

**TESTIMONY OF MELISSA MURRAY  
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**BEFORE THE COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**HEARING ON THE NOMINATION OF BRETT KAVANAUGH TO  
THE SUPREME COURT OF THE UNITED STATES**

**SEPTEMBER 7, 2018**

Thank you very much for the opportunity to appear before you in these hearings on the nomination of Judge Brett Kavanaugh to the Supreme Court of the United States. My name is Melissa Murray. I am a Professor of Law at New York University School of Law, where I teach constitutional law, family law, and reproductive rights and justice and serve as a faculty co-director of the Birnbaum Women's Leadership Network. Prior to my appointment at New York University, I was the Alexander F. and May T. Morrison Professor of Law at the University of California, Berkeley, where I taught for twelve years and served as Faculty Director of the Berkeley Center on Reproductive Rights and Justice and as the Interim Dean of the law school.

As a number of women's rights and reproductive rights, health, and justice groups have argued, Judge Kavanaugh's nomination to the United States Supreme Court raises grave concerns for constitutional protections for women's reproductive decision-making, including the rights to birth control and abortion care.

Judge Kavanaugh has ruled repeatedly against women seeking to make their own reproductive health decisions. His record shows a cramped reading of the right to liberty and personal decision-making that distorts or ignores existing precedent. If Judge Kavanaugh were to join the Supreme Court, his record suggests that he would overturn or eviscerate these critical rights.

This threat is neither hyperbolic nor hypothetical. There are a number of cases concerning access to abortion and birth control in the pipeline to the Supreme Court. That should give pause to anyone who cares about a person's ability to decide fundamental decisions about their lives and future—and especially those who care about the least privileged among us, who have the most to lose if Judge Kavanaugh is confirmed to the Supreme Court.

**I. The Constitution's Protection of Personal Liberty, Including Access to Contraception and the Right to Abortion, is Central to Women's Dignity and Equality and to Other Important Rights.**

The Fourteenth Amendment guarantees all of us liberty and equality. These guarantees cannot exist without recognition of the dignity afforded every member of society as an autonomous individual. For that reason, the Constitution protects an individual's right to make certain personal decisions about intimacy, marriage, and procreation.

The Supreme Court has specifically recognized that a woman has the right to make her own decision about whether to have an abortion.<sup>1</sup> Indeed, according to the Court “[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy,

than a woman’s decision . . . whether to end her pregnancy.”<sup>2</sup> The exercise of this right without undue hindrance from the State is essential to her dignity as an individual and her status as an equal citizen.

A woman’s reproductive autonomy is rooted in the deeply personal nature of her decisions about bearing children and expanding her family. However, the decision of “whether to bear or beget a child” has ramifications beyond the home and family. As the Court has recognized, women’s ability “to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>3</sup>

The Supreme Court’s decision in *Roe v. Wade*, establishing the right to abortion, does not stand on its own; it is part of a line of cases solidifying and expanding the constitutional right to privacy and liberty to encompass personal decisions essential to an individual’s dignity and autonomy. These decisions include the right to contraception—first recognized in *Griswold v. Connecticut* (1965)<sup>4</sup>—and the right to procreate—first recognized in *Skinner v. Oklahoma*.<sup>5</sup> The Court relied on these core precedents in deciding *Roe v. Wade*, and in *Carey v. Population Services*, it relied on *Roe* in turn for its central holding that “the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.”<sup>6</sup>

Critically, the right to personal liberty is not limited to reproductive rights. It includes the right to marry, first recognized in *Loving v. Virginia*,<sup>7</sup> and reaffirmed in 2015 in *Obergefell v. Hodges*.<sup>8</sup> It includes the right of parents to direct the upbringing of their children, first recognized in two 1920s cases *Meyer v. Nebraska*<sup>9</sup> and *Pierce v. Society of Sisters*.<sup>10</sup> It includes the right to maintain family relationships, including relationships that go beyond the traditional nuclear family.<sup>11</sup> And *Roe* has also influenced the Supreme Court’s decision to recognize the right to form intimate relationships,<sup>12</sup> and the right to personal control of medical treatment.<sup>13</sup>

*Roe* is inextricably bound to this constellation of privacy and personal liberty rights. If *Roe* is dismantled or otherwise eroded, these other rights are threatened too.

## **II. Judge Kavanaugh’s Decisions Demonstrate an Extremely Limited Vision of the Right to Liberty and Reproductive Decision-Making.**

Judge Kavanaugh’s judicial record evinces a very narrow view of constitutional protections long recognized by the Supreme Court, especially when it comes to women’s decisions concerning their bodies and their health care needs. Although he claims to follow precedent, his actual decisions reveal a deep skepticism of the principles and values that animate these precedents. In decisions concerning women’s bodily autonomy and their exercise of certain constitutional rights, like the right to contraception and the right to an abortion, Judge Kavanaugh has ignored, distorted, or undermined existing precedents.

In 2017, Kavanaugh voted in *Garza v. Hargan* to allow the Trump Administration to continue blocking Jane Doe, a seventeen-year-old immigrant woman who came to the United States without her parents, from obtaining an abortion.<sup>14</sup> In September 2017, Jane Doe came to the U.S. and was placed in the custody of the Office of Refugee Resettlement (ORR).<sup>15</sup> While in custody, she learned she was pregnant and decided to have an abortion. Jane Doe met all of the requirements of Texas law before obtaining an abortion, including, because she was under 18 at the time, going before a judge to “bypass” the state’s parental consent law to obtain an order granting her the right to

consent to the abortion on her own.<sup>16</sup> Throughout all of this, Jane Doe had a guardian ad litem and an attorney ad litem who were available to advise and support her; the cost of the abortion procedure would have been paid for by private funds; and the government did not need to arrange her transportation to the clinic.<sup>17</sup>

Despite having made her decision and complying with all of the requirements prescribed by Texas, ORR instructed the government-funded shelter to prohibit Jane Doe from leaving the facility for any abortion-related appointment, including abortion counseling.<sup>18</sup> Her guardian ad litem filed a lawsuit on behalf of Jane Doe, and other similar situated individuals, to prevent ORR from further interfering or preventing Jane Doe from getting the care she needed. In response, the government argued that allowing Jane Doe to leave the shelter would constitute “facilitating” her abortion.<sup>19</sup>

The district court issued a temporary restraining order against the government, preventing it from further interference with Jane Doe’s decision.<sup>20</sup> The Trump Administration asked the U.S. Court of Appeals for the D.C. Circuit to halt the district court’s order and further delay Jane Doe’s abortion.<sup>21</sup> A few days later, a divided three-judge panel of the D.C. Circuit, which included Judge Kavanaugh in the majority, issued an order blocking Jane Doe’s abortion—for at least eleven days more<sup>22</sup>—in order to give the government time to find her a sponsor, even though the record already showed that the government had been unsuccessful in its earlier attempts to identify a sponsor.<sup>23</sup> On October 24, 2017, an *en banc* panel of the D.C. Circuit overruled the three-judge panel’s order, allowing Jane Doe to obtain the abortion.<sup>24</sup> Critically, Judge Kavanaugh dissented, insisting that the majority had “badly erred” and accusing the majority of creating a new right for “unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.”<sup>25</sup> His dissent disregarded precedent and effectively allowed what amounted to an unconstitutional pre-viability ban on abortion.

What is more, Judge Kavanaugh failed to adequately consider the burdens the government had imposed on Jane Doe’s right to abortion.<sup>26</sup> He did not cite or refer to the Supreme Court’s 2016 decision on abortion—*Whole Woman’s Health v. Hellerstedt*—in which a majority of the Court identified the kinds of harms that must be considered when analyzing an abortion restriction.<sup>27</sup> He did not account for the weeks the government had already forced Jane Doe to delay the exercise of her constitutional right and force her to remain pregnant against her will; the possibility that additional delay would push her to, or past, the point at which she could obtain an abortion in Texas; the increased health risks associated with that delay; or the fact that after this additional delay, she might have to re-start her litigation, further delaying her.<sup>28</sup> By insisting that Jane Doe obtain a sponsor before exercising her constitutional right, Judge Kavanaugh effectively imposed upon Jane Doe a pre-viability abortion ban. This kind of substantial obstacle is clearly out of step with the Supreme Court’s extant abortion jurisprudence.

In his dissenting opinion, Judge Kavanaugh argued that the government’s attempts to block Jane Doe’s abortion were justified because she lacked a sufficient “support network of family and friends.”<sup>29</sup> Jane Doe had already made the decision to terminate her pregnancy and complied with all state-mandated requirements, including completing state-mandated counseling and securing a judicial bypass in lieu of obtaining parental consent.<sup>30</sup> At this point, the government, by preventing her from leaving the shelter, was simply blocking Jane’s abortion, with no valid reason. Yet, Judge Kavanaugh insisted upon obtaining a sponsor, thereby introducing an unconstitutional delay, because he believed Jane Doe was unable to make this decision on her own, despite the fact that she had satisfied the Texas judicial bypass process. The sponsor search had already lasted for six weeks

before the matter came before Judge Kavanaugh and continued while Jane Doe was in custody and no sponsor was ever found before Jane Doe aged out of ORR's custody at age 18. Without further intervention, Jane Doe would have been forced to carry her pregnancy to term.<sup>31</sup>

Kavanaugh's disregard of precedent and cramped view of personal decision-making is also apparent in his decision in *Doe ex rel. Tarlow v. D.C.*<sup>32</sup> There, Kavanaugh upheld a District of Columbia policy allowing health care providers to perform medical procedures on individuals with cognitive disabilities without considering, or even trying to determine, their wishes.<sup>33</sup> The case was brought on behalf of three adult women forced to undergo medical procedures, including eye surgery and abortion care.<sup>34</sup> One of the women forced to have an abortion had clearly expressed her wishes to carry her pregnancy to term.<sup>35</sup>

The case involved statutory claims, as well as constitutional claims involving liberty rights sounding in substantive and procedural due process.<sup>36</sup> Kavanaugh sided against the cognitively disabled plaintiffs, whom he referred to as "never-competent patients."<sup>37</sup> He overturned the District Court's decision holding that the policy violated plaintiffs' liberty interest to accept or refuse medical treatment.<sup>38</sup> Kavanaugh's opinion was brief, summarily rejecting plaintiffs' argument with little analysis.

The analysis Judge Kavanaugh did provide, however, suggests a crabbed understanding of substantive due process rights. When considering whether there was a substantive due process right at issue, Kavanaugh chose to define the right at stake narrowly, asserting that the plaintiffs "have not shown that consideration of the wishes of a never-competent patient is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [the asserted right] were sacrificed.'"<sup>39</sup> In defining the right at issue so narrowly, Kavanaugh ignored precedent from his own court and the Supreme Court that make clear every person's right to accept or refuse medical treatment. For example, the D.C. Circuit had previously held, in *In re A.C.*, that "[e]very person has the right, under the common law and the Constitution, to accept or refuse medical treatment. This right of bodily integrity belongs equally to persons who are competent and persons who are not."<sup>40</sup>

At no point in this opinion did Kavanaugh discuss the impact the decision would have on the plaintiffs or the potential harm of forcing individuals to undergo a medical procedure without consideration of their wishes. And Kavanaugh ignored the long and shameful history in this country of forcing individuals with disabilities to undergo medical treatment they do not want or need.<sup>41</sup>

In the same vein, in *Priests for Life v. Dep't of Health and Human Services*, Kavanaugh wrote a dissent in support of allowing employers' religious beliefs to override their employees' right to birth control.<sup>42</sup> *Priests for Life* involved a challenge to the Affordable Care Act's contraceptive coverage requirement, which requires employer health plans to cover the full range of FDA-approved birth control methods, alongside other women's preventive services.<sup>43</sup> To accommodate the religious beliefs of certain employers and universities who object to birth control coverage, the government created a process, known as the "accommodation."<sup>44</sup> This process essentially exempts certain employers and universities who object to birth control coverage from the contraceptive coverage requirement while at the same time ensuring that employees and students get the birth control coverage guaranteed to them by the ACA.<sup>45</sup> Under the accommodation, objecting organizations must simply notify the government or their insurance company of their objections, and employees and students receive the coverage directly from their insurance companies.<sup>46</sup> Some organizations that qualified for the

accommodation nonetheless filed a lawsuit claiming that even having to give notice of their objections violated their rights under the Religious Freedom Restoration Act (RFRA).<sup>47</sup> The objecting organizations claimed that providing the notice burdened religious exercise because it required them to be “complicit” in providing birth control coverage to employees.<sup>48</sup> In fact, the contraceptive coverage requirement functioned independently of the employer’s notice, requiring insurance companies to provide the birth control coverage.<sup>49</sup> In other words, the organizations’ claim of complicity rested on an incorrect understanding of how the accommodation actually operated.

Of the nine federal circuit courts of appeals to consider this issue, eight—including the D.C. Circuit—flatly rejected these challenges, concluding that merely giving notice of an objection does not substantially burden religious exercise.<sup>50</sup> In the D.C. Circuit’s case, *Priests for Life*, Judge Kavanaugh dissented, siding with the objecting organizations.<sup>51</sup> Specifically, Judge Kavanaugh argued that courts have no right to question the claims of religiously-affiliated organizations, even if their claims are based on a misunderstanding of the law.<sup>52</sup> As he explained, even if the religiously-affiliated organizations were “misguided” in thinking that the accommodation made them “complicit” in “wrongdoing,” the courts had no power to second-guess them.<sup>53</sup> As the majority opinion states, the approach favored by Judge Kavanaugh and objecting organizations creates 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.”<sup>54</sup> This view would give objectors tremendous power to bring claims to refuse to comply with laws—including anti-discrimination and consumer protection laws—that they claim violate their religion.

As troubling, despite Supreme Court precedent on the issue, Kavanaugh did not conclude that birth control coverage is a compelling government interest. While a majority of justices in *Burwell v. Hobby Lobby Stores, Inc.* squarely found that ensuring contraceptive coverage is a compelling government interest,<sup>55</sup> Kavanaugh merely noted that *Hobby Lobby* “strongly suggests” that guaranteeing birth control coverage is a compelling government interest.<sup>56</sup>

As a judge on the DC Circuit, Judge Kavanaugh was bound to follow Supreme Court precedent, yet even in that role he has taken steps to undermine the force of the Supreme Court’s precedents on liberty and personal decision-making when it comes to reproductive autonomy. If he were confirmed to the Supreme Court, he would be even less constrained in his ability to reverse or change that precedent, and his decisions would have severe repercussions for women seeking to do no more than exercise their recognized constitutional rights.

### **III. The Supreme Court with Judge Kavanaugh Could Overturn or Severely Undermine *Roe v. Wade*, with Devastating Consequences for Women.**

Based on Judge Kavanaugh’s record, there is every reason to believe that he would provide the fifth vote necessary to overturn or severely undermine *Roe*, if confirmed to the Court.

Of course, the practical effects of overturning *Roe* would be staggering. If *Roe* is overturned, women could be criminalized and punished in this country for having an abortion.<sup>57</sup> If the Supreme Court overturned *Roe*, 22 states are at high risk for quickly making abortion illegal.<sup>58</sup> This would erode access even further in this country, leaving women living in large areas in the South and Midwest with potentially no legal access at all—a burden that weighs most heavily on women of color, women struggling to make ends meet, immigrant women, and rural women in these states.

The fact that women would have to flee to other jurisdictions in order to access abortion highlights the degree to which overturning *Roe* would render women reproductive refugees who have been stripped of their dignity and equality as citizens. Not only would this deprive many women of their dignity and autonomy as citizens, it also would require those states that did permit abortion to assume responsibility to treat women as equal citizens under the law.

And of course, with *Roe* in the rearview mirror, an anti-abortion Congress and President could pass a nationwide federal ban on abortion, thereby usurping women's reproductive autonomy for the country as a whole.

Even if Kavanaugh did not vote to overturn *Roe* as a formal matter, he could nonetheless provide a crucial vote to eviscerate abortion rights, effectively rendering *Roe*'s protections toothless. This would be the culmination of a decades-long effort from abortion opponents to gut *Roe* by an incremental "death by a thousand cuts."

Since 2011, politicians have passed 401 new abortion restrictions in 33 states across the country.<sup>59</sup> These include outright bans on abortion like those that prohibit abortion at six weeks,<sup>60</sup> before most women even know that they are pregnant, and restrictions that shame, pressure, and punish women who have decided to have an abortion. Many of these laws restrict access to abortion by making the procedure more difficult or expensive to obtain, including requirements that a woman undergo a medically unnecessary ultrasound before obtaining an abortion,<sup>61</sup> requirements that a woman wait a significant amount of time before obtaining an abortion,<sup>62</sup> prohibitions on purchasing a comprehensive health insurance plan that includes coverage of abortion,<sup>63</sup> and medically unnecessary and burdensome facility and staffing requirements.<sup>64</sup>

The restrictions—and associated costs—make it difficult, and sometimes impossible, for women to obtain an abortion. In so doing, the restrictions jeopardize women's long-term economic security and have a negative impact on women's equal participation in social and economic life by threatening financial well-being, job security, workforce participation, and educational attainment. These costs are especially detrimental to women struggling to make ends meet, women of color, rural women, immigrant women, and women who already have children.<sup>65</sup> In practice, these types of restrictions mean that *Roe* is merely an empty promise, not a reality for many women.

The Court stands as the final bulwark against these efforts to steadily dismantle reproductive rights. In 2016, the Court addressed some of the most restrictive abortion regulations in the *Whole Woman's Health v. Hellerstedt* decision. In that case, the Court issued a 5-3 ruling holding Texas restrictions that created medically unnecessary, burdensome facility and staffing restrictions to be an unconstitutional undue burden.<sup>66</sup> The Court looked at how all of the burdens women face when accessing abortion operate in tandem to shutter clinics, increase wait times and travel distances, and threaten women's health.

If the Texas restrictions had been upheld, more than 75 percent of abortion clinics in Texas would have closed.<sup>67</sup> But even during the time in which one of the restrictions was in effect, several clinics were forced to close—and most have never reopened. The closure of these clinics has meant that the average one-way distance to the nearest abortion provider has increased four-fold.<sup>68</sup> In this regard, although they were eventually invalidated, the Texas restrictions nevertheless had devastating and irreversible effects on access to abortion and other essential health care.

The restrictions on abortion providers not only affected abortion access, but access to other critical health care services, as clinics providing abortion care also typically provide a range of necessary reproductive health care services, and often provide care to underserved communities that are the least likely to have access to other health care providers.<sup>69</sup>

In invalidating the Texas restrictions in *Whole Woman's Health*, the majority—with Justice Kennedy providing the crucial fifth vote—specifically noted that the lower court had applied the undue burden standard incorrectly to uphold the challenged restrictions. By contrast, the *Whole Woman's Health* dissenters—Justices Thomas and Alito and Chief Justice Roberts—took a different view of the undue burden standard, agreeing with the lower court's assessment that the restrictions did not impose an undue burden.<sup>70</sup>

If Judge Kavanaugh had been on the Court in Justice Kennedy's place, his judicial record suggests that he likely would have joined the dissenters in upholding the challenged restrictions. Under this scenario, all but nine or ten Texas clinics would have been forced to close. In a state with 5.4 million women of reproductive age, the impact on access to reproductive care would have been devastating, resulting in fewer doctors, longer wait times, and increased crowding, and leaving broad swaths of the second-largest state without an abortion provider. Put simply, it would have dramatically threatened women's health care and deprived countless women of abortion access.<sup>71</sup>

That kind of decision would not have formally overturned *Roe* but would nonetheless render *Roe* essentially meaningless for many women in this country. It would have resulted in many more women facing insurmountable hurdles that would act as a complete obstacle to abortion.

The Supreme Court will have numerous opportunities to review such restrictions in the future. And a Court with Judge Kavanaugh as a member could uphold many or all of them—endorsing the incremental effort to eviscerate *Roe* without ever explicitly overruling it.

#### IV. Conclusion

Judge Kavanaugh's judicial record evinces a narrow and crabbed understanding of precedent and the principles undergirding those precedents. I urge you to consider what I have described in my testimony: how narrow his views are on the right to liberty, how he has distorted existing precedent, even as a lower court judge who should be bound by it, and how damaging he could be on the Supreme Court for generations to come. When combined with his views on other important rights upon which women rely, including protections against employment discrimination, the right to live free from gun violence, and the right to clean air and water, his views on personal liberty pose a real threat to women's autonomy over their bodies, families, and futures.

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<sup>1</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

<sup>3</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 556 (1992).

<sup>4</sup> 381 U.S. 479 (1965).

<sup>5</sup> 316 U.S. 535 (1942).

<sup>6</sup> *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977).

<sup>7</sup> 388 U.S. 1, 12 (1967).

<sup>8</sup> 135 S. Ct. 2584, 2604-2605 (2015).

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- <sup>9</sup> 262 U.S. 390 (1923).
- <sup>10</sup> 268 U.S. 510 (1925).
- <sup>11</sup> *See e.g.*, Moore v. East Cleveland, 431 U.S. 494, 500-506 (1977).
- <sup>12</sup> *See e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003).
- <sup>13</sup> *See e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 342 (1990) (Stevens, J., dissenting).
- <sup>14</sup> Garza v. Hargan, No. 17–5236, 2017 WL 4707112, at \*1 (D.C. Cir. 2017).
- <sup>15</sup> *See* Complaint for Injunctive Relief and Damages at 2, *Garza v. Hargan*, 2017 WL 4707287 (D.C. Cir. 2017) (1:17-cv-02122), available at <https://www.aclu.org/legal-document/garza-v-hargan-complaint-injunctive-relief-and-damages>.
- <sup>16</sup> *See id.* at 4.
- <sup>17</sup> Garza v. Hargan, No. 17–5236, 2017 WL 4707112, at \*2-3 (D.C. Cir. 2017) (Millett, dissenting).
- <sup>18</sup> *Id.* at 2; Complaint for Injunctive Relief and Damages at 3, *Garza v. Hargan*, 2017 WL 4707287 (D.C. Cir. 2017) (1:17-cv-02122).
- <sup>19</sup> Garza v. Hargan, No. 17–5236, 2017 WL 4707112, at \*4 (D.C. Cir. 2017) (Millett, dissenting).
- <sup>20</sup> *See* Garza v. Hargan, 2017 WL 4707287, 1 (D.D.C. 2017).
- <sup>21</sup> Appellants' Emergency Motion for Stay Pending Appeal at 1, *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (No. 17-5236).
- <sup>22</sup> *See* Garza v. Hargan, 2017 WL 9854552 1 (D.C. Cir. 2017).
- <sup>23</sup> *See id.*
- <sup>24</sup> Garza v. Hargan, 874 F.3d 735, 736 (D.C. Cir. 2017).
- <sup>25</sup> *Id.* at 752.
- <sup>26</sup> *Id.* at 739.
- <sup>27</sup> Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
- <sup>28</sup> Garza v. Hargan, No. 17–5236, 2017 WL 4707112, at \*7-8 (D.C. Cir. 2017) (Millett, dissenting).
- <sup>29</sup> 874 F.3d at 755.
- <sup>30</sup> *See* Complaint for Injunctive Relief and Damages at 2-3, *Garza v. Hargan*, 2017 WL 4707287 (D.C. Cir. 2017) (1:17-cv-02122).
- <sup>31</sup> Garza v. Hargan, No. 17–5236, 2017 WL 4707112, at \*7-8 (D.C. Cir. 2017) (Millett, dissenting).
- <sup>32</sup> 489 F.3d 376 (D.C. Cir. 2007).
- <sup>33</sup> *See id.*
- <sup>34</sup> *See* Jane Does I Through III v. District of Columbia, 232 F.R.D. 18, 20 (D.D.C 2005).
- <sup>35</sup> *See id.*
- <sup>36</sup> *See, e.g.*, Doe ex rel. Tarlow v. District of Columbia, 489 F.3d 376, 369 (D.C. Cir. 2007).
- <sup>37</sup> *Id.* at 383. In order to reach this outcome, Kavanaugh draws a distinction between individuals who were once able “to make medical decisions for themselves,” *id.* at 378, and then became unable to do so and those individuals “who have never had the mental capacity to make medical decisions.” *Id.* at 382-383. According to Kavanaugh, those who were once able to make medical decision and then became unable to do so should have their wishes considered. Those who have been deemed to not have “the mental capacity to make medical decisions” should not. *Id.* at 383-383.
- <sup>38</sup> *See, e.g.*, Jane Does I Through III v. District of Columbia, 232 F.R.D. 18, 20 (D.D.C 2005).
- <sup>39</sup> Doe ex rel. Tarlow at 383 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotation marks omitted).
- <sup>40</sup> 573 A.2d 1235, 1247 (D.C. 1990). Moreover, the Supreme Court has repeatedly reaffirmed the basic principle from an 1891 case that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891)).
- <sup>41</sup> *See e.g.*, *Buck v. Bell*, 274 U.S. 200 (1927).
- <sup>42</sup> *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 808 F.3d 1,14 (Kavanaugh J., dissenting) (D.C. Cir. 2015).
- <sup>43</sup> *See* *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 772 F.3d 229, 144-45 (D.C. Cir. 2014).
- <sup>44</sup> *See id.*
- <sup>45</sup> *Id.*
- <sup>46</sup> *Id.*
- <sup>47</sup> *See, e.g., id.*; Religious Freedom Restoration Act 42 U.S.C. § 21b (1993).
- <sup>48</sup> *See* *Priests for Life v. Dep't of Health and Human Servs.*, 772 F.3d 229, 241 (2014).
- <sup>49</sup> *See* *Priests for Life v. Dep't of Health and Human Servs.*, 808 F.3d 1, 17-22 (2015).
- <sup>50</sup> *Id.*; *Geneva Coll., et al. v. U.S. Sec'y Dep't of Health and Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *Univ. of Notre Dame v. Burwell, et al.*, 786 F.3d 606 (7th Cir. 2015); *Wheaton Coll. v. Burwell, et al.*, 791 F.3d 792 (7th Cir. 2015); *Little Sisters of the Poor Home for the Aged, et al. v. Burwell et al.*, 794 F.3d 1151 (10th Cir. 2015); *East Tex. Baptist Univ. v.*



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Burwell, et al., 793 F.3d 449 (5th Cir. 2015); Catholic Health Care System, et al. v. Burwell, et al., 796 F.3d 207 (2d Cir. 2015); Michigan Catholic Conference and Catholic Family Services, et al. v. Burwell et al., 807 F.3d 738 (6th Cir. 2015); Grace Schools, et al., and Diocese of Fort Wayne-South Bend, Inc., et al. v. Burwell, et al., 801 F.3d 788 (7th Cir. 2015); Eternal World Television Network v. U.S. Dep’t of Health and Human Servs., No. 14-12696, 14-12890, 14-13239, 2016 WL 659222 (11th Cir. Feb. 18, 2016). But see Sharpe Holdings, Inc. v. U.S. Dep’t of Health and Human Servs., 801 F.3d 927 (8th Cir. 2015); Dordt Coll., et al. v. Burwell, 801 F.3d 946 (8th Cir. 2015).

<sup>51</sup> Priests for Life v. U.S. Dep’t of Health and Human Servs., 808 F.3d 1, 14 (Kavanaugh J., dissenting) (D.C. Cir. 2015).  
<sup>52</sup> 808 F.3d 1, 5-6 (2015).

<sup>53</sup> *Id.* at 17.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014). In a concurring opinion, Justice Kennedy stated that “the mandate serves the Government’s compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee.” *Id.* at 2785-86 (Kennedy, J., concurring). Justice Ruth Bader Ginsburg, writing for the four Justices in the dissent, concluded that “the Government has shown that the contraceptive coverage for which the ACA provides further compelling interests in public health and women’s well-being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence.” *Id.* at 2799 (Ginsburg, J., dissenting).

<sup>56</sup> See Priests for Life v. Dep’t of Health and Human Servs., 808 F.3d 1, 15 (2015).

<sup>57</sup> See THE SIA LEGAL TEAM, ROE’S UNFINISHED PROMISE: DECRIMINALIZING ABORTION ONCE AND FOR ALL 1-2 (2018), <https://www.sialegalteam.org/roes-unfinished-promise>.

<sup>58</sup> See CTR. FOR REPRODUCTIVE RIGHTS, WHAT IF ROE FELL? (2018), <https://www.reproductiverights.org/what-if-roe-fell>.

<sup>59</sup> Elizabeth Nash et al., POLICY TRENDS IN THE STATES, 2017, GUTTMACHER INST., (Jan. 2, 2018), <https://www.guttmacher.org/article/2018/01/policy-trends-states-2017>.

<sup>60</sup> Forty-three states prohibit some abortions after a certain point in pregnancy. GUTTMACHER INST., *State Policies on Later Abortion*, (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>; . Two states ban the most commonly used method of abortion in the second trimester. GUTTMACHER INST., *Bans on Specific Abortion Methods Used After the First Trimester*, (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester>.

<sup>61</sup> Eleven states now require women to undergo a medically unnecessary ultrasound before obtaining an abortion. GUTTMACHER INST., *Requirements for Ultrasound*, (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound>.

<sup>62</sup> Twenty-seven states require that a woman wait at least 24 hours between receiving state-mandated counseling and obtaining an abortion. GUTTMACHER INST., *Counseling and Waiting Periods for Abortion*(Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion>.

<sup>63</sup> Twenty-eight states now prohibit women from buying an insurance plan that includes abortion coverage, except in limited circumstances, including in an exchange, in insurance for public employees, or in any private insurance plan. GUTTMACHER INST., *Restricting Insurance Coverage of Abortion*, (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/restricting-insurance-coverage-abortion>.

<sup>64</sup> Twenty-five states have laws that contain medically unnecessary facility and/or staffing requirements for abortion providers. GUTTMACHER INST., *Targeted Regulation of Abortion Providers*, (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers>.

<sup>65</sup> Brief of Amici Curiae Nat. Women’s Law Ctr, et al. at 12, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274) available at <https://nwl.org/resources/45623-2/>.

<sup>66</sup> *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016).

<sup>67</sup> CTR. REPROD. RTS., *Women’s Health Care Providers Ask U.S. Supreme Court to Take On Texas Clinic Shutdown Law* (Sept. 03, 2015), <https://www.reproductiverights.org/press-room/womens-health-care-providers-ask-us-supreme-court-to-take-on-texas-clinic-shutdown-law>.

<sup>68</sup> Caitlin Gerdts et al., *Impact of Clinic Closures on Women Obtaining Abortion Services After Implementation of a Restrictive Law in Texas*, 106 Am. J. Pub. Health 857, 857 (2016), <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2016.303134>.

<sup>69</sup> Women of color have long experienced stark health disparities in areas like cervical and breast cancer, unintended pregnancy, pregnancy-related complications, and burdens to accessing safe abortion. Marcela Howell & Ann Starrs, *For Women of Color, Access to Vital Health Services Is Threatened*, The Hill’s Congress Blog (July 27, 2017), <https://www.guttmacher.org/article/2017/07/women-color-access-vital-health-services-threatened>.

<sup>70</sup> 136 S. Ct. 2292, 2449, 2352 (2016).

<sup>71</sup> CTR. REPROD. RTS., *Whole Woman’s Health v. Hellerstedt* (Feb. 23, 2016), <https://www.reproductiverights.org/case/whole-womans-health-v-hellerstedt>.