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REPRODUCTIVE RIGHTS & HEALTH

JUDGE KAVANAUGH'S NOMINATION THREATENS THE AFFORDABLE CARE ACT AND WOMEN'S HEALTH CARE

On July 9, 2017, President Trump nominated Judge Brett Kavanaugh to fill Justice Kennedy's seat on the United States Supreme Court. Judge Kavanaugh currently sits on the U.S. Court of Appeals for the D.C. Circuit, where he has demonstrated hostility to reproductive rights and employment rights and a willingness to restrict students' rights in schools. The confirmation of Judge Kavanaugh would shift the balance of the Court against our core civil and constitutional rights.

The Affordable Care Act (ACA), and women's access to quality, affordable health care coverage is on the line with President Trump's nomination of Judge Kavanaugh to the United States Supreme Court.

Kavanaugh's Anti-ACA Record

President Trump made clear he would nominate only someone who would dismantle the ACA. Judge Kavanaugh expressed contempt for the Affordable Care Act in two ACA cases that came before him while on the D.C. Circuit.[1] While each case turned on procedural issues and Kavanaugh did not rule on the merits of the law in either case, he made his disdain for the law clear. Kavanaugh also criticized the ACA in speeches given just weeks before he landed on President Trump's short list of potential nominees. Some of Kavanaugh's former law clerks have made it clear that he fulfills Trump's anti-ACA litmus test. One wrote an article explaining how Kavanaugh's ACA decisions were a "roadmap" for those Supreme Court Justices who voted against the constitutionality of the ACA,[2] and another said, ". . . he left no doubt about where he stood. No other contender on President Trump's list is on record so vigorously criticizing the law."[3]

Cases Challenging the ACA Could Come Before the Supreme Court Soon

The threat to the ACA is not hypothetical. Those who want to overturn the ACA continue to bring court challenges. One case working its way through the courts was brought by Texas and 19 other states who argue that the health care law should be ruled invalid. The Trump Administration refused to defend the ACA, instead agreeing that key provisions, including the ones that protect individuals with pre-existing conditions, are unconstitutional. If this case works its way up to the Supreme Court, it could provide a newly constituted Court with the opportunity to undermine – or completely get rid of – the ACA. The health and economic security of women and families cannot be left in the hands of Brett Kavanaugh.

The ACA Has Done So Much for Women – Women's Health and Economic Security Are on the Line if Kavanaugh Joins the Court

The Affordable Care Act not only expanded health insurance coverage to millions of individuals who were previously uninsured, it changed the landscape for women's health insurance coverage and access.

For example, the ACA:

- *Stopped insurance companies from treating women as a pre-existing condition.* Prior to the ACA, insurance companies denied coverage to women based upon "pre-existing conditions," such as having had a cesarean delivery, a prior pregnancy, breast or cervical cancer or receiving medical treatment for domestic or sexual violence.[4]

- *Stopped insurance companies from charging women more.* Prior to the ACA, insurance companies charged women more than men for the same health coverage, which cost women $1 billion a year.[5]

- *Made sure insurance plans cover most of women's major health needs.* Prior to the ACA, many plans did not cover the major services women need, like maternity care.[6]

- *Reduced the rates of uninsured women in this country.* Prior to the ACA, far too many women – and especially women of color – did not have health insurance at all.[7]

The ACA ended these discriminatory practices and helped women get and afford health insurance, improving women's health and economic security. All of this is on the line with Kavanaugh's nomination.

1   *See Sissel v. U.S. Dep't of Health and Human Servs.*, 799 F.3d 1035 (2015); *Seven-Sky v. Holder*, 661 F.3d 1 (2011).

2   Justin Walker, *Brett Kavanaugh Said Obamacare Was Unprecedented And Unlawful*, The Federalist (July 3, 2018), https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful/.

3   Sarah E. Pitlyk, *Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism*, Nat'l Rev. (July 3, 2018), https://www.nationalreview.com/2018/07/judge-brett-kavanaughs-impeccable-record-of-constitutional-conservatism/.

4   *See* Brigette Courtot & Julia Kaye, *Still Nowhere to Turn: Insurance Companies Treat Women Like a Pre-Existing Condition*, Nat'l Women's Law Ctr. 1, 10 (2009), https://nwlc.org/wp-content/uploads/2015/08/stillnowheretoturn.pdf.

5   *See* Danielle Garrett, *Turning to Fairness: Insurance Discrimination against Women Today and the Affordable Care Act*, Nat'l Women's Law Ctr. 7 (Mar. 2012), http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf.

6   *See Women's Preventive Services in the Affordable Care Act: Frequently Asked Questions*, Nat'l Women's Law Ctr. (May 2013), https://nwlc.org/wp-content/uploads/2015/08/womens_prev_services_in_the_aca_faq_5-13-13.pdf; Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-13(a); Nora V. Becker & Daniel Polsky, *Women Saw Large Decrease in Out-of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing*, 34 Health Affairs 1204 (2015), *available at* http://content.healthaffairs.org/content/34/7/1204.abstract.

7   *See Women and the Health Care Law in the United States*, Nat'l Women's Law Ctr. (May 2013), http://nwlc.org/wp-content/ uploads/2015/08/us_healthstateprofiles.pdf (citing National Women's Law Center analysis of 2011 health insurance data from the U.S. Census Bureau Current Population Survey's (CPS) 2012 Annual Social and Economic Supplements, *available at* http://www.census.gov/hhes/www/ cpstc/cps_table_creator.html); National Women's Law Center analysis based on U.S. Census Bureau, Current Population Survey, 2016 Annual Social and Economic Supplements, *available at* http://www.census.gov/topics/income-poverty/poverty.html.