



**In Opposition to the Confirmation of
Brett Kavanaugh to the U.S. Supreme Court**

Ilyse G. Hogue
President
NARAL Pro-Choice America

U.S. Senate
Committee on the Judiciary
Testimony for the Record

September 4-7, 2018

Chairman Grassley, Ranking Member Feinstein, and members of the Judiciary Committee: I am honored to represent NARAL Pro-Choice America's 2 million member-activists in submitting this testimony for the record. You have before you the nomination of Brett Kavanaugh to the position of Associate Justice of the United States Supreme Court. Your constitutional responsibility to consider nominees to the Supreme Court is considerable, especially given the times in which we live. I fear deeply that we will wake up in a few years wondering how we allowed a constitutional crisis and the regression of our fundamental rights - and those of our children - to occur on our watch.

Kavanaugh was nominated by a President who has been implicated in federal crimes and who promised to only nominate judges who would overturn *Roe v. Wade* "automatically" by guaranteeing that his nominees would pass a litmus test on *Roe*. Kavanaugh was handpicked by the Federalist Society, an organization dedicated to radically altering America's laws through the courts. Kavanaugh's confirmation process has been rushed forward without the opportunity to review his full record, though we have seen enough to know that it disqualifies him from serving on the highest court. Kavanaugh has a chilling record that shows an intention to criminalize women who seek an abortion, to make voting something only for the privileged, and to place the President beyond the reach of the law. Given all of this, it is unsurprising that polling shows the majority of Americans do not support Kavanaugh, including 72 percent of women who are worried about our futures and our families. Given this full picture, the Senate should not even be considering Kavanaugh's nomination today. However, since the Committee is going forward, it is crucial that I share the reasons why NARAL Pro-Choice America strongly opposes the confirmation of Brett Kavanaugh.

The Long-Term Anti-Choice Strategy to Criminalize Abortion

In 1973, the Supreme Court recognized the constitutional right to abortion in *Roe v. Wade*.¹ Since then, the court has repeatedly upheld this ruling, including in *Planned Parenthood v. Casey* in 1992² and in *Whole Woman's Health v. Hellerstedt* in 2016.³ During these four decades and counting, the right to reproductive freedom has prevailed despite an onslaught of attacks at the state and federal level from anti-choice politicians attempting to restrict access to abortion and, in many cases, ban and criminalize abortion. These attacks, which began immediately after *Roe* was decided, are part of a long-term, well-funded and coordinated strategy.

Anti-choice politicians and activists have needed to employ a protracted approach because the right to abortion is exceedingly well-established precedent. Moreover, *Roe* has broad public support: seven in 10 Americans support this constitutional right⁴. As a result, frontal attacks on *Roe* are highly unpopular. Having grudgingly accepted this, anti-choice politicians have spent decades formulating and executing a less-direct approach to dismantling reproductive freedom. The nomination of Brett Kavanaugh to the Supreme Court is the grand finale of this strategy because his confirmation would cement a

¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

³ *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016).

⁴ Carrie Dunn, *NBC/WSJ poll: Support for Roe v. Wade hits new high*, NBC News, Jul. 23, 2018, <https://www.nbcnews.com/politics/first-read/nbc-wsj-poll-support-roe-v-wade-hits-new-high-n893806>.

conservative, anti-choice majority on the Court – a majority that would rule to gut or outright overturn *Roe v. Wade* at the first opportunity.

Development of an Anti-Choice Strategy Post-*Roe*

Soon after the Supreme Court recognized the constitutional right to abortion in *Roe*, anti-choice politicians looked for ways to undermine the decision in the short term and overturn it in the long term. One approach they repeatedly attempted – unsuccessfully – was to pass a federal measure banning abortion nationwide.⁵ After concluding that the frontal assault on *Roe* was futile, the anti-choice movement and its supporting politicians decided to pursue other approaches. They settled on a two-part strategy: first, they would seek out anti-choice Supreme Court nominees; second, in the meantime, they would work to chip away at abortion rights wherever possible.

Pat Buchanan, communications director for then-President Reagan, publicly acknowledged the first prong of this strategy: “[Our conservative appointment strategy] could do more to advance the social agenda – school prayer, anti-pornography, anti-busing, right-to-life, and quotas in employment – than anything Congress can accomplish in 20 years.”⁶ In other words, the anti-abortion movement knew it had to focus on Supreme Court nominees in order to achieve long-term success.

The second part of the strategy was perhaps best described in an internal memo drafted by young, conservative lawyers in the Reagan administration’s Justice Department. “No one seriously believes that the Court is about to overrule *Roe v. Wade*,”⁷ they wrote. Therefore, the key question is how “to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigating its effects?”⁸ The authors – including now-Justice Samuel Alito, who was an assistant to the solicitor general at the time – noted that “[t]here may be an opportunity to nudge the Court.”⁹

In the years since, the anti-abortion movement has remained committed to the two-part strategy that Buchanan, Alito, and others outlined in the 1980s: restrict both the right and access to abortion incrementally, wherever possible, while simultaneously waiting for opportunities to pack the judiciary with judges who will vote to end *Roe* and criminalize abortion – their ultimate goal.

The Anti-Choice Strategy in Action

Anti-choice activists and politicians have followed this strategy to a T. Over the years, they have pursued opportunities to push for anti-choice Supreme Court nominees. Initially, they had mixed success but over time they adjusted, refined, and built on their strategy of packing the courts with anti-choice

⁵ NARAL Pro-Choice America, Congressional Record on Choice (1981, 1982, 1983).

⁶ Robert A. Carp and Ronald Stidham, *The Federal Courts* 94 (4th ed. 2001).

⁷ Samuel Alito, et al., U.S. Dept. of Justice, Office of Solicitor General, *Memorandum* 8 (1985), <http://www.npr.org/documents/2005/nov/alito/alitothornburgh.pdf> (last visited Mar. 17, 2017) (reproduced from the Holdings of the Nat’l Archives and Records Admin, 1981-1985).

⁸ *Ibid.*

⁹ *Ibid.* at 16.

judges. For example, in 1987 they failed to confirm Reagan's anti-choice nominee, Robert Bork. However, in 1991, they successfully confirmed anti-choice Clarence Thomas to the Supreme Court. The second Bush Administration added to this success with the confirmations of anti-choice Justices John Roberts and Samuel Alito. Most recently, President Trump made his contribution with the confirmation of Neil Gorsuch last year. The confirmation of Kavanaugh would be the next and final step in their strategy to secure a conservative majority on the Court and roll back a generation's worth of progress.

As part of their Supreme Court strategy, the anti-choice movement, with the help of anti-choice politicians, have been building their bench of potential Supreme Court nominees by ensuring that the lower courts are packed with anti-choice judges. For example, the right-wing, anti-choice Federalist Society, which is known to groom and support the careers of young, conservative lawyers, has played an outsized role in the selection of nominees for the federal district and circuit courts over the last 20 years. The group was very influential in the Bush Administration¹⁰ and has even more power in the Trump Administration given that the judicial selection process has essentially been outsourced to them. So far, Trump has announced nearly 150 nominees for circuit and district court vacancies. Of that total number, none has a documented pro-choice record and nearly a third are demonstrably anti-choice.¹¹

Simultaneously, anti-choice politicians have sought to chip away at reproductive freedom by imposing as many restrictions as possible on women's access to abortion care. They enact laws to ban abortion based on a multitude of reasons. They restrict access to medication abortion (RU 486) or make it unavailable altogether. They deny insurance coverage for abortion services to low-income women, even when continuing the pregnancy would endanger her health. They put up roadblocks for young women that jeopardize their health and can force them to delay abortion care or even, in some cases, take drastic measures. They construct barriers for all women with state-mandated biased counseling and mandatory-delay requirements that can force women to unnecessarily delay the procedure. With these restrictions in place, women's reproductive health is already in serious danger. All told, from 1995 through 2017, nearly 1,000 anti-choice measures have been enacted.

The cumulative impact of these restrictions have achieved the short term goal of making it increasingly difficult for women to obtain safe abortion care. In addition, 16 states have laws that would criminalize abortion if *Roe* were ended, and 26 states have anti-choice legislatures and governors that could fast track legislation criminalizing abortion. If anti-choice forces prevail in their effort to gut *Roe*, women's lives will be in immediate danger. Studies show that the more restrictions are placed on abortion care, the less accessible the medical procedure becomes. However, history demonstrates that restricted access does not eliminate abortion; rather, in an anti-choice climate, women are forced to seek control over their reproductive lives in any way possible, often risking serious injury or death. Before *Roe*, it is estimated that each year 1.2 million women had an illegal abortions and 5,000 of those women died

¹⁰ People for the American Way, August 2002, <http://www.pfaw.org/report/the-federalist-society-from-obscurity-to-power/>.

¹¹ Trump's Anti-Choice Judicial Nominees, NARAL Pro-Choice America, <https://www.prochoiceamerica.org/laws-policy/trumps-anti-choice-judicial-nominees/>.

from them.¹² After the Supreme Court legalized abortion with *Roe*, deaths from unsafe, illegal abortions dropped dramatically.

Trump's Deal With Anti-Choice Movement to Trade the Courts for the Presidency

Since *Roe v. Wade*, the courts have been the ultimate bulwark against the most extreme attempts to undermine abortion rights, as these attempts are in direct conflict with Americans' basic constitutional rights. Anti-choice and conservative activists are keenly aware of the power of the courts, which is why they have been pursuing for decades their two-part strategy to overturn *Roe*.

During the 2016 election, there was some initial debate within the anti-choice movement about whether Donald Trump would advance or damage this long standing strategy. Trump saw their movement as an opportunity to bolster his far-right support, and took unprecedented steps to gain their loyalty.

Trump's Litmus Test

Trump had the early support of the far-right evangelical leader Ralph Reed,¹³ who cultivated Trump's friendship in 2011 and encouraged him to run in the 2012 election. Reed said he was impressed by the "compelling and transparent" way Trump described his anti-abortion views on TV.¹⁴ Reed believed Trump's aggressive anti-choice rhetoric could help him activate the far-right evangelical vote in a way that other Republican hopefuls couldn't. With guidance from Reed and other far-right leaders, Trump began actively courting the religious right, and in particular, the anti-choice movement. As Reed put it, Trump made this effort "a centerpiece of his campaign and his strategy for victory from the beginning."¹⁵

The core of Trump's plan to court the far right was his explicit promise to install anti-choice judges in the Supreme Court and throughout the federal court system. In May 2016, Trump pledged to nominate only "pro-life" judges. Then, in a letter to top anti-choice activists, Trump announced that he was "commit[ing]" to nominate "pro-life justices to the U.S. Supreme Court."¹⁶ Alongside these efforts, Trump also recruited the leader of an anti-abortion group to run his campaign's so-called "Pro-Life Coalition," selected a staunchly anti-choice running mate, and vowed to sign anti-abortion legislation. But his judicial commitments were the nonnegotiable core of his charm offensive and were a tipping point in Trump's relationship with the anti-choice community.

Leaders in the anti-choice movement couldn't contain their excitement over Trump's commitments and acknowledged that his promises were unprecedented. Alliance Defending Freedom's Matt Bowman said

¹² The American College of Obstetricians and Gynecologists, Committee Opinion, Nov. 2014, <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Increasing-Access-to-Abortion>.

¹³ BuzzFeed News, Aug. 2016, <https://www.buzzfeednews.com/article/mckaycoppins/the-religious-rights-dangerous-bet-on-trump#.en9VEdOk9>.

¹⁴ NPR, June 2016, <https://www.npr.org/2016/06/22/483046602/ralph-reed-weighs-in-on-trumps-meeting-with-evangelicals>.

¹⁵ Faith & Freedom Coalition, December 2016, <https://www.youtube.com/watch?v=9Sgxa4jLOIM>.

¹⁶ Letter from Donald Trump, to "Pro-Life Leader", Sept. 2016, <https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on-ProLife-Coalition.pdf> (last visited Mar. 17, 2017).

that “Donald Trump has actually raised the bar for what pro-lifers can expect from Republican candidates. ... Future Republican candidates will have much to explain if they are going to be less pro-life than Donald Trump.”¹⁷ And Marilyn Musgrave, vice president of the anti-choice Susan B. Anthony List, explained: “The commitments that Donald Trump has made to the pro-life community are extraordinary... We have never gotten these commitments from any other candidate, including the last two candidates who were pro-life.”¹⁸

These anti-choice leaders made it clear that Trump’s Supreme Court litmus test was not just the foundation of his support, but the whole ball game. Susan B. Anthony List president Marjorie Dannenfelser even said, “If nobody voted on any other issues apart from the direction of the Supreme Court, that would be enough.”¹⁹

For that reason, Trump consistently emphasizes his promise to nominate anti-choice judges when he needs to shore up support among far-right voters.²⁰ He continued to double and triple-down on that threat both before and after the election,²¹ saying that justices he would nominate would “automatically”²² move to end *Roe v. Wade*. He also said that the decision “can be unpassed.”²³ When questioned, he stated unequivocally that “it is” a litmus test for his Supreme Court picks.²⁴

Trump Outsourced the Selection of Supreme Court Nominees

Moreover, he outsourced the selection process to the ideologically-driven Federalist Society and Heritage Foundation, which created a list of potential nominees that was released in stages, but eventually grew to cover 25 potential nominees, including Kavanaugh. After the initial rollout of the list, reports noted the high number of anti-choice judges on the list²⁵ and the *National Review* commented that “the timing of the list’s release smacks of desperate pandering to conservatives.”²⁶

¹⁷ The National Pulse, Nov. 2016, <https://thenationalpulse.com/commentary/donald-trump-sets-new-pro-life-standard/>.

¹⁸ National Catholic Register, Sept. 2016, <http://www.ncregister.com/site/article/trump-plays-the-pro-life-card>.

¹⁹ The Telegraph, Sept. 2016, <https://www.telegraph.co.uk/women/politics/donald-trump-abortion-row-meet-marjorie-dannenfelser-the-woman-s/>.

²⁰ The Hill, Sept. 2016, <http://thehill.com/blogs/ballot-box/presidential-races/296254-trump-strengthens-anti-abortion-stance> (last visited Mar. 17, 2017).

²¹ CBS News, Nov. 2016, <http://www.cbsnews.com/news/trump-promises-pro-life-justices-supreme-court-same-sex-marriage/> (last visited Mar. 17, 2017).

²² Fox News, May 2016, <https://www.youtube.com/watch?v=dpIMuOPu5Hs>

²³ Life News, Feb. 2016, <https://www.lifenews.com/2016/02/18/donald-trump-roe-v-wade-was-wrongly-decided-i-will-appoint-judges-to-change-it/>.

²⁴ CNN, June 2015, via YouTube, timestamp 07:19, <https://www.youtube.com/watch?v=8fT7Np6PFao>.

²⁵ Reuters, May 2016, <https://www.reuters.com/article/us-usa-election-trump-court-list/trumps-supreme-court-list-all-conservative-some-provocative-idUSKCN0YA2XV>.

²⁶ National Review, May 2018, <https://www.nationalreview.com/corner/donald-trumps-supreme-court-list-too-little-too-late/>.

That pandering worked. Anti-choice activists called the list “stellar,”²⁷ and the key reason to vote for Trump.²⁸ Later, Trump continued to use the list to shore up his support, adding additional names in September 2016²⁹ and in November 2017.³⁰

Trump’s nomination of Neil Gorsuch to the Supreme Court bolstered anti-choice activists’ enthusiasm for his presidency and reinforced their loyalty to the Trump administration. Anti-choice leaders called the nomination “awesome,”³¹ said they were “thrilled.”³² They proclaimed Gorsuch an “exceptional choice”³³ and a “great SCOTUS pick!”³⁴ They agreed that “Trump had kept his promise to nominate only pro-life judges to the Supreme Court,” that Trump was “continuing to fulfill campaign promises at a breakneck speed.”³⁵ They explicitly told Trump, “You are a man of your word!”³⁶ They worked hard to lobby for Gorsuch, and, after his confirmation, Trump sent thank you notes to top anti-choice leaders, acknowledging “all of [their] efforts to help confirm our Supreme Court nominee Neil Gorsuch.”³⁷

Though “thrilled” about Gorsuch’s confirmation, anti-choice activists acknowledged that the next Supreme Court vacancy would be their biggest fight. In the months leading up to Justice Kennedy’s retirement, they had already begun to frame the next Supreme Court vacancy as the final step in their strategy to take down *Roe v. Wade*.

This Vacancy Puts Ending *Roe* Within Reach

As Alliance Defending Freedom (ADF) president Mike Farris said, “Winning means *Roe v. Wade* is reversed.”³⁸ A second Supreme Court vacancy was the key to realizing that goal. In early 2018, ADF senior counsel Jordan Lorence said their group was looking ahead to the next open seat. “If any of them retire say, at the end of the term, at the end of June,” he said, “Then things are going to go thermonuclear, because that would be probably the fifth vote to overturn *Roe v. Wade*.”³⁹

²⁷ The National Pulse, Nov. 2016, <https://thenationalpulse.com/commentary/donald-trump-sets-new-pro-life-standard/>.

²⁸ LifeNews.com, Oct. 2016, <https://www.lifenews.com/2016/10/27/kristan-hawkins-i-am-voting-for-donald-trump-and-pro-life-voters-should-too-heres-why/>.

²⁹ CNN, Sept. 2016, <https://www.cnn.com/2016/09/23/politics/donald-trump-judicial-nominations/index.html>.

³⁰ USA Today, Nov. 2017 *available at* <https://www.usatoday.com/story/news/politics/2017/11/17/trump-adds-five-names-list-potential-supreme-court-justices/875983001/>.

³¹ Students For Life, Jan. 2017, <http://studentsforlife.org/scotus-nomination-judge-neil-gorsuch/>.

³² Students For Life, Jan. 2015, <http://studentsforlife.org/2017/01/31/scotus-nomination-judge-neil-gorsuch/>.

³³ ConfirmGorsuch.com, Jan. 2017, via NARAL Research Department.

³⁴ Twitter.com, Jan. 2017, <https://twitter.com/AbbyJohnson/status/826604744571494400>.

³⁵ Students For Life, Jan. 2017, <http://studentsforlife.org/scotus-nomination-judge-neil-gorsuch/>.

³⁶ Twitter.com, Jan. 2017, <https://twitter.com/operationrescue/status/826603824789987328>.

³⁷ Susan B. Anthony List, April 2017, <https://www.sba-list.org/suzy-b-blog/victory-judge-gorsuch-confirmed-supreme-court>; Concerned Women for America email, May 2017, via NARAL Research Department.

³⁸ Alliance Defending Freedom, Freedom Matters podcast, <https://soundcloud.com/freedommatters/new-alliance-defending-freedom-ceo-mike-farris> (last visited June 20 2018).

³⁹ “The Empty Seat Looms Large At The Supreme Court,” Alliance Defending Freedom, Freedom Matters podcast, Jan. 2017, timestamp 6:00, <https://www.adflegal.org/detailspages/blog-details/allianceedge/2017/01/23/podcast-the-empty-seat-looms-large-at-the-supreme-court>.

Other extreme anti-choice activists agreed. Americans United for Life president Catherine Glenn Foster reflected, “I’m so happy that he [Gorsuch] was in fact confirmed. I think that we have a real inroad now towards overturning *Roe*.” When an interviewer asked, “One more turnover on the Supreme Court could make that happen, right?” Foster said, “Absolutely. One more.”⁴⁰ And in May 2018, Marjorie Dannenfelser, president of the anti-choice political group Susan B. Anthony List, said: “We are on the verge of a revolution when it comes to *Roe v. Wade* and that is because there is a strong possibility that we’ll have at least one opening on the Supreme Court.”⁴¹

When Justice Kennedy announced his retirement just a few weeks later, these activists didn’t bother to hide their glee. Dannenfelser announced, “If this is the *Roe* vote, then it is the most consequential battle since 1973.”⁴² Susan B. Anthony List shared a quote from Mike Pence stating, “I long for the day that *Roe v. Wade* is sent to the ash heap of history,” and commented, “It looks like this may happen sooner rather than later.”⁴³ Students for Life said, “Now is our time to overturn *Roe v. Wade*. We can overturn *Roe*!”⁴⁴ 40 Days for Life tweeted, “Justice Kennedy’s retirement could mean an overturning of #RoeVWade with a prolife Supreme Court. This is the beginning of the end of abortion!”⁴⁵ And the National Institute of Family and Life advocates (NIFLA) called the vacancy “that 5th vote to get rid of *Roe v. Wade*.”⁴⁶

The Anti-Choice Movement Has Found Their Man in Kavanaugh

As if his record were not enough to document his hostility to reproductive freedom, one needs to look no further than the outpouring of support the anti-choice movement has given to Kavanaugh since he was announced as the nominee. Anti-choice extremists have not been shy about their conviction that Kavanaugh meets Trump’s litmus test and would be that crucial fifth vote to end *Roe*, criminalize abortion, and turn back the clock for women in this country.

Immediately after Trump announced Kavanaugh’s nomination, anti-choice leaders leapt to praise his selection. Ralph Reed took a victory lap, saying, “If Judge Kavanaugh is confirmed, conservatives will have a rock-solid 5-4 majority on the Supreme Court,” which would mean “overturning *Roe v. Wade*.”⁴⁷ Students for Life President Kristan Hawkins wrote in an email, “Justice Kennedy’s replacement could give our Pro-Life Movement the majority we need to overturn *Roe v. Wade* and *Doe v. Bolton*.” She also emphasized that, “President Trump’s nominee, Brett Kavanaugh, is someone I think the pro-life movement can get behind 100%.”⁴⁸ Human Coalition president Brian Fisher said “Kavanaugh gives great

⁴⁰ theDoveTV, May 2017, timestamp 03:18, <https://www.youtube.com/watch?v=t5GraZiBBII>.

⁴¹ Susan B. Anthony List, May 2018, <https://www.youtube.com/watch?v=GMiBGwkbq94&feature=youtu.be>.

⁴² The Atlantic, June 2018, https://www.theatlantic.com/amp/article/563936/?__twitter_impression=true.

⁴³ Twitter.com, June 2018,

https://twitter.com/SBAList/status/1012145101190164481?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1012145101190164481&ref_url=https%3A%2F%2Fwww.liveaction.org%2Fnews%2Fpro-life-roe-overturn%2F.

⁴⁴ Twitter.com, June 2018, <https://twitter.com/StudentsforLife/status/1012037228195991560>.

⁴⁵ Twitter.com, June 2018, <https://twitter.com/40daysforlife/status/1012068948886675456>.

⁴⁶ NIFLA Decision Webcast, June 2018, timestamp 38:00,

https://instantteleseminar.com/Events/108422841?inf_contact_key=2f06492a2c2d1c7dbc5354e20ab652a2e9c148f753949560d4fcfc0a34ac6b6c.

⁴⁷ Faith and Freedom Coalition email, July 2018, via NARAL Research Department.

⁴⁸ Students for Life email, July 2018, via NARAL Research Department.

hope to the pro-life movement that the end of *Roe v. Wade* and legal abortion is in sight.”⁴⁹ 40 Days for Life called Kavanaugh’s nomination “a big win for pro-lifers” and emphasized the “unprecedented opportunity to overturn *Roe v. Wade*.”⁵⁰

The anti-choice movement also made it clear that they were fully aligned in support of Kavanaugh. Extreme anti-choice group Susan B. Anthony List rapidly formed the ‘Pro-Life Court Coalition’ to advocate on behalf of Kavanaugh. The Coalition’s website argued that, “The next Supreme Court justice could be the deciding vote in reversing *Roe*” and urged anti-choice activists to call on the Senate to “swiftly vote to confirm President Trump’s nominee to the Supreme Court, Judge Brett Kavanaugh.” Pro-Life Court Coalition’s members included extreme anti-choice groups such as Operation Rescue, Americans United for Life, Students for Life, Concerned Women for America, Americans United for Life, 40 Days for Life, Live Action, Priests for Life,⁵¹ alongside designated hate groups C-Fam⁵² and the Family Research Council,⁵³ among other organizations.

The groups specifically characterized Kavanaugh as a “pro-life” judge whose record demonstrates that he would be a reliable anti-choice vote. Susan B. Anthony List’s *Life Issues Institute* wrote, “Judge Brett Kavanaugh has a demonstrated pro-life record.”⁵⁴ *Life News* noted that, “Kavanaugh has taken the pro-life side in important cases and has very strong pro-life Bona fides.”⁵⁵ Secular Pro-Life called Kavanaugh “a man who will uphold abortion limits,”⁵⁶ and Texas Right to Life called Kavanaugh a “strongly Pro-Life nominee.”⁵⁷ SBA List’s Marjorie Dannenfelser pointed to Kavanaugh’s “strong record of protecting life and constitutional rights, as evidenced by his opinions in *Garza v. Hargan* and *Priests for Life v. HHS*” and said, “It’s up to you and me to seize this opportunity and secure a pro-life majority on the Supreme Court.”⁵⁸

Once again, anti-choice activists celebrated Trump’s adherence to his campaign promise to appoint “pro-life justices.” Moments after Kavanaugh’s announcement, Susan B. Anthony List⁵⁹ and Operation Rescue⁶⁰ immediately proclaimed Trump’s “promise kept.”⁶¹ Family Research Council wrote, “For a second time, President Trump has followed through on his promise to select a nominee from the list he

⁴⁹ Twitter.com, July 2018, <https://twitter.com/HumanCoalition/status/1016491246326632448>.

⁵⁰ 40 Days for Life email, July 2018, via NARAL Research Department.

⁵¹ Pro-Life Court Coalition, <http://prolifecourt.com/#coalition> (last visited July 10, 2018).

⁵² “Anti-LGBT”, Southern Poverty Law Center, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbt> (last visited Aug. 31, 2018).

⁵³ “Family Research Council”, Southern Poverty Law Center, <https://www.splcenter.org/fighting-hate/extremist-files/group/family-research-council> (last visited Aug. 31, 2018).

⁵⁴ Twitter.com, July 2018, <https://twitter.com/LifeIssuesUSA/status/1016717433090945025>.

⁵⁵ *Life News*, July 2018, <https://www.lifenews.com/2018/07/09/president-donald-trump-nominates-pro-life-friendly-judge-brett-kavanaugh-to-the-supreme-court/>.

⁵⁶ Twitter.com, July 2018, <https://twitter.com/secularprolife/status/1016489102479380482>.

⁵⁷ Texas Right to Life press release, July 2018, <https://www.texasrighttolife.com/texas-right-to-life-cautiously-optimistic-about-scotus-nomination/>.

⁵⁸ Susan B. Anthony List email, July 2018, via NARAL Research Team.

⁵⁹ Twitter.com, July 2018, <https://twitter.com/SBAList/status/1016489482324008966>.

⁶⁰ Operation Rescue, July 2018, <https://www.operationrescue.org/archives/trump-picks-judge-brett-kavanaugh-for-u-s-supreme-court/>.

⁶¹ Twitter.com, July 2018, <https://twitter.com/SBAList/status/1016489482324008966>.

presented during the campaign.”⁶² Students for Life President Kristan Hawkins praised Trump’s decision and stated, “In choosing Brett Kavanaugh, he is keeping a promise to the American people.”⁶³

The Man Behind Kavanaugh and Trump’s Judicial Nominees

It’s no surprise that anti-choice activists were so eager to embrace Kavanaugh. The man behind his nomination was one of their own.

The Federalist Society’s Leonard Leo led the development of Trump’s list of potential Supreme Court nominees,⁶⁴ and later announced he would “personally advise Trump on a replacement for retiring Justice Anthony Kennedy.”⁶⁵ His organization has been called “pipeline for talent” for conservative jurists, and, after Gorsuch’s nomination, Leo was known for being “responsible for a third of the Supreme Court.”⁶⁶

Leo has been outspoken about his personal anti-choice views.⁶⁷ He is a leader within the anti-choice movement as co-chairman of the board of the anti-choice organization Students for Life,⁶⁸ a group with a stated mission to “abolish abortion”⁶⁹ and, as mentioned previously, reacted to the news of Justice Kennedy’s retirement by saying, “Now is our time to overturn *Roe v. Wade*. We can overturn *Roe*!”⁷⁰

Leo’s organization, the Federalist Society, reportedly had its own anti-choice litmus test for judges,⁷¹ and there’s every reason to believe that Leo’s anti-choice lens played a key role in his work with Trump on selecting Kavanaugh. As conservative legal activist Edward Whelan put it, “No one has been more dedicated to the enterprise of building a Supreme Court that will overturn *Roe v. Wade* than the Federalist Society’s Leonard Leo.”⁷²

The Ultimate Partisan

Kavanaugh’s resume demonstrates that he is the ultimate partisan. He has been called the “consummate Washington insider” who “boasts conservative credentials,”⁷³ “a partisan warrior” and

⁶² Twitter.com, July 2018, <https://twitter.com/FRCdc/status/1016724481648353280>.

⁶³ Students for Life, July 2018, <http://studentsforlife.org/2018/07/10/sfla-praises-scotus-nominee-brett-kavanaugh/>.

⁶⁴ The New Yorker, April 2017, <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>.

⁶⁵ Huffpost, July 2018, https://www.huffingtonpost.com/entry/leonard-leo-supreme-court-federalist-society_us_5b354230e4b0f3c2219f4082.

⁶⁶ *Ibid.* at 65.

⁶⁷ *Ibid.*

⁶⁸ Students for Life, <http://studentsforlife.org/supporters/board-of-directors-1> (last visited July 2, 2018); Students for Life 2016 990, via Guidestar, <https://www.guidestar.org/FinDocuments/2016/521/576/2016-521576352-0e4a1701-9.pdf>.

⁶⁹ *Ibid.*

⁷⁰ Twitter.com, June 2018, <https://twitter.com/StudentsforLife/status/1012037228195991560>.

⁷¹ The Washington Times, June 2017, <https://www.washingtontimes.com/news/2017/jun/18/federalist-society-seen-as-danger-to-progressives/>.

⁷² The New Yorker, April 2017, <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>.

⁷³ Reuters, July 2018, <https://www.reuters.com/article/us-usa-court-trump-kavanaugh-newsmaker/washington-insider-kavanaugh-boasts-conservative-credentials-idUSKBN1K004F>.

“consistently conservative judge,”⁷⁴ a “conservative stalwart in political fights and on the bench,”⁷⁵ and “part of GOP legal elite.”⁷⁶ As *Reuters* wrote, Kavanaugh “has shown conservative credentials on social issues ranging from gun rights to abortion cases.”⁷⁷

This is nothing new. Kavanaugh faced criticism and controversy in his D.C. Circuit Court confirmation hearings due to his “political resumé”⁷⁸ and “polarizing work.”⁷⁹ In the time since his confirmation, Kavanaugh has shown more of the same. As *Slate* put it, there are no examples of Kavanaugh “using his legal skills to represent the type of client who is excluded from power in our society, or any record of an effort to address that exclusion.” That’s because “Judge Kavanaugh has chosen Goliath over David, just about every time.”⁸⁰

Public polling has consistently indicated that Americans do not believe that Kavanaugh should represent them. Kavanaugh’s polling is not only underwater; he is the most unpopular Supreme Court nominee in modern history, even worse than past failed nominees. In late July, a *FiveThirtyEight* analysis of Kavanaugh’s polling found Kavanaugh’s net favorability rating below that of past failed nominees Robert Bork and Harriet Miers.⁸¹ A Quinnipiac University poll later that week found Kavanaugh’s net favorability had sunk into the negatives,⁸² and an early August poll by Navigator Research saw his personal ratings sink to 8 points underwater.⁸³ *CNN* later noted that Kavanaugh was doing particularly poorly with women, and that their dislike of him cut across partisan divides, “with fewer than three in 10 saying Kavanaugh ought to be confirmed.”⁸⁴

Kavanaugh’s Anti-Choice Record Puts Reproductive Freedom At Stake

Following his work as a partisan political operative for the Bush Administration and the Ken Starr investigation, Brett Kavanaugh was appointed by then-President Bush to serve as a judge on the D.C. Circuit Court of Appeals. During his time on the bench, Kavanaugh has heard and taken action on cases pertaining to reproductive freedom.

⁷⁴ The Washington Post, July 2018, https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2018/07/10/daily-202-kavanaugh-s-paper-trail-makes-his-confirmation-harder-but-ensures-he-ll-be-reliably-conservative/5b4420ba1b326b3348adddfb/?utm_term=.241492f6b48b.

⁷⁵ The New York Times, July 2018, <https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court-trump.html>.

⁷⁶ The Associated Press, July 2018, <https://apnews.com/a2e940d8376f4319bf289c87bdca2c0b>.

⁷⁷ Reuters, July 2018, <https://www.reuters.com/article/us-usa-court-trump-kavanaugh-newsmaker/washington-insider-kavanaugh-boasts-conservative-credentials-idUSKBN1K004F>.

⁷⁸ Mother Jones, June 2018, <https://www.motherjones.com/politics/2018/06/the-frontrunner-to-be-trumps-supreme-court-pick-is-the-forrest-gump-of-republican-politics/>.

⁷⁹ The Washington Post, July 2018, https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2018/07/10/daily-202-kavanaugh-s-paper-trail-makes-his-confirmation-harder-but-ensures-he-ll-be-reliably-conservative/5b4420ba1b326b3348adddfb/?utm_term=.241492f6b48b.

⁸⁰ Slate, August 2018, <https://slate.com/news-and-politics/2018/08/brett-kavanaugh-has-his-own-frozen-trucker-case-it-involves-a-killer-whale.html>.

⁸¹ FiveThirtyEight, July 2018, <https://fivethirtyeight.com/features/brett-kavanaugh-is-polling-like-robert-bork-and-harriet-miers/>.

⁸² Quinnipiac University, July 2018, <https://poll.qu.edu/national/release-detail?ReleaseID=2558>.

⁸³ Navigator, Aug. 2018, <https://navigatorresearch.org/how-to-link-republicans-in-congress-to-donald-trump/>.

⁸⁴ CNN, Aug. 2018, <https://www.cnn.com/2018/08/16/politics/cnn-poll-kavanaugh-confirmation/index.html>.

Undermining Access to Abortion and Contraception

- Just last year, Kavanaugh issued a strongly worded dissent against a D.C. Circuit decision that allowed an undocumented young woman to access abortion care. Kavanaugh argued that, despite the fact that she had already met all of Texas' burdensome requirements for young women seeking abortion care (a mandatory delay between when she received state-mandated counseling and when she could get the procedure, a judge's approval that she had met all of the requirements for judicial bypass in the absence of parental consent, etc.), she still should have to wait until she had an immigration sponsor to make "that momentous life decision."⁸⁵ He wrote, "The en banc majority...reflects a philosophy that unlawful immigrant minors have a right to immediate abortion on demand, not to be interfered with even by Government efforts to help minors navigate what is undeniably a difficult situation by expeditiously transferring them to their sponsors."⁸⁶ It is particularly notable that Kavanaugh uses notorious anti-choice language about abortion in his dissent.
- In a heated dissent in *Priests for Life v. HHS*, Kavanaugh argued that the Affordable Care Act's existing accommodation for religious employers who wanted an exemption from the contraceptive-coverage policy still placed a substantial burden on the employers' beliefs, even "if the religious organizations are misguided in thinking that this scheme...makes them complicit in facilitating contraception or abortion."⁸⁷ In this case, Kavanaugh makes clear that he believes a boss should be able to interfere with a women's access to insurance coverage of birth control.

Roe v. Wade and a Woman's Right to Abortion

In addition to his anti-choice judicial actions, Kavanaugh has given speeches in which he makes clear both his disdain for *Roe v. Wade* and a woman's constitutional right to abortion, as well as his openness to restrictions that would undermine -- and essentially gut -- access to this fundamental right.

- In 2017, Kavanaugh gave a speech praising former-Chief Justice Rehnquist, who dissented in *Roe v. Wade*, for rejecting "a wall of separation between church and state."⁸⁸ He went on to refer to *Roe* as part of a "general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition."⁸⁹ He also called Rehnquist his "judicial hero" and praised his disdain for the exclusionary rule, a critical tenant of our justice system.⁹⁰
- In 2017, Kavanaugh gave a speech in which he said the following about the right to abortion:

⁸⁵ *Garza v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

⁸⁶ *Ibid.*

⁸⁷ *Priests for Life v. HHS*, 808 F.3d 1, 2 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).

⁸⁸ Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, Remarks to the American Enterprise Institute, <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

“Consider next the Fourteenth Amendment and abortion. The Supreme Court said in *Roe v. Wade* that there was a right to abortion in certain circumstances. But that has raised a follow-on issue that has come up again and again in the years since *Roe*. What regulations of abortion are permissible? Informed consent, waiting periods, partial-birth bans, doctor licensing, parental notice, and the like. What is the answer and more importantly for present purposes, what is the nature of the test we should use to figure out the answer? Since 1992, the Court has settled on an undue burden test. That test is very much a common-law kind of test. Does the law burden the woman's right? And if so, is that burden ‘undue’? The word ‘undue’ calls for a classic assessment of the pros and cons of the regulation in question. And not surprisingly, that is how Justice Breyer articulated the test in the most recent abortion case, *Whole Woman's Health*.⁹¹”

Kavanaugh Will Try to Hide His Unpopular Anti-Choice Agenda

It is important to note that during the question-and-answer session of Kavanaugh’s hearing before you, he will be asked about the right to privacy and *Roe v. Wade*. As he has already indicated in his one-on-one interviews with senators, we expect him to provide a variation of the standard, anti-choice non-answer given by previous nominees to the Court who have consistently voted to end the protections guaranteed by *Roe*. Kavanaugh will likely make reference to a respect for Supreme Court precedent, settled law, and/or *stare decisis* in a way that sounds reassuring. In fact, we know that these answers in no way indicate respect for a woman’s constitutional right to abortion.

With seven in ten voters across the country in favor of legal access to abortion, anti-choice leaders are well aware that asking a Supreme Court nominee to openly identify as anti-choice or to commit to gut or overturn *Roe v. Wade* risks serious public backlash. At the same time, they need to signal to their extreme anti-choice base that they have a nominee who will actively work to undermine abortion access. To avoid these pitfalls, they’ve trained their followers to recognize “proxy” language, such as “originalist,” “textualist,” “constitutionalist” and “judicial restraint,” as code that signals “anti-choice.”

Americans United for Life’s chief legal officer and general counsel Steven Aden has explained what the terms “constructionist, originalist” and “textualist” mean to the anti-choice community. In a conversation about how to “ensure a pro-life Supreme Court,” he said that the anti-choice movement was looking for an “ardent pro-lifer, and very much a straight constructionist, originalist, who sought in Constitutional language the original meaning of the framers,” language that has frequently been used to minimize Kavanaugh’s anti-choice position. Aden explained, “We can’t ask and get answers to the question ‘Would you overturn *Roe*?’ The next best proxy analogue to that is ‘How true are you to the document, to the Constitution itself?’”⁹²

⁹¹ Brett M. Kavanaugh, Keynote Address: *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907, 1909 (2017).

⁹² Americans United for Life, Help Ensure A Pro-Life Supreme Court Webcast, July 2018, timestamp 30:13, https://instantteleseminar.com/Events/108787548?mc_cid=45c0d82e6b&mc_eid=04f7021662

Our Core Values and Freedoms Are At Stake

Each and every seat on the U.S. Supreme Court is important. Nevertheless, it must be acknowledged that retiring Justice Anthony Kennedy has long been the the Court's so-called "swing" vote. His centrist judicial philosophy has meant that at different times and on different issues he has joined both with the progressive and the conservative members of the Court to cast the pivotal deciding vote on a large number of 5-4 cases.⁹³

On the subject of reproductive rights, Justice Kennedy has twice -- in both *Planned Parenthood v. Casey*⁹⁴ and *Whole Woman's Health v. Hellerstedt*⁹⁵ -- been the fifth and deciding vote to strike down unnecessary and burdensome restrictions that undermined women's ability to access abortion care. And this is not just on the topic of reproductive freedom. In multiple cases Justice Kennedy was also the deciding vote in support of LGBTQ rights, including striking down laws that discriminated against LGBTQ individuals,⁹⁶ and establishing the right to same-sex marriage in the landmark *Obergefell* decision.⁹⁷ Recently, Justice Kennedy was also the deciding vote in a case upholding equal opportunity and affirmative action.⁹⁸ This is not to say that Justice Kennedy didn't also cast many votes contrary to progressive values, including on abortion and LGBTQ rights, but it does make clear that life would be different for many Americans if those cases had gone the other way. Abortion would be all but illegal and completely inaccessible for millions of women across the country if *Whole Woman's Health* had been decided by Kavanaugh instead of Justice Kennedy. The right to marry who you love would still be denied to millions of LGBTQ Americans if *Obergefell* had been decided by Kavanaugh instead of Justice Kennedy.

In addition to Kavanaugh's clear and outright hostility toward reproductive freedom and LGBTQ rights, his partisan and ideological record demonstrates that he would also rule to undermine the core rights and legal protections of many other critical civil and human rights issues, including access to healthcare for millions of Americans, voting rights and racial justice, immigrant rights, disability rights, labor rights, economic security, environmental protections, consumer protections, gun safety, and more. Shockingly, also at risk with this nomination is our democracy itself given Kavanaugh's views on executive power and privilege and the consequent impact on a fair and independent judiciary.

Right now, we, as a nation, are off track. What is at stake is so much bigger than this one confirmation. This moment is our best opportunity to back away from the precipice and choose a different path. Now is the time to clearly define the values that will guide our country forward. The truth is that the Supreme Court was designed to save us from this particular moment in history. We have a President who is hostile to the majority of Americans. He is using the office of the Presidency to consolidate power and wealth for himself and obstruct investigations into his corruption. Observers on both sides of the aisle

⁹³ Katie Reiley, *How Anthony Kennedy's Swing Vote Made Him 'the Decider'*, Time Magazine, June 27, 2018, <http://time.com/5323863/justice-anthony-kennedy-retirement-time-cover/>.

⁹⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁹⁵ *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016).

⁹⁶ *United States v. Windsor*, 570 U.S. ____ (2013).

⁹⁷ *Obergefell v. Hodges*, 576 U.S. ____ (2015).

⁹⁸ *Fisher v. University of Texas*, 579 US _ (2016).

agree we are on the brink of a constitutional crisis. If our democracy is going to survive, we must do everything in our power to stop this blatant power grab through the Supreme Court. Because if this President and his allies succeed in confirming a right-wing ideologue like Kavanaugh, their hate-filled, regressive policies will be preserved for generations to come. The result will be destruction of the Founders' vision of freedom and liberty, the wisdom of 250 years of the American experiment, and the future rights of our children.

Conclusion

Trump has now nominated a second Supreme Court justice who would serve for life. He has said he will pick justices who will overturn *Roe* and that women should be punished for having an abortion. We take him at his word. A vote for Kavanaugh is a vote to criminalize abortion and punish women. If the Supreme Court leaves it to states, 26 are poised to criminalize abortion, despite broad support for upholding *Roe*. This means women will be forced to stay pregnant even it risks our lives, our health and our future.

Given what's at stake, NARAL's millions of members have joined with partners who represent millions of Americans across movements and across the country to oppose Kavanaugh's confirmation. The American people are with us. In fact, support for a woman's constitutional right to abortion has hit an all-time high during this confirmation fight: 71 percent of Americans support *Roe*⁹⁹. The Supreme Court is the ultimate arbiter of our Constitution and is entrusted with the final say on decisions affecting the daily lives of all Americans. As such, the American people deserve a Supreme Court comprised of independent and qualified justices who believe in -- and would uphold -- our country's core constitutional protections, including the right to abortion.

Brett Kavanaugh's record demonstrates that, if confirmed as Associate Justice of the Supreme Court, he would help erase 44 years of constitutional law by voting to end *Roe v. Wade* and turn back the clock for women across the country to a time when thousands died from lack of access to safe and legal abortions. We urge you to do everything you can to defeat this nomination, including voting no.

⁹⁹ Carrie Dunn, *NBC/WSJ poll: Support for Roe v. Wade hits new high*, NBC News, Jul. 23, 2018, <https://www.nbcnews.com/politics/first-read/nbc-wsj-poll-support-roe-v-wade-hits-new-high-n893806>.