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ACCESS TO HEALTH CARE

REVIEW OF DISABILITY-RELATED CASES INVOLVING JUDGE BRETT KAVANAUGH

The Bazelon Center for Mental Health Law strongly opposes the nomination of Judge Brett Kavanaugh to serve on the U.S. Supreme Court. The appointment of Judge Kavanaugh would threaten hard-won rights and protections for people with disabilities. Judge Kavanaugh's record demonstrates his great skepticism of the Affordable Care Act, his hostility to civil rights—including the rights of people with disabilities—and his narrow view of the authority of executive branch agencies to interpret and enforce the law. His confirmation could add a fifth vote for such regressive views. A summary of his record is provided below.

Access to Health Care

Access to health care is crucial to ensuring that people with disabilities are able to live, work, and succeed in their communities. Troublingly, in a series of public appearances, Judge Kavanaugh has repeatedly expressed skepticism of the Affordable Care Act (ACA), criticism of Chief Justice Roberts' reasoning in upholding the ACA, and concerns about its "unprecedented" nature.[1] These comments indicate that Judge Kavanaugh would embrace the various challenges to the ACA that continue to make their way through the courts.

Judge Kavanaugh's judicial opinions support this view. He has written dissenting opinions in three ACA cases, advocating positions that, if accepted, would undermine crucial elements of the ACA and hinder its implementation. First, in ***Seven-Sky v. Holder***,[2] the panel majority upheld

[1] *The Joseph Story Distinguished Lecture*, The Heritage Foundation (Oct. 25, 2017), https://www.heritage.org/josephstory2017, at 34-37 min. (criticizing Chief Justice Roberts' use of the constitutional avoidance canon in upholding the ACA in *NFIB v. Sebelius*); *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, American Enterprise Institute (Sept. 18, 2017), http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf, at 15 (lauding former Chief Justice Rehnquist for "putting the brakes on the Commerce Clause" and commenting positively on the fact that a five-judge majority on the Supreme Court ruled against the ACA under the Commerce Clause); *The Administrative State After the Health Care Cases*, The Federalist Society (Nov. 17, 2012), 55:30-57:25 and 1:01:20-1:02:55, https://www.youtube.com/watch?v=zRImAIbJOt8, at 55-59 min. (calling the ACA "unprecedented" and an "erosion of federalism" and speaking approvingly about Chief Justice Roberts' ruling against the ACA on Commerce Clause grounds).

[2] 661 F.3d 1 (D.C. Cir. 2011), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

the constitutionality of the ACA's individual mandate. Judge Kavanaugh dissented, arguing that the court lacked jurisdiction to decide the issue.[3] But Judge Kavanaugh also revealed his distaste for the ACA, describing it as "unprecedented on the federal level in American history" and writing that this fact "counsels the Judiciary to exercise great caution" in finding it constitutional.[4] He also 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]

Second, Judge Kavanaugh dissented in another case challenging the constitutionality of the ACA, ***Sissel v. U.S. Department of Health and Human Services***.[6] The majority denied a petition for rehearing en banc, leaving in place a decision upholding the ACA. Judge Kavanaugh argued for a rehearing because the case raised the "serious constitutional question" of whether the ACA violated the Origination Clause of the Constitution, which requires that bills to raise revenue originate in the House of Representatives.[7] Judge Kavanaugh agreed, on different grounds than the majority, that there was no Origination Clause violation, but his extremely broad view of this Clause as applicable to any legislation that "raises revenue for general governmental purposes"[8] places important laws in jeopardy. Several judges joining the majority wrote separately to explain why Judge Kavanaugh's dissent was wrong, noting that it "forecloses the approach that the Supreme Court has used for more than a century and that we applied in this case."[9]

Finally, in ***Priests for Life v. U.S. Department of Health & Human Services***,[10] Judge Kavanaugh argued to rehear en banc a decision against an employer's religious liberty challenge to the ACA's contraception coverage mandate. The majority held that the religious accommodation regulation, which exempted religious organizations from the mandate if they submitted a form to either their insurer or the Secretary of Health and Human Services, distinguished this case from the Supreme Court's holding in *Hobby Lobby*. Judge Kavanaugh disagreed, arguing that even submitting the form substantially burdened the employer's religious freedom.[11] His arguments also have implications for people with disabilities—particularly those served by religiously affiliated providers.

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[3] *Id.* at 22 (Kavanaugh, J., dissenting).

[4] *Id.* at 51.

[5] *Id.* at 50.

[6] 799 F.3d 1035 (D.C. Cir. 2015).

[7] *Id.* at 1049 (Kavanaugh, J., dissenting).

[8] *Id.* at 1060.

[9] *Id.* at 1042 (Rogers, Pillard, and Wilkins, J.J., concurring).

[10] 808 F.3d 1 (D.C. Cir. 2015).

[11] *Id.* at 21 (Kavanaugh, J., dissenting). In 2016, the Supreme Court vacated the D.C. Circuit opinion and other decisions to allow the parties to resolve the matter and to "arrive at an approach going forward." Zubik v. Burwell, 136 S. Ct. 1557 (2016).

Based on Judge Kavanaugh's repeated and open willingness to undermine fundamental protections of the ACA, including the individual mandate, his confirmation to the Supreme Court likely endangers other important elements of the Act as well, such as requiring insurers to offer coverage to people with pre-existing conditions.