CENTER FOR REPRODUCTIVE RIGHTS

Judge Kavanaugh and Reproductive Rights: A Fact Sheet

President Trump has vowed to nominate a Supreme Court justice who would overturn *Roe v. Wade*. As demonstrated below, we presume that with the nomination of Judge Brett Kavanaugh he has kept his promise, absent a clear and compelling statement from the nominee that he agrees with the rationale and premise of *Roe v. Wade* – that the right to abortion is among the Constitution's guaranteed personal liberty rights.

Just last year, Judge Kavanaugh voted to allow the federal government to block Jane Doe, an unaccompanied young immigrant woman, from getting an abortion.

- Sitting on a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit in *Garza v. Hargan*, Judge Kavanaugh signed an order that allowed the federal government to continue to block Jane Doe from accessing abortion – potentially indefinitely - even after she had completed a state judicial process that authorized her to consent to the abortion, and the government had already delayed her by almost a month.
- When the full Court of Appeals heard the case and reversed the panel, Judge Kavanaugh authored a dissent in which he used the incendiary phrase "abortion on demand" and accused the majority of creating a "new right," when in fact the Court was applying the undue burden standard to an egregiously unconstitutional policy, holding that it is "settled, binding Supreme Court precedent" that "[s]etting up substantial barriers to the woman's choice violates the Constitution."

Judge Kavanaugh gave broad leeway to employers with religious objections to covering birth control in their insurance plans, and would have struck down the Obama accommodation policy to preserve seamless contraception coverage for employees.

- Kavanaugh authored a lengthy dissent to the 2015 D.C. Circuit Court case, *Priests for Life v. United States Department of Health and Human Services*, which involved a challenge to the Affordable Care Act's contraception coverage accommodation.
- Breaking with the majority ruling, Judge Kavanaugh voted to invalidate the accommodation. He would have found the mere act of employers notifying their insurers of their objection to offering coverage to constitute a substantial burden on their religious beliefs; and thought the government could find a way to ensure birth control coverage while being even more accommodating to religious employers.

Judge Kavanaugh has questioned an individual's right to medical decision-making – a liberty right that is closely related to the right to abortion.

- Kavanaugh authored *Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376 (D.C. Cir. 2007), holding that the plaintiffs, women with intellectual disabilities, had no liberty right to medical decision-making rooted in their right to bodily integrity.
- In his decision, Judge Kavanaugh took a narrow approach to defining liberty, holding that the plaintiffs' right to express their wishes about whether to have surgery was not "deeply rooted in this

Nation's history and tradition" and "implicit in the concept of ordered liberty," and their claim was thus "meritless."

- Two of the plaintiffs had been forced to have abortions without any consideration of their wishes. Yet, in rejecting their claims, Kavanaugh did not address nor acknowledge in his opinion the nation's reprehensible history of government actions that deprive people with disabilities of their rights of reproductive autonomy and medical decision-making.
- Kavanaugh's opinion shows that a narrow approach to liberty impacts rights across the board: not just the right to abortion, but also the right to make decisions about family and the right to bodily integrity, protected by the 14th Amendment.

Judge Kavanaugh has identified then-Supreme Court Justice Rehnquist, one of only two justices who dissented in *Roe v. Wade*, as his "first judicial hero."

- In September 2017, speaking before the American Enterprise Institute, Judge Kavanaugh praised Justice Rehnquist's dissenting opinion in *Roe v. Wade*, in which Rehnquist wrote that the Constitution does not protect abortion as a fundamental right.
- Kavanaugh stated that while Justice Rehnquist could not convince a majority of the Court that his approach was correct in *Roe* or *Planned Parenthood v. Casey*, which later affirmed the Constitution protects abortion as a fundamental right, "he was successful in stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition."

As White House staff secretary, Brett Kavanaugh was one of the highest-ranking staffers in the George W. Bush administration and may have been closely involved in a number of statements, decisions, and matters impacting reproductive rights.

- Judge Kavanaugh has described his time as staff secretary as "among the most instructive" experiences to his work as a federal court judge.
- During Judge Kavanaugh's time at the White House, President Bush signed into law a federal ban on an abortion procedure.
- Key documents from Kavanaugh's time at the White House that could show how a Justice Kavanaugh would rule on abortion continue to be withheld from the confirmation process.

While *Roe* has been settled law for nearly half a century, Judge Kavanaugh has indicated that Supreme Court Justices have "flexibility" when it comes to the concept of *stare decisis*—the basic legal principle that courts should defer to earlier cases on similar issues.

- In a law review article, Kavanaugh acknowledged that courts retain power to overrule their own decisions, making a distinction between "horizontal stare decisis" (a court adhering to its own precedent) and "vertical stare decisis" (the obligation of courts to follow the ruling of courts above them, e.g., the Supreme Court), writing that the former is less binding.
- The Supreme Court has established an unbroken line of precedent – most recently in the 2016 case *Whole Woman's Health v. Hellerstedt* — that people have a constitutional right to decide to continue or to end a pregnancy.
- If appointed as a Supreme Court Justice, the future of a half -century of unbroken precedent will be put in the hands of a judge who has never written or spoken of his agreement with it and has the power to vote to overturn it.