Lambda Legal
making the case for equality

July 31, 2018

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington D.C. 20510

RE: 63 National, State and Local LGBT Groups Oppose Confirmation of Judge Brett Kavanaugh to the Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned national, state and local advocacy organizations, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and people living with HIV, oppose the nomination of Judge Brett Kavanaugh to be an Associate Justice on the United States Supreme Court. After a comprehensive review of Judge Kavanaugh's publicly available record, we have concluded that his views on civil rights issues are fundamentally at odds with securing equality, liberty, justice and dignity under the law for all people, including LGBT people and people living with HIV. Our letter of opposition is based on what is currently known about Judge Kavanaugh's public record, and the American people have a right to know about his entire record as a White House official and in other political roles, and to have meaningful answers to questions about his views on core personal freedoms and protections that millions of people take for granted.

Every Supreme Court vacancy is significant, but the stakes for the LGBT community could not be higher in deciding who will replace Justice Kennedy—who served as the deciding vote in numerous landmark decisions affecting LGBT people. It is not an exaggeration to say that key protections that enable LGBT individuals to participate as equal members of our society are at stake. Judge Kavanaugh's record demonstrates that if he were confirmed to the Supreme Court, he would provide the fifth and decisive vote to undermine many of our core rights and legal protections. In case after case, he has ruled against individuals and in favor of the wealthy and the powerful. Judge Kavanaugh has not served as a neutral and fair-minded jurist. He has instead been a narrow-minded ideologue who cannot be trusted with the grave responsibility of administering impartial and equal justice under the law.

While we have serious concerns with many aspects of Judge Kavanaugh's record, we wish to call to your attention five areas of Judge Kavanaugh's record and philosophy that are of particular concern to our organizations and our constituents, and that raise questions of grave consequence to LGBT people living with HIV and anyone who cares about these communities: (1) We are deeply concerned about

Lambda Legal
making the case for equality

Judge Kavanaugh's philosophy regarding fundamental rights. Judge Kavanaugh believes that unenumerated fundamental rights must be tethered narrowly to "tradition," an approach that inherently favors those who historically have enjoyed power and privilege and that would erode or eliminate significant protections for LGBT people. (2) We have serious concerns that Judge Kavanaugh would support a novel and radical approach to religious freedom, discarding the longstanding doctrinal framework that has rejected attempts to invoke religious liberty to justify violations of anti-discrimination laws. Judge Kavanaugh has demonstrated that he is willing to provide a sweeping license to discriminate to religious adherents at the expense of LGBT civil rights protections. (3) We are deeply concerned that Judge Kavanaugh will gut critical health care protections—including protections against being denied health coverage for preexisting conditions, which would gravely threaten the health of people living with HIV and transgender people, among other vulnerable groups. (4) We are deeply concerned by Judge Kavanaugh's extreme views about the limits of executive privilege and the proper amount of deference owed to the President; and (5) because LGBT people and people living with HIV live in poverty at disproportionately high rates, we are deeply concerned that Judge Kavanaugh's propensity for supporting the interests of the rich and powerful will harm the economic well-being of our and other economically vulnerable communities.

- **Personal Liberty**: Judge Kavanaugh's approach to questions of personal liberty is not only inconsistent with, but would seek to drastically roll back, protections for personal liberty that have been essential to the ability of LGBT people to live authentically, to protect their families, and to make deeply personal decisions about their identity without fear of government penalty or interference. By way of example, Judge Kavanaugh recently gave a presentation to the American Enterprise Institute in which he voiced strong agreement with the efforts of former Chief Justice Rehnquist[1] to restrict the fundamental right to privacy and autonomy. Kavanaugh noted that that despite Rehnquist's inability to convince the court to rule otherwise in *Roe* and *Casey*, that Rehnquist has been successful in "stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition," thereby directly rejecting Justice Kennedy's recognition that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom*." Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Judge Kavanaugh noted that Rehnquist's dissent in *Roe*, which would have denied women the freedom to choose whether to carry a pregnancy to term, was premised on the number of then-existing laws prohibiting abortion, an approach that would effectively negate the Constitution as a check on states' denial of constitutional freedoms.[2] Mr. Kavanaugh

[1] Judge Brett Kavanaugh: *Constitutional statesmanship of Chief Justice William Rehnquist*, AMERICAN ENTERPRISE INSTITUTE, available at https://www.youtube.com/watch?v=2_8Hv4Mes_c (33:39-36:10). In addition to Chief Justice Rehnquist's dissent in *Roe v. Wade*, 410 U.S. 113 (1973), Judge Kavanaugh's first "judicial hero" voted in favor of the holding that Georgia's sodomy statute did not violate the fundamental rights of same-sex couples in *Bowers v. Hardwick*, 478 U.S. 186 (1986); dissented from the holding that a Colorado amendment prohibiting local nondiscrimination protections for gay and bisexual people violated the equal protection clause in *Romer v. Evans*, 517 U.S. 620 (1996); dissented from the decision that HIV is a disability under the ADA and that the "direct threat" provision of the ADA must be based on objective evidence in *Bragdon v. Abbott*, 524 U.S. 624 (1998); dissented from the holding that a Texas statute making it crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional in *Lawrence v. Texas*, 539 U.S. 558 (2003); and authored the opinion in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), holding that the Boy Scouts could exclude an openly gay man without even evaluating the compelling interests at stake in the case.

[2] "The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in

has also demonstrated his antipathy towards a person's control over their own body in other ways. As part of a three-judge panel in a case involving a young immigrant woman seeking an abortion while held in custody, Mr. Kavanaugh vacated a Temporary Restraining Order that was issued by the D.C. Federal District Court allowing the plaintiff's abortion to proceed.[3] Judge Kavanaugh's decision delayed the abortion by requiring the pregnant immigrant to be placed in a sponsor's custody.[4] Abortion restrictions in Texas limit the amount of time within which a person may seek the procedure. Judge Kavanaugh's ruling requiring the plaintiff to be turned over to a sponsor would have permitted the Office of Refugee Settlement to delay the procedure which would have led to limitations on her access to the procedure and would have limited the providers available to perform it.[5] After the D.C. Circuit reversed on appeal, Judge Kavanaugh wrote a sharply worded dissent that claimed the government was creating a 'new right" for immigrants in custody "to obtain immediate abortion on demand" for "unlawful immigrant minors."[6] If applied to other fundamental personal freedoms, his analysis would permit the government to impose severe burdens on those rights, even to the point of rendering their exercise impossible or futile. LGBT people have fought long and hard for judicial recognition of their personal freedoms under the law, to enter into consensual adult intimate relationships, to marry, and to raise children. Nothing in Judge Kavanaugh's record suggests that he would protect LGBT people against even serious incursions upon those rights.

When judges like Judge Kavanaugh invoke "tradition" as a reason to turn back challenges to discriminatory laws, they turn a blind eye to the fact that many traditions deeply rooted in our history reflect longstanding patterns of discrimination based on gender, sexual orientation, gender identity, national origin, and race. That approach—which the Supreme Court long ago rejected--stands in stark opposition to the principles embodied in case law that has developed over the last 50 years – case law that guarantees the right to contraception and a woman's freedom to choose and secures other protections enshrined in such landmark cases as *Roe v. Wade*, *Planned Parenthood v. Casey*, *Romer v. Evans*, and *Lawrence v. Texas*. Judge Kavanaugh has openly declared his animosity to those principles and his desire to turn back the clock, which poses a clear and present danger to the fundamental rights of LGBT people, women and all vulnerable minorities.

These are not abstract issues. There are cases that will likely come before the Supreme Court soon that will ask the Court to consider the issues affecting the fundamental liberty of LGBT people, such as challenges to state laws that seek to undermine the equality of same-sex married couples or to federal policies that infringe upon the autonomy and privacy rights of transgender

---

the traditions and conscience of our people as to be ranked as fundamental,'" *Roe v. Wade*, 410 U.S. 113, 174, 93 S. Ct. 705, 737, (1973), holding modified by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992).

[3] *Garza v. Hargan*, No. 17-5236, 2017 WL 4707112 (D.C. Cir. Oct. 19, 2017).

[4] *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017), cert. granted, judgment vacated sub nom. *Azar v. Garza*, 138 S. Ct. 1790 (2018).

[5] Leah Litman, *Liberals and the Powerless Should Worry About a Kavanaugh Court*, NEW YORK TIMES (July 10, 2018), *available at* https://www.nytimes.com/2018/07/10/opinion/brett-kavanaugh-supreme-court.html.

[6] *Id.*

people, such as challenges to the President's policy banning military service by transgender men and women. For this reason, we are gravely concerned that Judge Kavanaugh's narrow and backward-looking approach to fundamental rights will do deep and lasting damage to LGBT people's lives, and to other communities for whom "history" and "tradition" provide no protection against the deprivation of liberty.

- **License to Discriminate**: We have serious concerns that Judge Kavanaugh will support a radical new view of religious exemptions from generally applicable laws that will undermine longstanding doctrine and erode our nation's commitment to protecting civil rights. Judge Kavanaugh has demonstrated that he is willing to provide a sweeping license to discriminate to religious adherents that construes even enforcement of the most basic protections for women and others as an undue burden on religious beliefs. For example, in *Priests for Life v. U.S. Department of Health and Human Services*, Judge Kavanaugh wrote a dissent in response to the D.C. Circuit Court's denial of a petition challenging the Affordable Care Act's requirement that religious organizations must submit a form to their insurer if they want to object to providing contraceptive coverage for their employees. The organizations argued that completing the form impermissibly burdened their religious rights under the Religious Freedom Restoration Act (RFRA).[7] Judge Kavanaugh argued in his dissent that the filing of the form substantially burdened the adherents' exercise of religion because they believed that doing so amounted to a requirement that they take action contrary to their beliefs. The majority criticized the dissent as advocating for 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." Judge Kavanaugh's belief that courts should accept, without question, any claim by a religious organization that a government requirement substantially burdens their sincere religious beliefs demonstrates his willingness to inappropriately extend RFRA and religious exemptions in ways that will undercut LGBT protections.

  Judge Kavanaugh's view that the courts must show unquestioning deference to religious adherents' claims that government requirements substantially burden their beliefs raises significant concerns that he will undermine state and local nondiscrimination laws by allowing religious adherents to use RFRA and the First Amendment as a license to discriminate against LGBT people. This is especially disconcerting considering the kinds of cases that are likely to come before the Supreme Court in the wake of the Supreme Court's decision to reverse *Masterpiece Cakeshop*.[8] In addition, cases addressing the scope of RFRA with regard to sexual orientation and gender identity are percolating in the lower courts and will likely end up before the Supreme Court soon as well.[9]

---

[7] *Priests for Life v. U.S. Department of Health and Human Services*, 808 F.3d 1 (D.C. Cir. 2015).

[8] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

[9] The Sixth Circuit recently held that requiring an employer to comply with Title VII did not substantially burden his religious practice of operating his business. *Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) (the defendant has filed a petition for certiorari on a narrower question of whether "sex" in Title VII's prohibition on discrimination "because of…sex," meant "gender identity" and included "transgender status" when Congress enacted Title VII and whether *Price Waterhouse v. Hopkins* prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity).

- **Health Care Protections and Preexisting Conditions**: Access to health care is an issue of profound importance to LGBT people and people living with HIV. Prior to passage of the Affordable Care Act (ACA), transgender people and people living with HIV were routinely refused health insurance based on preexisting conditions. Based on Judge Kavanaugh's record there is every reason to believe he would use his position on the Court to overturn critical health care protections. Judge Kavanaugh's outright hostility towards the ACA has been evident in multiple decisions involving the fate of this law.[10] Judge Kavanaugh has been especially critical of the individual mandate. In one case, he referred to the mandate as "unprecedented on the federal level in American history" and referred to it as a significant expansion of congressional authority.[11] Judge Kavanaugh has also repeatedly expressed his opinion that Congress did not have the authority to implement the individual mandate,[12] and has asserted that the individual mandate is inextricably linked with the provisions protecting consumers with preexisting conditions from being denied health care coverage altogether or charged more for their care.[13]

  With the elimination by Congress in 2017 of the penalty imposed for the individual mandate,[14] it is clear that Judge Kavanaugh's supporters know they can count on him to strike down those protections as unconstitutional when the opportunity arises – which may happen sooner rather than later, thanks to the Justice Department's endorsement of a challenge to the ACA filed by 19 individual states seeking to strike down the protections for preexisting conditions.[15]

---

[10] In a 2011 case in which the D.C. Circuit upheld the Affordable Care Act ("ACA"), Judge Kavanaugh wrote a dissent arguing that it was premature for the Court to rule on the constitutionality of the law. Judge Kavanaugh filed a similar dissent after the D.C. Circuit refused to rehear a separate challenge to the constitutionality of the ACA. *Sissel v. U.S. Department of Health and Human Services*, 799 F.3d 1035 (D.C. Cir. 2015).

[11] *See supra* note 9.

[12] *See supra* note 1 (Judge Kavanaugh praising the fact that the 2012 NFIB ACA case held that the Commerce Clause did not give Congress authority to enforce the individual mandate); Brett M. Kavanaugh, *The Administrative State After the Health Care Cases* (Nov. 17, 2012), *available at* https://www.youtube.com/watch?v=zRImAIbJOt8 (speech in front of the Federalist Society where Judge Kavanaugh said the individual mandate was "unprecedented" as "Congress has never used the Commerce Clause power to force people to purchase goods or services); Brett M. Kavanaugh, *The Joseph Story Distinguished Lecture* (Oct. 25, 2017), THE HERITAGE FOUNDATION, *available at* https://www.heritage.org/josephstory2017 (10/25/17 : 33:50 – 36:27) (criticizing *NFIB v. Sebelius* for using the canon of constitutional avoidance (he wanted them to strike it down as unconstitutional).

[13] Jane Norman, *Judges Ponder Privatized Social Safety Net Health Care Law Arguments*, CONGRESSIONAL QUARTERLY HEALTHBEAT (Sept. 23, 2011). ("During oral argument, Judge Kavanaugh pointed out that the individual mandate was part of a larger scheme, since it was tied to guaranteed issue – a requirement in the law that people be allowed to enroll regardless of pre-existing conditions – and community rating, which means the same premiums are assessed regardless of health condition.")

[14] H.R. 1, 115th Congress (2017-2018) available at https://www.congress.gov/bill/115th-congress/house-bill/1.

[15] *Texas v. United States*, No. 4:18-cv-00167 (N.D. Tex.) The lawsuit was filed in the Northern District of Texas and has been assigned to Judge Reed O'Connor who has issued three nationwide injunctions adversely effecting LGBT people: Judge O'Connor issued a nationwide injunction that prohibited same-sex couples from enjoying equal access to the Family and Medical Leave Act following the *Obergefell v. Hodges* decision, issued a nationwide injunction halting the enforcement of President Obama's Title IX guidance on transgender students, and a nationwide injunction halting the Office of Civil Rights from enforcement of the nondiscrimination regulations of the Affordable Care Act. Most recently, O'Connor presided over a case that resulted in a significant revision of the Federal Bureau of Prison's Transgender Offender Manual that eliminated key provisions clarifying that transgender people should be classified and housed in accordance with their gender identity.

If the protections against denying coverage for preexisting conditions are struck down, an estimated 52 million people will lose their health coverage.[16] The elimination of coverage would be dire for LGBT people and people living with HIV. LGBT people are more than twice as likely to be uninsured as non-LGBT people, and there has been a significant decrease in the uninsurance rates following the passage of the ACA for people living with HIV.[17]

- **Presidential Power**: We are deeply concerned that Judge Kavanaugh's excessive deference to presidential authority would have serious consequences for LGBT people and people living with HIV. Judge Kavanaugh has argued that sitting Presidents should not be subject to civil or criminal investigation or process while in office, that a president should be able to dismiss any counsel "out to get him," and that the president need not follow a law if he thinks the law is unconstitutional. In Judge Kavanaugh's words:

    - "To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch – at least unless the President deems the law unconstitutional in which event the President can decline to follow the statute until a final court order says otherwise."[18]

  It is important to note that questions about the limits of executive privilege and the proper amount of deference owed to the President are issues related to matters far beyond the Special Counsel's purview - these questions are at the heart of every challenge to arbitrary presidential action ranging from the separation of children from their families at the border to the declaration of a ban on military service by transgender people.

- **Kavanaugh Will Side with the Rich and Powerful**: LGBT people across the country live in poverty at disproportionately high rates, especially LGBT people of color – and particularly transgender and gender non-conforming people of color.[19] LGBT people depend on longstanding protections for employees and consumers. Judge Kavanaugh has repeatedly voted against workers and consumers and in favor of the rich and powerful. For example, in *PHH Corporation*

---

[16] *See* Gary Claxton et al. *Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA* (Dec. 12, 2016), KAISER FAMILY FOUNDATION, *available at* https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca/ (according to this 2016 analysis, approximately 52 million Americans under the age of 65 could find their health insurance at risk because of a wide range of preexisting conditions).

[17] *See* Kellen Baker et al, *The Senate Health Care Bill would Be Devastating for LGBTQ People*, CENTER FOR AMERICAN PROGRESS (July 6, 2017), *available at* https://www.americanprogress.org/issues/lgbt/news/2017/07/06/435452/senate-health-care-bill-devastating-lgbtq-people/.

[18] Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907 (2014), *available at* https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4554&context=ndlr.

[19] Lourdes Ashley Hunter, Ashe McGovern, and Carla Sutherland, eds., *Intersecting Injustice: Addressing LGBTQ Poverty and Economic Justice for All: A national Call to Action* (New York: Social Justice Sexuality Project, Graduate Center, City University of New York, 2018).

v. Consumer Financial Protection Bureau, Judge Kavanaugh wrote an opinion holding that the leadership structure of the Consumer Financial Protection Bureau—an agency tasked with regulating consumer financial projects or services such as payday lending services—was unconstitutional because Congress decided that the president could only fire its director for cause (a holding which was subsequently reversed).[20] Judge Kavanaugh also wrote a dissent in *SeaWorld of Fla., LLC v. Perez* in which he argued that the Department of Labor does not have the authority to regulate and protect employees who interact with killer whales at SeaWorld.[21] Judge Kavanaugh's dissent fails to address the fact that there were *three* previous deaths involving the same whale, and his dissent demonstrates the low regard Mr. Kavanaugh holds for worker protections. Judge Kavanaugh also seems to hold employee privacy rights in low regard. After the D.C. Circuit majority invalidated a random drug testing program for U.S. Forest Service employees based on the fact that their preexisting policy had been successful without such testing, Judge Kavanaugh wrote a dissent in favor of instituting the invasive testing.[22]

Judge Kavanaugh's record demonstrates he will side with employers over employees when important questions arise regarding the scope of laws prohibiting employment discrimination. With three petitions for *certiorari* currently pending before the Supreme Court that address the scope of employment protections for LGBT people under Title VII, Senators must ensure that a new justice would rule fairly on these momentous issues, and Judge Kavanaugh's record does not meet that test.

Our letter of opposition is based on what is known from Judge Kavanaugh's currently available public record, as outlined above. But the American people have a right to know about his entire record as a White House official and in other political roles and to have meaningful answers to questions about his views on core personal freedoms and protections that millions of people take for granted. LGBT Americans, people living with HIV, and other at-risk communities rely upon the Constitution's guarantees of equality, liberty, dignity and justice under the law for their ability to participate fully in society and make major life decisions, and they are entitled to know whether a new justice would protect those guarantees.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sharon McGowan, Chief Strategy Officer and Legal Director for Lambda Legal, at smcgowan@lambdalegal.org or Sasha Buchert, Federal Judicial Nominations Lead and Staff Attorney for Lambda Legal, at sbuchert@lambdalegal.org.

Very truly yours,

Lambda Legal
AIDS United
Alaskans Together for Equality

[20] *PHH Corporation v. Consumer Financial Protection Bureau*, 839 F.3d 1 (Oct. 11, 2016).

[21] *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014).

[22] *Nat'l Fed'n of Fed. Employees-IAM v. Vilsack*, 681 F.3d 483 (D.C. Cir. 2012).

Athlete Ally
Basic Rights Oregon
BiNet USA
Bisexual Organizing Project (BOP)
Boston Bisexual Women's Network
Bradbury-Sullivan LGBT Community Center
CenterLink: The Community of LGBT Centers
Colorado LGBTQ+ Chamber of Commerce
Equality Alabama
Equality California
Equality Federation
Equality Florida
Equality Illinois
EqualityMaine
Equality Michigan
Equality New Mexico
Equality North Carolina
Equality Ohio
Equality Pennsylvania
Equality South Dakota
Equality Texas
Equality Utah
Fairness Campaign – Kentucky
Fairness West Virginia
Family Equality Council
FilmDis
FORGE, Inc.
FreeState Justice
Garden State Equality
Genders & Sexualities Alliance Network (GSA Network)
Georgia Equality
GLAAD
Kansas City Center for Inclusion
Louisiana Trans Advocates
MassEquality
Mazzoni Center
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Equality Action Team (NEAT)
National Latina Institute for Reproductive Health
National LGBTQ Task Force Action Fund
National Health Law Program
One Colorado
One Iowa

OutCenter of Southwest Michigan
OutFront Minnesota
Outserve – SLDN
PROMO
SAGE
Sexuality Information and Education Council of the United States (SIECUS)
Southern Arizona Gender Alliance
The LGBT Bar Association and Foundation of Greater New York (LeGaL)
The Trevor Project
Transgender Law Center
TransOhio
Trans Youth Equality Foundation
URGE: Unite for Reproductive & Gender Equity
Whitman-Walker Health
#StillBisexual

cc: United States Senate Judiciary Committee Members