



August 30, 2018

Senator Chuck Grassley
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Senator Diane Feinstein
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the more than 170,000 bipartisan members and supporters of the American Association of University Women (AAUW), I urge you to oppose the confirmation of Judge Brett Kavanaugh to the United States Supreme Court. If confirmed to this lifetime appointment, Judge Kavanaugh will have a say in the health, education, and economic security of women and girls for decades to come. After careful review of Judge Kavanaugh's available record, including his record on the U.S. Court of Appeals for the D.C. Circuit, as well as his known speeches and writings over his legal career, I am concerned that he will do grave harm by undermining positions central to AAUW's mission, including upending employment and labor rights, curtailing reproductive rights and access to health care, entangling public education and religion, and restricting voting rights.

AAUW believes that, as with all nominations, a full and fair vetting process is vital to determine the nominee's qualifications and temperament. AAUW is looking for an independent, fair-minded jurist who will uphold the protections that are critical to the equity of women and girls. We support Supreme Court justices who are committed to upholding our hard-fought constitutional and fundamental rights that ensure equality for women in all the spheres of their lives. While we continue to urge Senators to demand full disclosure of Judge Kavanaugh's record and to inquire about these issues during his confirmation hearing, his existing record makes clear his hostility to AAUW's policy priorities.

AAUW opposes Judge Kavanaugh's confirmation to the Supreme Court for the following reasons:

Judge Kavanaugh has consistently failed to ensure that workers who have faced discrimination are protected. Judge Kavanaugh has showed little support for workers' rights, including low wage workers, workers of color, and immigrant workers, dismissing claims that a majority of his D.C. Circuit colleagues found to be meritorious. AAUW advocates for "pay equity and fairness in compensation and benefits [and] equitable access and advancement in employment, including vigorous enforcement of employment anti-discrimination statutes,"¹ positions to which Judge Kavanaugh has not demonstrated a commitment. His positions in several D.C. Circuit opinions illustrate these points. In *Howard v. Office of the Chief Administrative Officer of the U.S. House of Representatives*, Judge Kavanaugh authored a dissent arguing that an African American women fired from her position could not pursue her claims of racial discrimination and retaliation in federal court under the Congressional Accountability Act (CAA).² His argument would have limited workers in Congressional offices and throughout the legislative branch from pursuing most CAA claims in federal court, including sexual harassment, discrimination, and retaliation claims.

Similarly, in *Rattigan v. Holder*, the majority ruled that an African American FBI agent could pursue a case of retaliation for filing a discrimination claim, where the agency began a security investigation against him, if he

could show the agency employees acted with a retaliatory or discriminatory motive in reporting information they knew to be false.³ Judge Kavanaugh disagreed with the majority and wanted to see the entire suit dismissed,⁴ despite his colleagues' warning that this was not required by precedent and that the courts should preserve "to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation."⁵

Again, in *Miller v. Clinton*, the majority held that the State Department was not exempt from and had violated the Age Discrimination in Employment Act (ADEA) when it imposed a mandatory retirement age and fired an employee that turned 65.⁶ Judge Kavanaugh sided against workers, arguing to permit age discrimination in the form of a mandatory retirement age,⁷ something his colleagues in the majority pointed out could reach beyond age discrimination to limit other civil rights protections.⁸ Finally, in his dissent in *Agri Processor Co., Inc. v. NLRB*, Judge Kavanaugh also demonstrated a willingness to interpret the law to side with employers and to limit the rights of unions and immigrant workers, by saying that undocumented workers were not covered by the National Labor Relations Act.⁹ In this case, workers at Agri Processor decided to join a union, but their employer argued that the union vote did not count because of the immigration status of some workers. Judge Kavanaugh agreed. The majority opinion pointed out that Judge Kavanaugh's dissent both ignored the plain language of the law, as well as misread Supreme Court precedent regarding the protection of these workers.¹⁰

Judge Kavanaugh has demonstrated hostility to reproductive freedom and a lack of commitment to employees' vital health care coverage. AAUW believes that, "to guarantee equality, individual rights, and social justice for a diverse society, [we advocate for] self-determination of one's reproductive health decisions."¹¹ We take President Donald Trump at his word when he promised to nominate someone to the high court who would overturn *Roe v. Wade*. Judge Kavanaugh has shown hostility to women's reproductive freedom and we should expect, based on his record, that he would be willing to severely weaken or overturn women's right to access abortion. In *Garza v. Hargan*, as part of a three-judge panel, Judge Kavanaugh ruled to delay an abortion of a 17-year-old undocumented, young woman in government custody, holding this did not unduly burden her right to an abortion.¹² Four days later the full D.C. Circuit reheard the case and ruled that the young woman was entitled to exercise her right to choose without delay.¹³ Judge Kavanaugh dissented from that second decision, adopting troubling language in his opinion, signaling his lack of support for this constitutional right.¹⁴

In addition, Kavanaugh has not shown support for contraceptive healthcare coverage, arguing in his dissent in the denial for an *en banc* review in *Priests for Life v. U.S. Department of Health and Human Services*, that the mere submission of a form opting out of ACA's birth control benefit (so that coverage may be guaranteed to employees elsewhere) burdens the religious beliefs and free exercise of religion of certain employers.¹⁵ This raises significant concerns about Judge Kavanaugh's willingness to allow religious claims to be used as a basis to deny care to others.

Judge Kavanaugh has criticized the Affordable Care Act (ACA), making clear that he is not committed to protecting access to health care for women and those with preexisting conditions. AAUW supports, "increased access to quality, affordable health care and family planning services, including expansion of patients' rights."¹⁶ The ACA has made a significant impact on women's health. Coverage of women's reproductive health services and preventive care is required. Fewer women of reproductive age are uninsured.¹⁷ And, the millions of women and girls with preexisting conditions do not have to fear that they will be denied health insurance, as they had in the past.¹⁸ Judge Kavanaugh has expressed opposition to upholding the ACA.

Seven-Sky v. Holder upheld the ACA's individual mandate as within Congress' authority under the Commerce Clause.¹⁹ While in his dissent, Judge Kavanaugh did not take a position on the constitutionality of the ACA and instead argued that the court lacked jurisdiction to hear the case, he did outline the problems he saw with the individual mandate and asserted that the President "might not enforce the individual

mandate provision if the President concludes that enforcing it would be unconstitutional.”²⁰ In a footnote, Judge Kavanaugh asserted “[u]nder the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”²¹

Judge Kavanaugh has entangled church and state in public education. While in private practice, Kavanaugh argued for the permissibility of public school prayer and against long-standing precedent prohibiting the use of public funds for religious activities. For example, in *Santa Fe Independent School District v. Doe*,²² Kavanaugh authored an amicus brief²³ arguing that student-led prayers at public high school football games did not violate the First Amendment. The Supreme Court soundly rejected this argument ruling that the school district’s permitting student-led prayers using a public address system at football games violated the Establishment Clause of the First Amendment. AAUW believes in the separation of church and state and advocates for equal access to education.²⁴

Judge Kavanaugh has undermined the fundamental right to vote. To guarantee equality, individual rights, and social justice for a diverse society, AAUW advocates for the expansion of voting rights.²⁵ In *South Carolina v. United States*,²⁶ Judge Kavanaugh authored the majority opinion that upheld the state’s restrictive and discriminatory government photo ID law, objected to by the Department of Justice because of racial disparities in voting caused by the law’s requirement. The Justice Department objected to the proposal, explaining that thousands of voters of color did not have the form of ID the new law would have required. South Carolina then made modest changes to the law and went to federal court in DC to seek approval of the new requirements. Judge Kavanaugh wrote the opinion for the three-judge court that approved the voter ID law, despite the Department of Justice’s continued arguments that the law harmed voters of color. In a separate and notable concurrence, one of the other judges praised the vital role of the Voting Rights Act in deterring discriminatory voting changes²⁷ -- a point absent from Judge Kavanaugh’s opinion. Judge Kavanaugh’s opinion signals that he might continue this Supreme Court’s rollbacks of the Voting Rights Act – a law which has protected the voting rights of millions of voters of color for decades.

Conclusion

The Supreme Court plays a critical role in our nation’s system of checks and balances. It is the final arbiter when it comes to many of the most important legal challenges our country faces. Now more than ever we need a Supreme Court justice who will be an independent voice and will understand that the law has real impact on real people.

What we know so far about Judge Kavanaugh makes it clear that he is the wrong choice for women and girls. I urge you to oppose the confirmation of Judge Brett Kavanaugh to the United States Supreme Court. Votes associated with this nominee may be scored in the AAUW Action Fund *Congressional Voting Record for the 115th Congress*. Please do not hesitate to contact me at 202/785-7720 or Anne Hedgepeth, director of federal policy, at 202/785-7724, if you have any questions.

Sincerely,



Deborah J. Vagins
Senior Vice President, Public Policy and Research

cc: Members of the Senate Judiciary Committee

¹ AAUW. (2017). *AAUW Public Policy Priorities*. www.aauw.org/resource/principles-and-priorities.

² 720 F.3d 939, 953-57 (D.C. Cir. 2013) (Kavanaugh, J., dissenting).

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- ³ 689 F.3d 764 (D.C. Cir. 2012)
- ⁴ *Id.* at 773-76 (Kavanaugh, J., dissenting).
- ⁵ *Id.* at 770 (internal cites omitted).
- ⁶ 687 F.3d 1332 (D.C. Cir. 2012).
- ⁷ *Id.* at 1353-61 (Kavanaugh, J., dissenting)
- ⁸ *Id.* at 1351-52
- ⁹ 514 F.3d 1, 10-15 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).
- ¹⁰ *Id.* at 6-7.
- ¹¹ AAUW. (2017). *AAUW Public Policy Priorities*. www.aauw.org/resource/principles-and-priorities.
- ¹² No. 17-5236, 2017 WL 9854552 (D.C. Cir. Oct 20, 2017).
- ¹³ 874 F.3d 735 (D.C. Cir. 2017).
- ¹⁴ *Id.* at 752 (Kavanaugh, J., dissenting).
- ¹⁵ 808 F.3d 1, 14-26 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).
- ¹⁶ AAUW. (2017). *AAUW Public Policy Priorities*. www.aauw.org/resource/principles-and-priorities.
- ¹⁷ *Dramatic Gains in Insurance Coverage for Women of Reproductive Age are Now in Jeopardy*, www.guttmacher.org/article/2018/01/dramatic-gains-insurance-coverage-women-reproductive-age-are-now-jeopardy (Jan. 17, 2018).
- ¹⁸ *Moving Backward: Efforts to Undo Pre-Existing condition Protections Put Millions of Women and Girls at Risk*, www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf (Jun. 2018).
- ¹⁹ 661 F.3d 1 (D.C. Cir. 2011) (abrogated on other grounds by *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)).
- ²⁰ *Id.* at 50 (Kavanaugh, J., dissenting).
- ²¹ *Id.* at n.43 (Kavanaugh, J., dissenting).
- ²² 530 U.S. 290 (2000).
- ²³ Brief of Amici Curiae Congressman Steven Largent et al. in Support of Petitioner, No. 99-62, 1999 WL 1272963 (1999).
- ²⁴ AAUW. (2017). *AAUW Public Policy Priorities*. www.aauw.org/resource/principles-and-priorities.
- ²⁵ AAUW. (2017). *AAUW Public Policy Priorities*. www.aauw.org/resource/principles-and-priorities.
- ²⁶ 898 F.Supp.2d 30 (D.D.C. 2012).
- ²⁷ *Id.* at 53-4 (Bates, J., concurring).