what, in your opinion, is still unresolved? For example, can a state prevent a woman from using the most common or widely accepted medical procedure determining her pregnancy? Do you believe that that is still an unresolved issue? I'm not asking how you would decide it.

JUDGE KAVANAUGH: So I don't want to comment on hypothetical cases. *Roe v. Wade* is an important precedent. It has been reaffirmed many times.

SENATOR HARRIS: So are you willing to say that it would be unconstitutional for a state to play such a restriction on women...

JUDGE KAVANAUGH: Senator...

SENATOR HARRIS: ... per *Roe v. Wade*?

JUDGE KAVANAUGH: ... you can -- the process in the Supreme Court was -- *Roe* was reaffirmed in *Parenthood v. Casey*, of course, and that's precedent on precedent. And there are a lot of cases applying the undue burden standard. And -- and those themselves are important precedence, and I had to apply them.

[. . .]

SENATOR HARRIS: Can Congress ban abortions nationwide after 20 weeks of pregnancy?

JUDGE KAVANAUGH: Senator, that's -- it would require me to comment on potential legislation that I understand, and therefore I -- I shouldn't -- as a matter of judicial independence following the precedent of the other [nominees] . . .

(September 6, 2018 p.m.)

**Judge Kavanaugh's 2003 email that not all legal scholars view *Roe* as "settled law"**

SENATOR FEINSTEIN: Have your views about whether *Roe* is settled precedent changed since you were in the Bush White House?

[ . . . ]

JUDGE KAVANAUGH: Well, I'll tell you what my views -- I'm not sure what it's referring to about Bush White House, but I will tell you what my view right now is. Which is it's important precedent Supreme Court that's been reaffirmed many times, but then *Planned* -- and this is the point I want to make that I think is important. *Planned Parenthood v. Casey* reaffirmed *Roe* and did so by considering the stare decisis factors. So *Casey* now becomes a precedent on precedent.

It's not as if it's just a run-of-the-mill case that was decided and never been reconsidered, but *Casey* specifically reconsidered it, applied the stare decisis factors and decided to reaffirm it. That makes *Casey* a precedent on precedent. Another example of that -- because you might say there are other cases like that -- is *Miranda*.

So *Miranda*'s reaffirmed a lot but then in the *Dickerson* case in 2000, Chief Justice Rehnquist writes the opinion, considering the stare decisis factors and reaffirming *Miranda*, even though Chief Justice Rehnquist, by the way, had been a fervent critic of *Miranda* throughout his career, he decided that it had been settled too long, had been precedent too long and he reaffirmed it.

(September 5, 2018 a.m.)

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SENATOR BLUMENTHAL: Is it a fact, judge, also that while you were in the Bush White House, you took the position that not all legal scholars actually believe that *Roe v. Wade* is the settled law of the land and that the Supreme Court could always overturn it as precedent -- and in fact there were a number of justices who would do so?

JUDGE KAVANAUGH: I think that's what legal scholars have -- some -- some legal scholars have undoubtedly said things like that over time, but that -- that's different from what I as a judge -- my position as a judge is that there's 45 years of precedent and there's *Planned Parenthood v. Casey*, which reaffirmed *Roe*. So that's precedent on precedent, as I've explained, and that's important. And that's an important precedent to the Supreme Court.

(September 5, 2018 p.m.)

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**Note:** The email that Senator Blumenthal referenced in his 9/5 questioning was released on 9/6. Commenting on a draft op-ed in support of then-nominee to the Fifth Circuit Priscilla Owen, Kavanaugh wrote in the 2003 email: "I am not sure that all legal scholars refer to *Roe* as the settled law of the land at the Supreme Court level since Court can always overrule its precedent, and three current Justices on the Court would do so."

SENATOR FEINSTEIN: Thank you, Mr. Chairman. I'm going to go back to *Roe*, because most of us look at you as the deciding vote. And I asked yesterday if your views on *Roe* have changed since you were in the White House.

You said something to the effect that you didn't know what I meant. And we have an e-mail that was previously marked confidential but is now public and shows that you asked about making edits to an op-ed that read the following, and I quote, "first of all it is widely understood, accepted by legal scholars across the board, that *Roe v. Wade* and its progeny are the settled law of the land", end quote.

You responded by saying, and I quote, "I'm not sure that all legal scholars refer to *Roe* as a settled law of the land at the Supreme Court level, since court can always overrule its precedent. And three current justices on the court would do so."

This has been viewed as you saying that you don't think *Roe* is settled. I recognize the words said is what legal scholars refer to, so please, once again, tell us why you believe *Roe* is settled law and if you could, do you believe it is correctly settled?

JUDGE KAVANAUGH: So thank you, Senator Feinstein, in that draft letter, it was referring to the views of legal scholars and I think I -- I think my comment in the e-mail was that might be overstating the position of legal scholars and so it wasn't a technically accurate description in the letter of what legal scholars thought. At that time, I believe, Chief Justice Rehnquist and Justice Scalia were still on the court at that time.

But the -- the broader points was simply that I think it was overstating something about legal scholars. And I'm always concerned with accuracy and I thought that was not quite accurate description of legal -- all legal scholars, because it referred to all. To your point, your broader point, *Roe v. Wade* is an important precedent of the Supreme Court.

(September 6, 2018 a.m.)

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SENATOR HATCH: Well, I -- I want to return to the e-mail Senator Feinstein was asking you about. You were asked for your comments on an op-ed that was going to be published by a group of pro-choice women in support of a circuit court nominee. You said, quote, "I am not sure that all legal scholars refer to *Roe* as the settled law of the land at the Supreme Court level since court can always overrule its precedent," unquote. You then added, quote, "the point there is in the inferior court point," unquote.

Were you giving your opinion on *Roe* there or were you talking about what law scholars might say?

JUDGE KAVANAUGH: I was talking about what legal scholars might say, and I thought the op-ed should be accurate about what -- in describing legal scholars.

(September 6, 2018 a.m.)

**Judge Kavanaugh's dissent in *Garza v. Hargan***

SENATOR DURBIN: In your dissent in *Garza v. Hargan*, you wrote that the court had created, quote, “a new right for unlawful immigrant minors in the United States 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.”

[. . .]

Do you believe that this was an abortion on demand?

JUDGE KAVANAUGH: Senator, the *Garza* case involved first and foremost a minor; it's important to emphasize it was a minor.

SENATOR DURBIN: Yes.

JUDGE KAVANAUGH: So she had been -- and she's in an immigration facility in the United States. She's from another country, she does not speak English, she's -- and she's by herself. If she had been an adult, she would have a right to obtain the abortion immediately.

As a minor, the government argued that it was proper or appropriate to transfer her quickly first to an immigration sponsor. Who is an immigration sponsor, you ask? It is a family member or friend who she would not be forced to talk to, but she could consult with if she wanted about the decision facing her.

So we had to analyze this first as a minor and then for me, the first question was, what's the precedent? The precedent on point from the Supreme Court is there is no case on exact point, so you do what you do in all cases -- you reason by analogy from the closest thing on point.

What's the closest body of law on point? The parental consent decisions of the Supreme Court, where they've repeatedly upheld parental consent laws over the objection of dissenters who thought that's going to delay the procedure too long, up to several weeks.

[. . .]

SENATOR DURBIN: Judge -- well, I -- before you get to the point, you've just bypassed something. You just bypassed the judicial bypass, which she received from the state of Texas when it came to parental consent. That's already happened here.

JUDGE KAVANAUGH: But that -- that...

SENATOR DURBIN: And you're still stopping her.

JUDGE KAVANAUGH: I -- I -- I'm not. The -- the government is arguing that placing her with an immigration sponsor would allow her, if she wished, to consult with someone about the decision. That is not the purpose of the state bypass procedure, so I just want to be very clear about that.

SENATOR DURBIN: But Judge, the clock is ticking.

JUDGE KAVANAUGH: It is.

SENATOR DURBIN: The clock is ticking. A 20 week clock is ticking.

JUDGE KAVANAUGH: And I...

SENATOR DURBIN: She made the decision early in the pregnancy, and all that I've described to you and the judicial decisions, the clock is ticking. And you are suggesting that she should've waited to have a sponsor appointed who she may or may not have consulted in making this decision.

JUDGE KAVANAUGH: Again, this is -- I'm a Judge; I'm not making the policy decision. My job is to decide whether that policy is consistent with law. What do I do? I look at precedent, and the most analogous precedent is the parental consent precedent.

From *Casey* has this phrase, so page 895 -- "minors benefit from consultation about abortion" -- it's a quote, talking about consultation with parents.

(September 5, 2018 p.m.)

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SENATOR BLUMENTHAL: [Your *Garza* dissent] would have delayed [Jane's abortion], and it would have set it perilously close to the 20-week limit under Texas law, correct?

JUDGE KAVANAUGH: No. We were still several weeks away. I said several things that are important, I think.

[. . .]

I was trying to follow precedent of the supreme court on parental consent, which allows some delays in the abortion procedure, so as to fulfill the consent -- parental consent requirements. I was reasoning by analogy from those. People can disagree, I understand, on whether we were following precedent, you know, how to read that precedent, but I was trying to do so as faithfully as I could and explain that.

(September 5, 2018 p.m.)

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SENATOR BLUMENTHAL: Well, let's talk about the dissent though. In that dissent, three times you used the term, abortion on demand. Abortion on demand, as you know, is a code word in the anti-choice community.

In fact, it's used by Justices Scalia and Thomas in their dissents from Supreme Court opinions that affirm *Roe v. Wade*. They used it numerous times in those dissents and it is a word used in the antichoice community.

And in addition in that dissent, you refer to *Roe v. Wade* as existing Supreme Court precedent. You don't refer to it as *Roe v. Wade* protecting Jane Doe's right to privacy or the right to an abortion. You refer to it as existing Supreme Court precedent. Not Supreme Court precedent, existing Supreme Court precedent.

Now, I don't refer -- I don't recall seeing a judge refer to existing Supreme Court precedent in other decisions, this is certainly not commonly unless they're opening the possibility of overturning that precedent. It's a little bit like somebody introducing his wife to you as my current wife; you might not expect that wife to be around for all that long. My current wife, existing Supreme Court precedent.

JUDGE KAVANAUGH: [. . .] I was referring to the parental consent cases as well, which I just talked about at some length there, and my disagreement with the other judge was that I thought I was, as best I could, faithfully following the precedent on a parental consent statutes, which allowed reasonable regulation, as *Casey* said, minors benefit from consultation about abortion, that's an exact quote from *Casey*. [. . .] And so an existing Supreme Court precedent, I put it all together, *Roe v. Wade*, plus the parental consent statutes. And I said, different people disagree about this from different direction, but we have to follow it as faithfully as possible, and the parental consent, were the -- was the model -- not the model, the precedent.

Can I say on abortion on demand, I don't -- I'm not familiar with the codeword, what I am familiar with is Chief Justice Burger and his concurrence on *Roe v. Wade* itself. So he joined the majority in *Roe v. Wade*, and he wrote a concurrence that specifically said that the court to date does not uphold abortion on demand, that's his phrase, and he joined the majority in *Roe v. Wade*. And what that meant in practice over the years, over the last 45 years is that reasonable regulations are permissible, so long as they don't constitute an undue burden, and that's then the parental consent, the informed consent, the 24 hour waiting period, parental notice laws. And that's what I understood Chief Justice Burger to be contemplating and what I was recognizing when I used that term.

[. . .]

I'll just say two other things, Senator? One, I did not join the separate opinion of another dissenter who said that there was no constitutional right at all for the minor in that case; I did not join that opinion. And secondly I -- or I'll say three things -- secondly, I said in a footnote, joined by Judge Henderson and Judge Griffith that -- the whole -- my whole dissent was joined by both of them -- that the government could not use this transfer to be a sponsor procedure as a ruse to delay the abortion past unsafe time...

[. . .]

And I said thirdly that if the nine days or seven days expired, that the minor, at that point, unless the government had some other argument it had not unfolded yet that was persuasive and I -- since they hadn't unfolded it yet, I'm not sure what that would have been, that the minor would have to be allowed to obtain the abortion at that time.

So the whole point was simply -- and it wasn't my policy, but my question was to review the policy set forth by the government. And the question was was that policy consistent with precedent. And it was a delay, undoubtedly, but a delay consistent as I saw it with the Supreme Court precedent on parental consent provisions.

(September 5, 2018 p.m.)

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SENATOR HIRONO: Does the fact that you didn't join [Judge Henderson's dissent] mean that undocumented persons do have a constitutional right to an abortion?

JUDGE KAVANAUGH: Well, I decided that case based on the precedent of the Supreme Court and the arguments that were presented in the case. I made clear that I was following as carefully as I could the precedent.

[. . .]

SENATOR HIRONO: Since you've mentioned several times that you did not join the dissent and the crux of the dissent was that there was no constitutional right for an alien minor to have an abortion. I want to ask you did you join or did you not join that consent because you disagree with that. That in fact alien minors do have a right to an abortion in our country.

JUDGE KAVANAUGH: Well as a general proposition -- first of all, the government did not argue in that case that aliens lack constitutional right generally to obtain an abortion.

SENATOR HIRONO: Yes, even they didn't argue it because probably they figured that that's -- that is a decided issue but maybe you don't think so. Do you think that is an open question as to whether or not alien minors or in fact, aliens in our country have a right to -- constitutional right to an abortion? Do you think that is an open case?

JUDGE KAVANAUGH: The Supreme Court has recognized that persons in the United States have constitutional rights.

(September 5, 2018 p.m.)

### The constitutional right to contraception

SENATOR HARRIS: Thank you. In *Griswold* and *Eisenstadt*, the Supreme Court said that states could not prohibit either married or unmarried people from using contraceptives. Do you believe *Griswold* and *Eisenstadt* were correctly decided?

JUDGE KAVANAUGH: So those cases followed from the Supreme Court's recognition of unenumerated rights in the *Pierce* and *Meyer* cases earlier. And so what those cases held is that there is a right of privacy...

SENATOR HARRIS: And do you agree -- do you personally agree that these cases, those two cases were correctly decided? So I'm asking not what the court held, but what you believe.

JUDGE KAVANAUGH: I mean, so I -- so to just go back to *Pierce* and *Meyer*, those cases recognized a right of privacy, the ability -- one might say family autonomy or privacy, is the term, under the liberty clause of the due process clause of the 14th Amendment.

SENATOR HARRIS: And with due respect then, Judge, I'm asking, do you agree that those cases were rightly decided, correctly decided?

JUDGE KAVANAUGH: So I think *Griswold* -- for -- so in *Griswold*, I think that Justice White's concurrence is a persuasive application, because that specifically rooted the *Griswold* result. In the *Pierce* and *Meyer* decisions, I thought that was a persuasive opinion and no...

SENATOR HARRIS: Do you believe that it's correctly decided?

JUDGE KAVANAUGH: No quarrel with that. It's...

SENATOR HARRIS: Do you believe it was correctly decided? Words matter. Again, words matter. Do you believe it was correctly decided?

JUDGE KAVANAUGH: I think -- given the *Pierce* and *Meyer* opinions, like I said, Justice White's concurrence in *Griswold* was a persuasive application of *Pierce* and *Meyer*. I have no quarrel with it. I...

SENATOR HARRIS: So there's a term that actually both Chief Justice Roberts and Justice Alito used, I believe, and affirmed in their confirmation hearings that these cases were correct. And so I'm asking you the same question. Are you willing in this confirmation hearing to agree that those cases were correctly decided?

JUDGE KAVANAUGH: Given the precedent of *Pierce* and *Meyer*, I agree with Chief -- Justice Alito and Chief Justice Roberts, what they said.

SENATOR HARRIS: That it was correctly decided?

JUDGE KAVANAUGH: That's what they said.

(September 5, 2018 p.m.)

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SENATOR COONS: And here's the most important thing about Justice Kagan's jurisprudence, she did not apply the *Glucksberg* test in *U.S. v. Windsor*, in *Obergefell* or *Whole Woman's Health*.

So, the question I want to get to is what would it mean to go and apply this test in a range of setting? So, first, is judicial protection of the fundamental right to access and use contraception consistent with the *Glucksberg* test? Just simply yes or no question, Judge.

JUDGE KAVANAUGH: I disagree that it's a simple yes or no question. What I've said here is that the precedent of the Supreme Court on that question, what Justice Alito and Chief Justice Roberts said about those . . . , Justice White's concurrence in *Griswold* as first way of application of precedent.

(September 6, 2018 p.m.)

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SENATOR CRUZ: Another case you were involved in as a judge is you wrote a dissent from denial of rehearing en banc in -- in the *Priests for Life* case. Can you tell this committee about that case and your opinion there?

JUDGE KAVANAUGH: That was a group that was being forced to provide a certain kind of health coverage over their religious objection to their employees, and under the Religious Freedom Restoration Act, the question was first, was this a substantial burden on the religious exercise? And it seemed to me quite clearly it was. It was a technical matter of filling out a form, in that case with -- that -- they said filling out the form would make them complicit in the provision of the abortion-inducing drugs that they were -- as a religious matter, objected to.

The second question was did the government have a compelling interest nonetheless in providing the coverage to the employees and applying the governing Supreme Court precedent from *Hobby Lobby* I said that the answer to that was yes, the government did have a compelling interest, following Justice Kennedy's opinion in *Hobby Lobby*. He said the government did have a compelling interest in ensuring access.

(September 6, 2018 p.m.)

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SENATOR HIRONO: In recent years, a wide range of individuals and institutions have received special dispensation to impose their beliefs on others. And of course, most notably, this is the *Hobby Lobby v. Burwell* case. So a case that raised those kinds of issues came before you in the *Priests for Life*.

[. . .]

So my question to you is, do you believe that the freedom of religion cause - supersedes other rights?

JUDGE KAVANAUGH: No, Senator, I made on that decision, that the Religious Freedom Restoration Act has a three-part test. For a substantial burden, I found that satisfied there based on the *Hobby Lobby* precedent which I was bound to follow, in the *Wheaton College*.

Second, compelling interests - I did find a compelling interest there for the government, in ensuring access. [. . .]

SENATOR HIRONO: Let me get to the first problem which is - whether this was unduly burdensome. So you determined that filling out a two-page form was unduly burdensome, did you not?

JUDGE KAVANAUGH: I concluded that penalizing someone thousands and thousands of dollars for failing to fill a form, when they didn't fill it out because of their religious beliefs, was [a substantial burden].

(September 6, 2018 p.m.)

### **Judge Kavanaugh's judicial philosophy regarding individual liberty**

SENATOR LEE: How does textualism relate to or differ from originalism?

JUDGE KAVANAUGH: So originalism, as I see it, has, to my mind, means in essence constitutional textualism, meaning the original public meaning of the constitutional text. Now originalism -- it's very careful when you talk about originalism to understand that people are hearing different things sometimes.

So Justice Kagan, again at her -- at her confirmation hearing said we're all originalists now, which was her comment. By that she meant the precise texts to the constitution matters, and by that the original public meaning, of course informed by history and tradition and precedent, those -- those matter as well.

(September 5, 2018 p.m.)

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SENATOR CRUZ: What you make of the ninth amendment? Robert Bork famously described it as an -- as an ink blot. Do you share that assessment?

JUDGE KAVANAUGH: So I think the Ninth Amendment and the privileges and immunities clause and the Supreme Court's doctrine of substantive due process are three roads that someone might take that all really lead to the same destination under the precedent of the Supreme Court now, which is that the Supreme Court precedent protects certain unenumerated rights so long as the rights are, as the Supreme Court said in the *Glucksberg* case, rooted in history and tradition.

And Justice Kagan explained this well in her confirmation hearing, that the *Glucksberg* test is -- is quite important for allowing that protection of unenumerated rights that are rooted in history and tradition, which the precedent definitely establishes, but at the same time making clear that when doing that, judges aren't just enacting their own policy preferences into the Constitution.

And an example of that is the old *Pierce* case where Oregon passed a law that said everyone in the state of -- this is in the 1920s -- everyone in the state of Oregon had to attend -- every student had to attend a public school. And a challenge was brought by that by parents who wanted to send their children to a parochial school, a religious school. And the Supreme Court ultimately upheld the rights of the parents to send their children to a religious parochial school and struck down that Oregon law.

And that's of the foundations of the unenumerated rights doctrine that's folded into the *Glucksberg* Test and rooted in history and tradition. So how you get there is -- as you know well, Senator, there are stacks of law reviews written to the ceiling on all that. Whether it's privileges and immunities, substantive due process, or Ninth Amendment. But I think all roads lead to the *Glucksberg* test as the test that the Supreme Court has settled on as the proper test.

(September 5, 2018 p.m.)

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SENATOR HIRONO: In 2017 you gave a tribute to the late Chief Justice William Rehnquist. You explained that you chose the topic because it pains me -- you -- that many young lawyers and law students, even Federalist Society-types have little or no sense of the jurisprudence and importance of William Rehnquist to modern constitutional law.

And then they -- you went on -- they do not know about his role in turning the Supreme Court away from its 1960s Warren Court approach where the court in some cases has seemed to be simply enshrining its policy views in to the Constitution, or so the critics charged. And then you praised Chief Justice Rehnquist because he righted the ship of constitutional jurisdiction.

What decisions of the Warren Court were you referring to as simply enshrining its policy views in to the Constitution? Were you thinking about *Brown*? Were you think about *Loving*? Were you thinking about any of the Warren Court decisions that created rights for individuals? Privacy rights?

There's a whole array, so which were the Warren Court decisions that you thought needed to be righted by the Rehnquist court?

JUDGE KAVANAUGH: ... I -- and I said, or so the critics charged. I identified the areas where Chief Justice Rehnquist had helped the court, I think, reach consensus or maybe a middle ground on areas such as criminal procedure, that is -- religion clause cases, and identified all those in the speeches. When he -- when he passed away, and even before he passed away many of the justices who worked with him were very much praiseworthy of Chief Justice Rehnquist for fiercely defending the independence of the judiciary...

SENATOR HIRONO: I'd really be interested to know the particular cases that you're referring to -- not general kinds of cases -- particular cases.

JUDGE KAVANAUGH: I think I referred to them in the speech, but thank you, Senator.

(September 6, 2018 p.m.)

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SENATOR KENNEDY: Can you tell me what in God's name a penumbra is?

JUDGE KAVANAUGH: Senator, the -- the Supreme Court, as I think you're referring to, once used that term, but it -- it doesn't use that term anymore for figuring out what otherwise unenumerated rights are protected by the Constitution of the United States. What it refers to now is a test in the *Glucksberg* case -- and Justice Kagan talked about this in her confirmation hearing when she was sitting in this seat -- the *Glucksberg* case sets forth a test where unenumerated rights will be recognized if they're rooted in history and tradition.

[. . .]

SENATOR KENNEDY: Is it a -- is it -- is it something that Americans have cherished for a long time, or can it be something that is a -- is a -- is a more of contemporary society?

JUDGE KAVANAUGH: So when the court has referred to deeply rooted in history and tradition, it is -- it has looked to history. Now, how deep the history must be is -- there -- I don't think there's a one-size-fits-all answer to that, and how much contemporary practice matters, I also don't think there's a one-size-fits-all, but the important thing is the court -- and again, Justice Kagan emphasized this in her hearing, that the *Glucksberg* test means that the court is not simply doing what your role is, which is to figure out the best policy and to enshrine it into the law, in the Constitution, in the case of the court, but rather is looking for, as best it can, objective indicia of rights that are not explicitly enumerated in the Constitution but that are nonetheless protected. The best example I think is the *Pierce* case.

(September 6, 2018 p.m.)

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SENATOR HARRIS: So, what we're talking about is the right to vote. That's an unenumerated right. The right to have children, the right to control the upbringing of your children, the right to refuse medical care, the right to love the partner of your choice, the right to marry, and the right to have an abortion.

Now, putting those unenumerated rights in the context of the statement you made, which was to praise the stemming of the general tide of freewheeling creation of unenumerated rights, which means you were -- the interpretation there is you were praising the -- the -- the quest to end those unenumerated rights. My question to you is which of the rights that I just mentioned do you want to put an end to or roll back?

JUDGE KAVANAUGH: Three points, I believe, Senator. First, the constitution, it is in the book that I carry. The constitution protects unenumerated rights. That's what the Supreme Court has said.

SENATOR HARRIS: But that does not explicitly protect the rights that I just listed in. And we both know that that's the case.

JUDGE KAVANAUGH: Right, so that's point one. Point two *Glucksberg*, the case you're referring to, specifically cited *Planned Parenthood v. Casey* as authority in that case. So *Casey* reaffirmed *Roe*. *Casey* is cited as authority in *Glucksberg*. That's point two. And point three, Justice Kagan, when she sat in this chair, pointed repeatedly the *Glucksberg* as the test for recognizing unenumerated rights going forward. I -- in describing the precedent, I agree with her description of that in her hearing.

(September 6, 2018 p.m.)