**High Stakes In the High Court**

***Warning:***

***Hazardous to the Health of West Virginians***

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

West Virginians for Affordable Health Care is non-profit state-wide organization dedicated to protecting quality, affordable health insurance coverage and health care access for all West Virginians.

Consistent with this mission, West Virginians for Affordable Health Care is extremely concerned about the nomination of a candidate to the Supreme Court who has a history of opposing the Affordable Care Act (ACA) and women’s reproductive rights.

As a voice for health care consumers in West Virginia, we respectfully ask that Senator Manchin vote no on Judge Kavanaugh’s confirmation to the U.S. Supreme Court. West Virginians for Affordable Health Care has researched Judge Kavanaugh’s record and statements and conclude that **Judge Kavanaugh’s confirmation could be hazardous to the health of West Virginians.**

**Warning: Judge Kavanaugh is Hazardous to the ACA’s Consumer Protections for West Virginians with Pre-existing Conditions and Other Consumer Protections**

There are already cases on their way to the Supreme Court, including *Texas v. United States 2018,* which could invalidate the entire ACA including the Medicaid expansion for about 12 million people and wipe out important protections for people with pre-existing conditions. The Trump Administration's Department of Justice (DOJ) has taken the extraordinary step of joining this lawsuit that seeks to strike down the ACA and the DOJ is asking for the Courts to allow insurance companies to discriminate against West Virginians and all Americans who are in less-than-perfect health.

Judge Kavanaugh has argued that presidents may simply ignore or refuse to enforce existing laws that they deem to be unconstitutional *even when the court has previously upheld that law*. No one, including the President, should be above the law or able to subvert the will of the voters, elected representatives in Congress or decisions made by the highest court in the land.

Brett Kavanaugh’s previous rulings, dissents and writings suggest that he does not support the Affordable Care Act and would support the President’s current refusal to uphold the law:

* Judge Kavanaugh disagreed with a 2011 D.C. Circuit Court decision that upheld the constitutionality of the Affordable Care Act. He wrote in his [dissent](https://scholar.google.com/scholar_case?case=12283140068462647556&q=661+F.3d+1+&hl=en&as_sdt=20003) that *“Under the Constitution, the president may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”*
* Judge Kavanaugh publicly criticized Chief Justice Roberts after Roberts voted to uphold the Individual mandate in the ACA in a ruling that affirmed the constitutionality of the ACA (NFIB vs. Sebelius, 2012).
* Judge Kavanaugh called the ACA’s individual mandate “a law that is unprecedented on the federal level in American history.” [According to his former law clerk](https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful/), Judge Kavanaugh’s dissent served as roadmap for the Supreme Court dissenters in the later *NFIB v. Sebelius* case that upheld the constitutionality of the ACA.Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas  and Samuel Alito argued that the mandate violated the Constitution.

Roughly half of non-elderly American adults and one in 4 children, or up to 130 million people, have at least one pre-existing condition. That includes everyone with cancer, diabetes, asthma, and any form of mental health issue or drug abuse problem.

Prior to the Affordable Care Act, insurance companies were able to discriminate against them, by charging them more, dropping coverage once people got sick, or denying coverage altogether. The ACA banned these practices, providing health security to millions. Experts estimate that even if a cancer patient could get covered, they would have to pay as much as $140,000 a year more in premiums.

In West Virginia, the confirmation of Judge Kavanaugh is a direct threat to:

* 737,900 West Virginians Live with A Pre-Existing Condition.​ About one in two West Virginians, 52 percent, lives with a pre-existing condition.
* 90,600 West Virginia Children Already Have A Pre-Existing Condition.​ Roughly 91,000 West Virginians below age 18 live with a pre-existing condition.
* 188,500 Older West Virginians Live with A Pre-Existing Condition. ​188,500 West Virginia adults between the ages of 55 and 64 live with at least one pre-existing condition, meaning attacks on these protections significantly threaten West Virginians approaching Medicare age.
* 175,000 people who rely on Medicaid coverage through the ACA Medicaid ​Expansion.

**Judge Kavanaugh is Hazardous to Older West Virginians, Women in West Virginia, and Any West Virginian Shopping for Insurance**

Further, if successful, the lawsuit joined by the Justice Department also would get rid of protections that prevent insurance companies from charging women and adults over 50 more for their health care coverage.

If these protections are taken away, older West Virginians could be charged up to 5 times more for the same coverage as someone younger and West Virginia women could be charged up to 50 percent more just because they are women. Studies by AARP say premiums for someone over 50 could go up by more than $4,000 a year.

*Texas v United States 2018* is not the only threat, with the Trump administration issuing new rules and expanding the state waiver authority in the ACA marketplaces, the Supreme Court could be deciding cases that impact every West Virginian who relies on consumer protections in the ACA. These protections include the prohibition of surprise dollar limits on coverage in insurance plans (annual and lifetime limits) and require that every plan cover certain basic, essential benefits. Already at issue are new Trump administration rules that allow so-called “short-term plans” to be sold that could leave West Virginians paying premiums only to discover that they have no insurance when they most need it.

**Judge Kavanaugh is Hazardous to West Virginians on Medicaid**

Also, on the way to the U.S. Supreme Court is a Kentucky lawsuit about Medicaid eligibility requirements and other state Medicaid waiver authority. On June 29, 2018, a District Court rejected the federal justification for approving Kentucky’s waiver that would have forced thousands off Medicaid. Now the federal government is looking for ways to circumvent this ruling through administrative action and states are appealing this ruling and future court decisions will go to the heart of whether there are any consumer protections for Medicaid-eligible people.

It is likely that the Supreme Court will have to decide about the future of the Medicaid program and whether the President and the Executive branch alone – without action by Congress – can undermine the statutory purpose of Medicaid and add new eligibility restrictions to Medicaid. This could negatively impact both the 175,000 West Virginians who have coverage under the ACA Medicaid expansion and ALL other West Virginians who rely on Medicaid.

Medicaid is a lifeline for one in three West Virginians, providing critical preventive care, substance use treatment, acute care, and more to 600,000 people. Medicaid is the primary provider for long-term care in West Virginia, covering more than 7 in 10 nursing home residents, is also the primary provider to help people with disabilities stay in their homes, and pays for roughly half of the births in the state.

**Warning: Judge Kavanaugh is Hazardous to the Reproductive Health of West Virginians**

**The Right to Choose an Abortion**

Judge Kavanaugh, who strictly interprets the Constitution as it was written rather than in historical context, has already made clear his position on abortion rights. He gave a speech praising Justice Rehnquist’s dissent in Roe V. Wade, calling the decision part of a "general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition."

Retracting the guaranteed constitutional right to abortion takes women backwards and diminishes their freedom and opportunity.  [One in four](https://www.washingtonpost.com/news/to-your-health/wp/2017/10/19/u-s-abortion-rate-fell-25-percent-from-2008-to-2014-one-in-four-women-have-an-abortion/?utm_term=.2be4bba61819) women in America will have at least one abortion in her lifetime; most of those women already have children. Taking away abortion rights means taking away women’s ability to decide if, when and how many children they will have, denying them the control over their own lives.

* President Trump [promised in his campaign for president](https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html) that he will only put justices on the Supreme Court that would overturn *Roe V. Wade*, the landmark legal decision that created the constitutional right to abortion in 1973.
* Judge Kavanaugh, who interprets the Constitution as it was written, has already made clear his position on abortion rights. He gave a speech praising Justice Rehnquist’s dissent in *Roe V. Wade*, calling the decision part of a "general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition."
* In last year’s high-profile *Garza v. Hargan* case about an undocumented immigrant minor seeking an abortion, Judge Kavanaugh dissented even though the minor met all the conditions to qualify for an abortion.

**No-Cost Birth Control Health Insurance Benefit**

Also, at risk is the no-cost birth control provisions of the ACA. An estimated 62 million women now have access to birth control with no out-of-pocket costs. Three courts of appeals are considering the Trump Administration's roll back of the birth control health insurance benefit under the ACA, allowing any employer to deny birth control coverage.

Judge Kavanaugh dissented against another D. C. Circuit Court (*Priests for Life vs. U.S. Dept of HHS*) ruling which upheld the Obama Administration’s no cost birth control rule as making insufficient accommodation for employers’ rights. Kavanaugh argued that religious employers should have more latitude to deny their employees coverage for birth control based on the bosses’ personal religious views.

**Support for Breast-Feeding Moms**

The ACA provided new mothers with access to lactation consultants, breast pumps, and time and space at work to pump their milk until as late as a year after birth. Two court cases challenging the breast-feeding services available to mothers at no cost under the ACA could jeopardize these critical services for maternal and infant health in West Virginia and across the country.

***Let Senator Manchin Know What You Think:***

When a Judge is confirmed and takes a seat on the U.S. Supreme Court, he or she is there until they choose to retire or can no longer serve due to illness. The impact of Judge Kavanaugh’s confirmation will be felt by West Virginians for many years.

Judges can be nominated by the President, but it is the duty and responsibility of the U.S. Senate to carefully review a judge’s record and statements to be sure that he or she will serve in a fair and unbiased manner.

We encourage West Virginians to express their opinion on Judge Kavanaugh’s confirmation. Call his office at 304-264-4626. Also, Senator Manchin has asked West Virginians to share their thoughts at:
 <https://www.manchin.senate.gov/tell-joe-about-the-supreme-court-of-the-united-states>