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Statement of Health Law Advocates on the Nomination of Judge Brett Kavanaugh to the United States Supreme Court

In the decades to come, the U.S. Supreme Court will have a profound impact on the ability of Americans to access quality health care, particularly those who are at risk due to factors such as race, gender, immigration status, disability, age or geographic location. Right now, challenges to the Affordable Care Act ("ACA"), reproductive freedom and the authority of regulators to protect our most vulnerable citizens are among the most critical legal issues making their way through the lower courts. How the court acts on these issues could impact access to health care in our country for generations.

As an organization dedicated to assisting people overcome obstacles to accessing or paying for needed medical services, Health Law Advocates ("HLA") believes that the next justice confirmed to the Supreme Court who will consider these and other health-related legal issues, must share our commitment to legal principles that will enable our society to have a health care system that works for everyone - not just those of or with a certain age, race, gender, citizenship, medical history or financial status.

"We are gravely concerned that throughout his time on the bench, Judge Kavanaugh has repeatedly adopted positions that undermine, or simply block, access to health care for consumers," said HLA's Executive Director Matt Selig. "His hostility toward the ACA, opinions on reproductive rights and intolerance for government regulation of business place him far outside the mainstream of our country. The Senate should reject his nomination to the Court."

Based on Judge Kavanaugh's record as a jurist in matters concerning health care access, HLA strongly opposes his nomination to the U.S. Supreme Court.

The ACA: Existential threats to the ACA continue to mount in the form of lawsuits challenging the constitutionality of the statute, and efforts by the Trump Administration to undermine the law. In *Texas v. Azar*[i], a case that may very well be taken up by the Supreme Court at some point in the future, 20 states have jointly filed suit to invalidate the ACA by arguing that Congress exceeded its authority in passing the law. Judge Kavanaugh has consistently expressed skepticism of the ACA as a valid exercise of Congress' taxing power or power to

regulate commerce and is likely to favorably view Plaintiffs' arguments.[ii]

Reproductive Rights: Judge Kavanaugh has repeatedly taken legal positions that undermine and erode reproductive rights. In Priests for Life v. U.S. Dep't of Health & Human Servs.[iii], Judge Kavanaugh dissented from the majority's denial of rehearing *en banc*, and argued that it was a "substantial burden" on the exercise of religion for the government to require a religious employer to self-certify eligibility for an exemption from the ACA's requirement to provide contraception.[iv] Here, Judge Kavanaugh held that the mere requirement to complete and submit a form to the government was an unconstitutional intrusion on religious liberty. On the other hand, when considering a case involving an unaccompanied minor's right to abortion while in detention, Judge Kavanaugh concluded that it was not an "undue burden" on her right to an abortion for the government to require that she first be transferred to the custody of an immigration sponsor, despite that the minor was already 15-weeks pregnant.[v]

Consumer Protection: Judge Kavanaugh has long championed limited government, often at the expense of consumers and the public. In the aftermath of the 2008 financial crisis, Congress created the Consumer Financial Protection Bureau ("CFPB") to safeguard consumers from the abusive practices of large financial firms.[vi] In a suit brought by a mortgage lender challenging a $109 million order resulting from an enforcement action by the CFPB, Judge Kavanaugh sided with the mortgage company, reversed the CFPB's disgorgement order and declared the structure of the agency unconstitutional.[vii] Judge Kavanaugh's limited view of agency authority has also resulted in a number of decisions curbing the authority of the Environmental Protection Agency and other agencies dedicated to the protection of the public.[viii]

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Health Law Advocates (HLA) is a 501(c)(3) public interest law firm whose mission is to provide pro bono legal representation to low-income residents experiencing difficulty accessing or paying for needed medical services. HLA is committed to ensuring universal access to quality health care in Massachusetts, particularly for those who are most at risk due to such factors as race, gender, disability, age, or geographic location.

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[i] Docket No. 4:18-cv-00167 (N.D. Tx.)

[ii] See Seven-Sky v. Holder, 661 F.3d 1, 48-49, 51 (D.C. Cir. 2011), abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); The Joseph Story Distinguished Lecture, The Heritage Foundation (Oct. 25, 2017), https://www.heritage.org/josephstory2017, at 34-37 min.; The Administrative State After the Health Care Cases, The Federalist Society (Nov. 17, 2012), https://www.youtube.com/watch?v=zRImAIbJOt8, at 55-59 min.

[iii] 808 F.3d 1, 15–16 (D.C. Cir. 2015).

[iv] *Id.*

[v] Garza v. Hargan, 874 F.3d 735, 752 (D.C. Cir. 2017), cert. granted, judgment vacated sub nom. Azar v. Garza, 138 S. Ct. 1790, (2018).

[vi] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 80 (D.C. Cir. 2018).

[vii] PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 8 (D.C. Cir. 2016), reh'g en banc granted, order vacated (Feb. 16, 2017), on reh'g en banc, 881 F.3d 75 (D.C. Cir. 2018).

[viii] See EME Homer City Generation, L.P. v. E.P.A., 696 F.3d 7, 11 (D.C. Cir. 2012), rev'd and remanded, 572 U.S. 489 (2014); see Grocery Mfrs. Ass'n v. E.P.A., 693 F.3d 169, 181 (D.C. Cir. 2012).