

August 20, 2018

Hon. Charles Grassley
Chairman, Committee on Judiciary
135 Hart Senate Office Building
Washington, DC 20510

Hon. Dianne Feinstein
Ranking Member, Committee on Judiciary
331 Hart Senate Office Building
Washington, DC 20510

Re: Kavanaugh Nomination

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned organizations, which represent the interests of millions of Americans with disabilities, write to express our strong opposition to the nomination of Judge Brett Kavanaugh to be an Associate Justice on the United States Supreme Court. Our review of Judge Kavanaugh's record indicates that his confirmation would place at risk access to health care and civil rights protections for people with disabilities, opportunities for people with disabilities to make choices about their own lives, and the ability of executive branch agencies to interpret and enforce the law. Because Judge Kavanaugh's confirmation would tip the balance of the Supreme Court toward such regressive views, we ask that you vote against his confirmation.

Access to Health Care. Judge Kavanaugh's distaste for the Affordable Care Act (ACA) is clear. In public appearances, he has repeatedly expressed his skepticism about the ACA and his criticism of the Supreme Court's basis for upholding it.¹ He has also written dissenting opinions in cases upholding the ACA, advocating positions that, if accepted, would undermine fundamental protections of the ACA, including the individual mandate.² He has described the ACA as "unprecedented on the federal level in American history,"³ urged the court to "exercise great caution" in finding it constitutional,⁴ and made the concerning statement that the president could decide not to enforce the ACA's individual mandate if the president concluded that it was unconstitutional, even if the courts had already ruled that it was constitutional.⁵ The ACA expanded access to health care for millions of people with disabilities and enacted other crucial protections, including the requirement that insurers offer coverage to people with pre-existing conditions, and remains under constant attack in the courts. Judge Kavanaugh's confirmation to the Supreme Court likely endangers this life-changing—and life-saving—progress.

¹ *The Administrative State After the Health Care Cases*, FEDERALIST SOC'Y (Nov. 17, 2012), 55:30-57:25 and 1:01:20-1:02:55, <https://www.youtube.com/watch?v=zRImAlbJOt8>, at 55-59 min.; *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, AM. ENTER. INST. (Sept. 18, 2017), <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>, at 15; *The Joseph Story Distinguished Lecture*, HERITAGE FOUNDATION (Oct. 25, 2017), <https://www.heritage.org/josephstory2017>, at 34-37 min.

² *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); *Sissel v. U.S. Dep't of Health and Human Servs.*, 799 F.3d 1035 (D.C. Cir. 2015); *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 808 F.3d 1 (D.C. Cir. 2015).

³ 661 F.3d at 51.

⁴ *Id.*

⁵ *Id.* at 50.

Self-Determination. In a case called *Doe v. D.C.*,⁶ Judge Kavanaugh demonstrated a disturbing lack of regard for the fundamental rights and autonomy of people with disabilities. He reversed a district court ruling that had stopped District of Columbia officials from consenting to elective surgeries (including unwanted abortions) on people with intellectual disabilities living in District of Columbia facilities, unless the officials had first attempted to ascertain the known wishes of the individual. Judge Kavanaugh rejected the district court’s finding that an individual who lacks the capacity to make medical decisions may nevertheless be capable of expressing a choice or preference regarding medical treatment; he claimed that this idea “does not make logical sense”⁷ and that the District’s actions did not violate the due process rights of the individuals subjected to the surgeries. He also overruled the district court’s holding that the individual’s wishes should be given weight under D.C. law, which requires that the District base medical decisions on the wishes of individuals who lack the capacity to make medical decisions unless those wishes cannot be ascertained.

Judge Kavanaugh’s decision is extremely troubling, especially in light of the long and shameful history of forced sterilizations and other state-sanctioned intrusions into the physical autonomy of people with disabilities, particularly people with intellectual and developmental disabilities.

Civil Rights Protections. Judge Kavanaugh has revealed an exceedingly narrow understanding of the important antidiscrimination laws that protect the rights of people with disabilities. In one case, he wrote a dissenting opinion arguing that workers abroad were exempted from the Age Discrimination in Employment Act (ADEA),⁸ despite the warning from the majority that his position would exempt these workers “from the protections of the entire edifice of [Congress’s] antidiscrimination canon.”⁹ In other employment discrimination cases, he has routinely discounted or ignored the experiences of people with disabilities and the evidence they present, affording great deference to the explanations of employers.¹⁰ Similarly, he has demonstrated a lack of appreciation for the importance of the rights of students with disabilities under the Individuals with Disabilities Education Act (IDEA),¹¹ and he has advocated for school voucher programs,¹² which often force students with disabilities to waive their IDEA rights—including the right to receive a free and appropriate education—in order to participate. Judge Kavanaugh

⁶ 489 F.3d 376 (D.C. Cir. 2007). Notably, the case proceeded following Judge Kavanaugh’s remand, and the district court ultimately found that the unwanted abortions on two of the women were unconstitutional batteries. *Doe v. D.C.*, 206 F. Supp. 3d 583 (D.D.C. 2016).

⁷ *Id.* at 382.

⁸ *Miller v. Clinton*, 687 F.3d 1332 (D.C. Cir. 2012).

⁹ *Id.* at 1338.

¹⁰ *See, e.g., Stewart v. St. Elizabeths Hospital*, 589 F.3d 1305 (D.C. Cir. 2010); *Adeyemi v. D.C.*, 525 F.3d 1222 (D.C. Cir. 2008); *Baloch v. Kempthorne*, 550 F.3d 1191 (D.C. Cir. 2013); *Johnson v. Interstate Management Co.*, 849 F.3d 1093 (D.C. Cir. 2017).

¹¹ *Hester v. D.C.*, 505 F.3d 1283 (D.C. Cir. 2007).

¹² Judge Kavanaugh has served as co-chairman of the Federalist Society’s “School Choice Practice Group,” *Confirmation Hearing on the Nomination of Brett M. Kavanaugh to Be Circuit Judge for the District of Columbia Circuit Before the Committee on the Judiciary*, 108th Cong. 72-73 (2004), and as an attorney, he defended a Florida school voucher program that was ultimately found to violate the state constitution, *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

would also permit states to restrict voting rights through voter identification laws,¹³ which impose financial and practical burdens on many voters with disabilities.

Agency Authority. Finally, Judge Kavanaugh has expressed distaste for the administrative agencies that play a key role in enforcing civil rights protections and managing federal healthcare, employment, and benefits programs that are crucial to many people with disabilities. He has called for judges to limit the application of *Chevron* deference—the long-accepted rule under which courts defer to an agency’s reasonable interpretation of the laws they are responsible for implementing—calling it “an atextual invention by courts” and “a judicially orchestrated shift of power from Congress to the Executive Branch.”¹⁴ In one particularly troubling case, Judge Kavanaugh ruled that the Consumer Financial Protection Bureau (CFPB) was unconstitutionally structured; in his opinion, he demonstrated outright hostility to independent agencies—a group that includes many important agencies such as the National Labor Relations Board, the Equal Employment Opportunity Commission, and the Social Security Administration—writing that they “pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.”¹⁵

Judge Kavanaugh’s record reveals his skepticism of the ACA, his particularly narrow view of disability and other civil rights protections, and his disdain for the important role played by administrative agencies in interpreting and implementing the law. His confirmation to the Supreme Court would affect the lives of millions of people with disabilities for decades to come. Because of the serious concerns discussed in this letter, we urge you to vote against his confirmation.

Thank you for your consideration of the important concerns that this nomination poses for people with disabilities and the crucial rights and protections that are at stake.

Sincerely,

National organizations:

ADAPT
The Advocacy Institute
American Association of People with Disabilities
The Arc of the United States
Association of Programs for Rural Independent Living
Association of University Centers on Disabilities
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Campaign for Trauma-Informed Policy and Practice

¹³ *South Carolina v. U.S.*, 898 F. Supp. 2d 30 (D.D.C. 2012).

¹⁴ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 128 HARV. L. REV. 2118, 2150-54 (2016), <http://cdn.harvardlawreview.org/wp-content/uploads/2016/06/2118-2163-Online.pdf>.

¹⁵ *PHH Corporation v. Consumer Finance Protection Bureau*, 839 F.3d 1, 5–6 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

Center for HIV Law and Policy
Center for Public Representation
Civil Rights Education and Enforcement Center
Clinical Social Work Association
Disability Power and Pride
Disability Rights Education and Defense Fund
Harriet Tubman Collective
Helping Educate to Advance the Rights of Deaf Communities
Judith Heumann LLC
Justice in Aging
Legal Action Center
Mental Health America
National Association of Community Behavioral Health and Developmental Disability Directors
National Association of the Deaf
National Association for Rights Protection and Advocacy
National Association for Rural Mental Health
National Association of Social Workers
National Black Justice Coalition
National Council on Independent Living
National Health Law Program
National Mental Health Consumers' Self-Help Clearinghouse
Not Dead Yet
TASH
United Spinal Association

State and local organizations:

Ability Resources (OK)
Able Opportunities, Inc. (WA)
Access Living (IL)
ADAPT-Arizona
ADAPT Montana
AIM Center for Independent Living (IL)
Alliance Center for Independence (NJ)
Aloha Independent Living Hawaii
Appalachian Independence Center, Inc. (VA)
Atlantis Community, Inc. (CO)
ATTIC-Inc. (IN)
Autism Alliance of Michigan
Cape Organization for Rights of the Disabled (MA)
Center for Independence (WA)
Center for Independent Living of North Central Pennsylvania
Center for Independent Living for Western Wisconsin
Colorado Cross-Disability Coalition
Connecticut Cross Disability Lifespan Alliance

Connecticut Legal Rights Project
Counseling DIRECTIONS (AZ)
Democratic Disability Caucus of Florida
DIRECT Center for Independence (AZ)
Disabilities Resource Center of Siouland (IA)
Disability Achievement Center (FL)
Disability Advocates for Rights and Transition (PA)
Disability Community Resource Center (CA)
Disability in Action (TX)
disABILITY LINK (GA)
Disability Partners (NC)
Disability Policy Consortium of Massachusetts
Disability Resource Center (IL)
Disability Rights Maine
Disability Rights Pennsylvania
D.C. Metro ADAPT
Empower Tennessee
Federations of Organizations (NY)
Florida Democratic Disability Caucus
Healing Hearts and Minds (NY)
Healthy Mind of Niagara (NY)
Illinois-Iowa Center for Independent Living
IMPACT Center for Independent Living (IL)
Independent Living Center of Southern California
Indiana United Methodist Church Disability Advocacy Team
Lake County Center for Independent Living (IL)
LIFE Center for Independent Living (IL)
Living Independence Network Corporation (LINC) (ID)
Montana Independent Living Project
Morgantown Pastoral Counseling Center, Inc. (WV)
Mountain State Centers for Independent Living (WV)
NAMI Huntington (NY)
National Association of Social Workers-Michigan
New York Association of Psychiatric Rehabilitation Services
New York Association on Independent Living
Nevada Disability Advocacy and Law Center
North Country Access to Health Care Committee (NY)
Northern Regional Center for Independent Living (NY)
Open Doors For Multicultural Families (WA)
Options Center for Independent Living (IL)
Options for Independent Living (WI)
Organize Florida
Progress Center for Independent Living (IL)
Psychotherapy Associates of Westchester (NY)
Putnam Independent Living Services (NY)

Self-Advocates in Leadership (SAIL) (WA)
Southwest Center for Independence (CO)
Springfield Center for Independent Living (IL)
St. Joseph's Medical Center (NY)
Statewide Independent Living Council of Alaska
Texas Advocates
Urban Justice Center Mental Health Project (NY)
West Central Illinois Center for Independent Living

cc: all Senate offices