National Association of Women Lawyers Supreme Court Committee
Statement of Qualification – Judge Brett Kavanaugh

The National Association of Women Lawyers ("NAWL") Committee for the Evaluation of Supreme Court Nominees ("Committee")[1] has completed an extensive review of the qualifications and background of the Honorable Brett Kavanaugh, nominee for the United States Supreme Court ("Nominee") to fill the vacancy created by the retirement of Justice Anthony Kennedy.

The Committee's standards require review of each nominee under several separate evaluation criteria, including his or her integrity, professional competence, judicial temperament ***and*** "demonstrated commitment to women's rights or issues that have a special impact on women."[2] A nominee may meet one or several of the criteria but, in all cases, must meet the last category to be considered qualified.

With respect to personal integrity, our interviews of several dozen litigants who had appeared before Judge Kavanaugh, former law clerks, former and current colleagues, and others who have interacted with him during the last three decades persuaded the Committee that Judge Kavanaugh has the highest reputation for integrity and generally demonstrates a sound judicial temperament. Further, the Committee finds Judge Kavanaugh to be supportive of women professionally, including hiring a diverse pool of law clerks. As to professional competence, our review of Judge Kavanaugh's writings, which entailed a review of over 300 opinions, concurrences, and dissents written by Judge Kavanaugh, as well as articles and books he authored or coauthored, led the Committee to conclude that Judge Kavanaugh's professional competence is consistent with that required for service on the Supreme Court.

Following this extensive review, the Committee ultimately concludes, however, that Judge Kavanaugh is "not qualified" because he has failed to demonstrate the requisite "commitment to women's rights or issues that have a special impact on women."[3] Specifically, the Committee is troubled by key decisions and other statements by Judge Kavanaugh, which the Committee believes reflects a propensity to deviate from established law as it relates to the protection of women's rights, particularly their reproductive rights.

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[1] NAWL's Supreme Court Committee is comprised of distinguished law professors, appellate practitioners, corporate counsel, and current and former federal law clerks.
[2] National Association of Women Lawyers Manual for the Committee for the Evaluation of Supreme Court Nominees at p. 5 (emphasis added).
[3] *Id*. at p. 5.

A few of Judge Kavanaugh's writings dealt directly with issues that have a special impact on women. We highlight three of these cases and also call attention to Judge Kavanaugh's comments on *Roe v. Wade*.

1. *Garza v. Hargan*, 874 F.3d 735 (2018).

Garza is one of two troubling opinions authored by Judge Kavanaugh that gave the Committee concern. Both opinions reflected a lower level of commitment to women's health issues, specifically their reproductive health. Judge Kavanaugh's dissent in *Garza* gave rise to concern that he would implement an overly restrictive undue burden analysis to curtail women's right to safe and legal abortion.

In *Garza,* a 17-year-old undocumented female immigrant detainee discovered she was pregnant after entering U.S. custody seeking asylum from an abusive situation. She filed suit seeking release from custody so that she could obtain an abortion, which had already been approved through judicial bypass. On appeal, the D.C. Circuit panel, including Judge Kavanaugh, refused the request for temporary release. The D.C. Circuit, sitting *en banc*, reversed the panel's order, granting the teen a release from detention to obtain an abortion. Judge Kavanaugh dissented, and it is this dissent that provoked the Committee's grave concern. The dissent is emotionally charged, using phrases such as "abortion on demand," and ignores the reality of the minor's situation while relying upon issues not raised by the parties.

One paragraph in the dissent contains the core of Judge Kavanaugh's complaints:

> Today's majority decision, by contrast, 'substantially' adopts the (lower court) panel dissent and is ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand. *Id.* at 752.

Importantly, the government never disputed that the undocumented minor had a constitutional right to an abortion. Judge Kavanaugh, *sua sponte*, inserted the concept as if the majority had conjured a new constitutional right. Judge Kavanaugh's use of the phrase "abortion on demand" is as inaccurate as it is inflammatory, given its use in activist circles. Abortion is an elective procedure, no more "on demand" as any other optional medical service. And the process for this teen was hardly rapid.

Judge Kavanaugh cited the right of government to protect the fetus by imposing reasonable regulations that do not impose an undue burden as described in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The solution proposed by the government and endorsed by Judge Kavanaugh was to "expeditiously" find a "sponsor" for the minor to assist her making the decision whether to obtain an abortion. This option denied the reality of both the facts as well

as the procedural history. Judge Kavanaugh stated that the minor was 15 weeks pregnant and estimated that it would take two weeks to find a sponsor. It is undisputed that the legal proceedings had already taken 7 weeks. The government had already failed to find a sponsor during that time. A "sponsor" for immigration purposes is typically a relative or someone with a connection to the child, but this minor came to the U.S. alone to escape child abuse. The likelihood of the government finding a sponsor, much less in short order, was remote. But Judge Kavanaugh did not view this requirement as an undue burden. Judge Kavanaugh's interpretation of *Casey's* undue burden framework, as applied to the *Garza* case, would have eviscerated the minor's constitutional right to an abortion, rendering *Roe v. Wade* a nullity. That is cause for concern for the Committee.

Also of concern to the Committee is what we interpret as a patronizing attitude toward the 17-year-old minor's decision-making. Judge Kavanaugh writes:

> The majority points out that, in States such as Texas, the minor will have received a judicial bypass. That is true but *is irrelevant to the current situation*. The judicial bypass confirms that the minor is capable of making a decision. For most teenagers under 18, of course, they are living in the State in question and have a support network of friends and family to rely on, if they choose, to support them through the decision and its aftermath, even if the minor does not want to inform her parents or her parents do not consent. For a foreign minor in custody, there is no such support network. It surely seems reasonable for the United States to think that transfer to a sponsor would be better than forcing the minor to make the decision in an isolated detention camp with no support network available. *Id.* at 755 (Emphasis added).

While Judge Kavanaugh focused on the ideal, many minors do not have a support network available to them when making a decision on whether to abort a fetus. The judicial bypass was created for just this situation. Judge Kavanaugh presumed that the minor in this case has not made a rational decision. Yet the minor had support. She was appointed a *guardian ad litem* and had lawyers assisting her. She participated in a judicial bypass proceeding. A judge found her decision to abort to be both informed and based upon sufficient maturity. Judge Kavanaugh refused to accept that judicial finding. The distinct impression given by Judge Kavanaugh is that he presumed the teen made the incorrect decision. Judge Kavanaugh's approach in this case gives rise to a concern that Judge Kavanaugh would be results-oriented in curtailing women's reproductive rights.

2. *Priests for Life v U.S. Dept. of Health and Human Services*, 808 F.3d 1 (2015)

Priests for Life is the second decision that the Committee found troubling. This case similarly reflects the Nominee's propensity to delimit women's rights, this time applying a restrictive presumption in favor of religious rights.

Priests for Life came on the heels of *Burwell v. Hobby Lobby*, in which the Supreme Court held that a closely held corporation was a "person" entitled to protection under the Religious Freedom and Restoration Act ("RFRA"), and that the Affordable Care Act's contraceptive mandate was an undue burden on a corporation's right to free exercise of religion. In response, the government created an accommodation for religious employers that simply required the employer to fill out a form requesting accommodation of its religious objection to providing contraceptive coverage. Priests for Life, a religious non-profit, qualified for an accommodation, but claimed that the act of filling out the form violated its religious freedom under RFRA. A three-judge panel of the D.C. Circuit (not including the Nominee) found for the government and rejected the RFRA challenge on the basis that the accommodation was not a substantial burden. The plaintiffs sought rehearing *en banc*, which was denied. Judge Kavanagh dissented from the denial of the rehearing.

The crux of his analysis does not address why submitting a form would constitute a substantial burden on Priests for Life, because "that is not our call to make." He interpreted *Hobby Lobby* to require the court to defer to any party's allegation of infringement of their religious beliefs, stating that "the 'narrow function' of federal courts is to determine whether the belief is sincere and 'reflects an honest conviction.'" *Id.* at 2779. Judge Kavanaugh wrote, "When the Government forces someone to take an action contrary to his or her sincere religious belief (here, submitting the form) or else suffer a financial penalty (which here is huge), the Government has substantially burdened the individual's exercise of religion." The government can still prevail if they demonstrate a compelling interest and least restrictive alternative, which he did not find in this case.

The Committee is concerned that anytime a party asserts an infringement of their religious beliefs, Judge Kavanaugh would not proceed to any additional analysis of the extent of the burden or the reasonableness of the asserted infringement. A mere assertion of rights under RFRA would essentially defeat any individual rights, even those rooted in the Constitution.

3. Other Writings

Other writings indicate that Judge Kavanaugh supports reversal of *Roe v. Wade*, which the Committee finds to be inconsistent with a commitment to women's rights. His speech lauding Justice Rehnquist's legacy, and specifically detailing his approval of Rehnquist's dissent in *Roe*, highlights Judge Kavanaugh's belief that there is no constitutional right to abortion. He stated:

> Rehnquist's dissenting opinion did not suggest that the Constitution protected no rights other than those enumerated in the text of the Bill of Rights. But he stated that under the Court's precedents, any such enumerated right had to be rooted in the traditions and conscience of our people. Given the prevalence of abortion regulations both historically and at the time, Rehnquist said he could not reach such a conclusion about abortion. He explained that a law prohibiting an abortion, even where the mother's life was in jeopardy, would violate the Constitution. But otherwise he stated the states had the power to legislate with regard to this matter....

This paragraph clarifies Judge Kavanaugh's agreement with Justice Rehnquist that state regulation of abortion, when the mother's life is not in jeopardy, does not violate the Constitution.

Buttressing the Committee's conclusion, Judge Kavanaugh further opined:

> It is fair to say that Justice Rehnquist was not successful in convincing a majority of the justices in the context of abortion either in *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of *stare decisis*. But he was successful in stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition.

While Judge Kavanaugh is bound by *stare decisis* in his present position, he will not be as a Supreme Court Justice, particularly on constitutional issues. This gives rise to the concern that on the U.S. Supreme Court Judge Kavanaugh would be free to rely on arguments that prior cases were improperly decided and then interpret facts and law in a way that promotes his personal beliefs, including and especially in cases involving women's reproductive health.

Based on these writings, the Committee is gravely concerned that, if given an opportunity, Judge Kavanaugh would vote to overturn *Roe v. Wade* or find other ways to curtail access to safe and legal abortions. His solo dissent in *Garza* demonstrates the extent to which Judge Kavanaugh is willing to contradict the majority view using a strained interpretation of undue burden to undermine settled law.

The Committee acknowledges that in one case, *U.S. v Nwoye,* 824 F.3d 1129 (2016), Judge Kavanaugh displayed an impressive understanding of the complexities of domestic violence and the impact of battered woman syndrome. In *Nwoye*, the defendant appealed a conviction on conspiracy to extort money based on her attorney's failure to present evidence on the impact of battered women's syndrome on her decision-making. Judge Kavanaugh understood the

significance of the psychological control the defendant's boyfriend had over her as informed by the battered woman defense:

> A woman was beaten repeatedly by her boyfriend. Some outsiders may question why she didn't just leave her boyfriend. But the expert testimony would help explain why. For the Government to come in now and say that such expert testimony, combined with Nwoye's own testimony about the beatings, still would not entitle her to a duress instruction is to say in essence that battered woman syndrome does not matter, at least in duress cases. We do not agree with that suggestion. *Id.* at 1139.

Nevertheless, given the Committee's other concerns, that opinion did not sway the Committee's opinion that Judge Kavanaugh does not display a commitment to women's issues.

Conclusions

The Committee finds that Judge Kavanaugh consistently displayed intellect, good judicial temperament, professionalism, and collegiality with his colleagues on the bench and those he employed. The Committee applauds his history of hiring gender diverse law clerks and supporting their development and future employment. Likewise, many of those who were interviewed expressed that Judge Kavanaugh treated attorneys appearing before him equally regardless of their gender.

Both the Committee's readings and its interviews, however, raised a concern with his jurisprudence, especially in the area of substantive due process and the right to abortion. In the *Garza* case, for example, Judge Kavanaugh's opinion appeared to be an attempt to sound reasonable whereas, in reality, his proposed solution posed an insurmountable obstacle for a woman attempting to exercise her constitutionally protected right to secure an abortion. A number of those the Committee interviewed expressed a similar concern that Judge Kavanaugh sometimes crafted an ill-fitting legal argument around a predetermined result.

The Committee finds that Judge Kavanaugh has demonstrated the intellectual and analytical talent, judicial temperament, and professional demeanor required to serve on our Nation's highest court. Nevertheless, because the Committee has found that Judge Kavanaugh's writings in the areas of women's reproductive rights make it impossible for us to conclude that he has "demonstrate[d] a commitment to women's rights or issues that have a special impact on women,"[4] we find that he is not qualified under NAWL's standard to assume the position of Justice of the Supreme Court of the United States.

[4] National Association of Women Lawyers Manual for the Committee for the Evaluation of Supreme Court Nominees at p. 5.