



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

The undersigned member organizations of the Consortium for Citizens (CCD) are writing to express our support for the Disability Integration Act (S. 910, H.R. 2472). This legislation, if passed, would ensure the rights of people with disabilities to live full and independent lives in their communities.

CCD is a coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration, and inclusion of the approximately 57 million children and adults with disabilities in all aspects of society.

The undersigned organizations endorse the Disability Integration Act's goals of ensuring that millions of Americans with disabilities have access to services they need to live in the community and of removing the institutional bias in critical Federal programs. This bill builds on the Americans with Disabilities Act and the Supreme Court's *Olmstead* decision, and asserts that people with disabilities have a right to live in their own homes and communities and to receive the services and supports they need to do so.

For too many years, thousands of people with disabilities have been isolated and segregated in institutional settings, where they lose the opportunity to be full participants in society. As the Supreme Court observed in *Olmstead v. L.C.*, "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment,"¹ and furthermore, institutionalizing people who could live in community settings "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."²

While we have made progress in recent years in expanding home and community-based services for individuals with disabilities, many thousands of people with disabilities remain in institutional settings when they could and should have the opportunity to live, work, and receive services in their own homes and communities. The Disability Integration Act would complement the ADA and accelerate the pace of people with disabilities leaving institutions, including by describing with specificity steps that must be taken by states and providers of insurance covering long-term services and supports to achieve community integration.

We urge Congress to pass the Disability Integration Act and affirm the right of people with disabilities to live independently and be full participants in their communities.

¹ 527 U.S. 581, 583 (1999).

² *Id.*

The Advocacy Institute
Allies for Independence/Advance CLASS
American Association on Health and Disability
American Association on Intellectual and Developmental Disabilities (AAIDD)
American Association of People with Disabilities
American Civil Liberties Union
American Foundation for the Blind
The Arc of the United States
Association of Assistive Technology Act Programs
Association of People Supporting Employment First (APSE)
Association of University Centers on Disabilities
Autistic Self Advocacy Network (ASAN)
Bazelon Center for Mental Health Law
Brain Injury Association of America
Center for Public Representation
The Christopher & Dana Reeve Foundation
Disability Rights Education and Defense Fund
Lutheran Services in America Disability Network
The Michael J. Fox Foundation for Parkinson's Research
National Academy of Elder Law Attorneys
The National Council on Independent Living
National Disability Rights Network
National Down Syndrome Congress
National Association of State Head Injury Administrators
National Organization of Nurses with Disabilities (NOND)
National Respite Coalition
National Multiple Sclerosis Society
Paralyzed Veterans of America
Parent to Parent USA

TASH

United Cerebral Palsy

United Spinal Association



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President's FY 2019 American Budget is an Un-American Attack on People with Disabilities

Washington DC, February 13, 2018 - The Co-Chairs of the Fiscal Policy Task Force of the Consortium for Citizens with Disabilities (CCD), a national coalition of more than 100 national disability organizations, is once again deeply troubled by the vision that the Administration has laid out for Americans with disabilities. "An American Budget" deeply cuts programs that support the health and wellbeing of people with disabilities. It justifies these extreme cuts as necessary measures to reign in deficits, a concern that was not the least bit in evidence when the tax law - that will increase deficits substantially and primarily benefit the most prosperous segment of society - was enacted less than two months ago:

Medicaid. The President's Budget would drastically cut Medicaid funding through per capita cap and block grants and it assumes repeal of critical provisions such as the requirements for adequate benefits and affordable health plans that protect people with pre-existing conditions.

Social Security and Supplemental Security Income (SSI). The President's Budget would [cut roughly \\$70 billion over 10 years](#) out of Social Security's disability programs, including SSI.

Developmental Disabilities (DD) Act Programs. The President's Budget provides double digit cuts to three of the four DD Act programs - State Councils on Developmental Disabilities (-23%), University Centers for Excellence in Developmental Disabilities (-13%), and Projects of National Significance (-90%).

Supplemental Nutrition Assistance (SNAP). The President's Budget cuts food assistance under SNAP by more than \$213 billion over 10 years, a reduction of 30%.

Social Services. The President's Budget eliminates the Social Services Block Grant, a flexible source of funds used by states to help prevent abuse and neglect, provide family supports, and prevent the institutionalization of persons with disabilities, among other things.

Public Health. Though the Administration proposes to substantially increase funding to address the opioid epidemic, much of this increase in the President's Budget comes from significant cuts

to existing programs at the Health Resources and Services Administration and the Centers for Disease Control and Prevention.

Housing. The President's budget cuts \$6.8 billion from affordable housing programs at the Department of Housing and Urban Development, including major cuts in housing choice vouchers, public housing, and other vital programs for people with disabilities.

In addition, the President's Budget includes other proposals that purport to be beneficial, but in reality, there is ample evidence of their significant limitations and/or actual harm.

Work Requirements. As members of CCD detailed in a [February 7, 2018 letter](#), Medicaid work requirements will result in hundreds of thousands of low-income Americans, including people with disabilities, losing access to Medicaid services.

School Choice. The President's Budget proposes a \$1.1 billion "down payment" towards a \$20 billion federal investment in for school choice programs. Such initiatives are purportedly for giving more decision-making power to parents and families. However, only private schools - that do not have to accept nor appropriately serve students with disabilities - would actually be given such power.

Paid Family Leave. The President's Budget proposes a new paid family leave program. However, this proposal burdens underfunded state unemployment insurance systems and offers a very time limited benefit (6 weeks) for a single circumstance (birth/adoption) that would do little to meet the needs of the vast majority of persons with disabilities.

"We are deeply disappointed that the President, once again, goes against campaign promises to protect Social Security, Medicare, and Medicaid," stated Kim Musheno, CCD Chair. "Instead, this plan would reverse decades of progress for our citizens with disabilities by making deep cuts to the very programs that have made it possible for people with disabilities to get jobs, live in the community, and stay out of more expensive and unchosen institutional settings."

"CCD urges Congress to reject the President's Budget for what it is, a transparent assault on people with disabilities and other low-income Americans that comes on the heels of one of the largest tax cuts for the wealthiest individuals and large corporations."

The Consortium for Citizens with Disabilities is a broad coalition of national organizations working together to advocate for national public policy that ensures the education, self determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. For more information visit www.c-c-d.org or contact Annie Acosta, 202-783-2229 or acosta@thearc.org; Lisa Ekman, 202-550-9996 or Lisa.Ekman@nosscr.org; Kim Musheno, 301-657-0881 or kmusheno@autism-society.org; Donna Meltzer, 202-506-5813 or dmeltzer@nacdd.org

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**CONSORTIUM FOR CITIZENS
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President's FY 2019 Budget: Devastating Cuts to Social Security

Our Social Security system is a foundation of our nation's economic security. Nearly all U.S. workers pay in to Social Security and are insured for Social Security Old-Age Insurance, Survivors' Insurance, and Disability Insurance. Social Security's Supplemental Security Income program, or SSI, is another core part of this system. SSI provides a basic standard of living for extremely low-income seniors and for children and adults with significant disabilities.

President Trump has promised repeatedly that he would not cut Social Security. Yet the President's proposed 2019 budget does just that, slashing over \$83 billion from Social Security and SSI over 10 years, including at least \$70 billion over 10 years proposed in cuts to the Social Security Administration's disability programs.

Social Security and SSI must be there for us all when we need them, to help us maintain a basic standard of living, putting food on the table and keeping a roof over our heads – including Social Security's core disability programs. Over the years, Congress and Presidents have worked together on a bipartisan basis to make Social Security stronger. National surveys consistently show that Americans overwhelmingly support strengthening and expanding Social Security, and oppose benefit cuts. Instead, President Trump's 2019 budget, like his 2018 budget, proposes cuts that would be nothing short of devastating. The CCD Social Security Task Force urges all Members of Congress to reject the President's proposed cuts to Social Security.

Social Security Cut: \$48.4 Billion (2019-2028)

Budget line item: "Test new approaches to increase labor force participation"

The budget proposes to generate nearly \$50 billion in savings through Social Security demonstration programs to help disability beneficiaries to stay at work or return to work. Since 1980, Social Security has initiated 8 demonstrations to promote return to work. As summarized by Mathematica, all completed demonstrations have reported modest positive outcomes, including increased earnings. However, "none of the findings reported to date show that the demonstrations tested would likely lead to a substantial reduction in caseload sizes" (p. 5). President Trump's budget would tie new demonstrations to reaching a 5 percent cut in Social Security Disability Insurance and SSI by 2028. Cuts of this magnitude would likely be pursued with punitive work requirements and other harsh measures that slash benefits or cut off eligibility entirely. CCD's Social Security Task Force has long supported demonstrations that open up opportunities to work – but not by putting beneficiaries' economic security and Medicare at risk.

Social Security Cut: \$2.5 Billion (2019-2028)

Budget line item: "Offset overlapping unemployment and disability payments"

At the same time that the budget purports to promote work, it would punish Social Security disability beneficiaries for doing exactly that. Thanks to longstanding bipartisan Congressional policy, Social Security already encourages disabled beneficiaries to attempt to work. Work incentives include allowing people to earn up to a Substantial Gainful Activity level (SGA; \$1,180

per month in 2018) as well as numerous other work incentives. Beneficiaries who attempt to work, but get laid off from a job through no fault of their own, may qualify for Unemployment Insurance benefits that their employers have paid for. As explained in this CCD fact sheet, cuts to these benefits would put beneficiaries' ability to meet their day to day living expenses at risk and would deter work by punishing people who attempt to work. For these reasons, 75 national organizations have strongly opposed past versions of this proposal.

Social Security Cut: \$10.3 Billion (2019-2028)

Budget line item: "Reduce 12 month retroactive Disability Insurance benefits to six months"

People who qualify for Social Security disability benefits may get benefits retroactively, for up to 12 months prior to application. Retroactive eligibility starts in the first month in the 12 months prior to application that Social Security finds that a person met all eligibility criteria, including having an eligible disability. Social Security has provided these retroactive benefits since 1958, after a study found that many people did not file for benefits in the first month that they were eligible – and as a result, lost out on one or more months of benefits. Retroactive benefits can be vital for many newly-qualified beneficiaries who can use the retroactive benefits to help pay off often-crushing medical bills and other disability-related and daily living expenses. The average disabled worker receives \$1,197 per month in Social Security benefits, representing *over \$7,000 on average for people who lose the full six months under this cut.*

Social Security Cut: \$6.8 Billion (2019-2028)

Budget line item: "Create sliding scale for multi-recipient Supplemental Security Income (SSI) families"

SSI's benefits average only about \$540 per month, or \$18 per day, and are the only personal income for roughly 3 in 5 recipients with disabilities. The maximum federal SSI payment for an individual (\$750 per month in 2018) is less than 75 percent of the federal poverty guideline for a single person. Nevertheless, SSI lifts roughly half of recipients out of deep poverty. "Sliding scale" proposals to cut SSI if recipients live together – including families – would run counter to the fundamental American value that people should be able to pull together in tough times. As explained in this CCD fact sheet, SSI cuts would devastate already-struggling households, making it harder to put food on the table, keep the lights on, and meet out-of-pocket medical and disability related expenses. Cuts would make it harder for families raising children with disabilities to meet each child's unique needs, and would put children and adults at risk of homelessness and institutionalization. Finally, "sliding scale" cuts would be very difficult and costly to administer.

Additional Social Security Cuts: \$15 Billion (2019-2028)

The budget proposes to cut an additional \$15 billion out of Social Security programs – including the retirement, survivors', and disability programs as well as SSI – in a variety of ways. These include by excluding Social Security debts (due to overpayments) from discharge in bankruptcy, by increasing Social Security's overpayment threshold, and by additional measures characterized as "reducing improper payments."

The bottom line: President Trump's proposed 2019 budget cuts over \$83 billion in Social Security spending over 10 years, including over \$70 billion in cuts to Social Security and SSI disability benefits. Congress should reject these proposed cuts.

Prepared by the CCD Social Security Task Force, February 2018. For more information contact Lisa Ekman, NOSSCR, lisa.ekman@nosscr.org; Tracey Gronniger, Justice in Aging, tgronniger@justiceinaging.org; or T.J. Sutcliffe, The Arc, sutcliffe@thearc.org.

The Disability Integration Act



Over 25 years after the signing of the Americans with Disabilities Act (ADA), institutionalization seriously interferes with the liberty of people with disabilities and seniors. The Senate HELP Committee report “Separate and Unequal: States Fail to Fulfill the Community Living Promise of the Americans with Disabilities Act” documented the failure of States to secure and protect the liberty of people with disabilities and seniors by refusing to provide community-based services. That report recommended that Congress strengthen the ADA integration mandate to clarify that States and private insurers cannot interfere with every American’s right to liberty by failing to provide Long Term Services and Supports (LTSS) in the community.

Summary of Legislation

The Disability Integration Act is bipartisan, bicameral legislation that ensures that disabled Americans have a right to live and receive services in their own homes. The DIA further secures our Constitutionally-protected right to liberty by preventing people with disabilities from being forced into costly institutional settings by unnecessary government regulations. DIA was first introduced in the 114th Congress. Senate Minority Leader Schumer has reintroduced the bill (S.910) in the 115th Congress with minor changes that have strengthened the bill. Representative Sensenbrenner (R-WI), who was a cosponsor during the 114th Congress, has introduced DIA (HR.2472) in the House of Representatives.

Legislative Approach

The **Disability Integration Act** creates a comprehensive solution, assuring the full integration of disabled people in the community by:

- clarifying that **every individual who is eligible for LTSS** has a federally protected right to a **real choice** in how they receive services and supports;
- assuring that states and other LTSS insurance providers **deliver services** in a manner that allows disabled individuals to **live in the most integrated setting**, have maximum control over their services and supports, and lead an independent life;
- articulates the **right to live in the community** without creating unnecessary or wasteful Government programs; **States have broad latitude** to determine how they will secure that right;
- establishing a **comprehensive planning requirement** that includes enforceable benchmarks;
- requiring public entities to address the need for **affordable, accessible, integrated housing that is independent of service delivery**; and establishing **stronger, targeted enforcement** mechanisms.

Why You Should Support DIA

- It secures the Constitutional right to liberty for millions of disabled people and seniors who are in institutions and want to live in the community.
- It helps seniors stay in their own homes as they age.
- It saves millions of Federal and State dollars compared with institutionalization.
- It keeps families together.

Support for this Legislation

This legislation has broad-based support of organizations with over 40 national groups, and over 400 groups in all. It was crafted by ADAPT & the National Council on Independent Living with assistance from the Autistic Self Advocacy Network. Key supporters include:

- Advance CLASS
- American Association of People with Disabilities
- Association of University Centers on Disabilities
- Bazelon Center for Mental Health Law
- Brain Injury Association of America
- Leadership Conference on Civil and Human Rights
- Little People of America
- Medicare Rights Center
- National Academy of Elder Law Attorneys
- National Council on Aging
- National Disability Leadership Alliance
- National Disability Rights Network
- National Downs Syndrome Congress
- National Organization of Nurses with Disabilities
- Paraprofessional Healthcare Institute
- Parent to Parent USA
- Self Advocates Becoming Empowered
- SEIU
- Tash
- The Congress of Disabled Persons Against Exploitation
- United Spinal Association

This issue has significant untapped public support. In 2010, ADAPT secured a Harris poll assessing public support. The poll showed that 89% of all Americans, and 94% of retirees, support legislation which would require people to get home and community-based supports and services instead of forcing older and disabled Americans into nursing facilities and other institutions. **More information, including the full supporter list, is available at the DIA website: www.DisabilityIntegrationAct.org**

THE RIGHT TO LIVE IN THE COMMUNITY is logically prior to, and necessary for, the exercise of the rights which the ADA was intended to secure for all people with disabilities.

The lack of adequate community-based services and supports has imperiled the civil rights of people with disabilities, and has undermined the very promise of the Constitution for disabled Americans.

It is, therefore, necessary to recognize in statute a robust and fully-articulated right to community living.

Why DREDF Opposes Judge Kavanaugh's Appointment to the Supreme Court

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The Trump Administration's Supreme Court nominee Brett Kavanaugh's confirmation hearings are scheduled to begin Tuesday, September 4 and last between three and four days, Judiciary Chairman Chuck Grassley (R-Iowa) announced on Friday, August 10.

The Disability Rights Education & Defense Fund opposes the nomination of Judge Kavanaugh to the Supreme Court of the United States.

"We hold these truths to be self-evident, that all men are created equal." This Declaration of Independence was written by the same founders who made our Constitution the supreme law of the land and divided the balance of power between three distinct branches of government to guard against authoritarian rule. As one of those three branches, the Judiciary's primary role is to make certain that the Legislature passes laws, and the Executive administers those laws, in ways that respect key principles of the Constitution. Since 1789, the Supreme Court has held a unique and necessary position as the judicial last resort for individuals who seek justice in court and is, in effect, the final interpreter of the United States Constitution. In essence, the U.S. Supreme Court exists to ensure that fluctuating views of those with political influence or power do not undermine the fundamental core values that have consequences for, and are dear, to us all: individual liberty, equality, majority rule with inalienable minority protections.

People with disabilities understand that every person has equal worth, but is not necessarily *treated* as equal in a world with systemic discrimination and embedded imbalances of economic, political, social and cultural power. Civil rights laws like the Americans with Disabilities Act are needed so that people have freedom *from* overt discrimination, but also ensure that existing barriers do not prevent freedom *to do*, to have real choices, to live in the community, to participate fully and independently in American life with appropriate supports. The passage of the Affordable Care Act (ACA) gave people with disabilities another guarantee, healthcare coverage, to further expand access to equal participation.

On the three occasions that Judge Kavanaugh deliberated on the ACA, he broke with his judicial colleagues, writing dissenting judgments that characterized the ACA as "unprecedented on the federal level in American history" and warning that the judiciary should "exercise great caution" in determining its constitutionality. In June 2018, the Department of Justice under the Trump administration sided with 20 states in a lawsuit against the ACA, and argued that the ACA's requirement to cover people with preexisting conditions (legislative code for disabled) is unconstitutional. The case will be heard in a Texas district court and is expected to make its way to the Supreme Court, where, if appointed, Judge Kavanaugh has made his views on the ACA's constitutionality unmistakably clear.

Judge Kavanaugh has also made his views clear on other critical areas of concern to people with disabilities:

- In *Doe ex rel. Turlow v. D.C.*, Judge Kavanaugh decided that if a person with intellectual disabilities does not have the legal capacity to make medical decisions, she will **also lack the right to have her wishes considered for elective surgery**. The decision takes an all or nothing view that disregards a growing acknowledgement among states and courts that people with disabilities have levels of capacity, and governments and institutions need the check of being required to consider the desires of the individual.
- In employment discrimination cases, Judge Kavanaugh has routinely favored employers' discretion and placed high evidentiary standards on employees to establish claims of retaliation or discrimination.

- Judge Kavanaugh has not written many special education decisions, but in his career has clearly supported school voucher programs, without ever apparently recognizing the common practice of requiring families of students with disabilities to contractually waive their federal rights to a free and appropriate education under the Individuals with Disabilities Education Act before entering the school.
- In his writings, Judge Kavanaugh has opined on “extraordinary duplication, overlap, and confusion among the missions of different agencies,” and then gone on to decide cases where he struck down an entire rule put out by the Environmental Protection Agency concerning air pollutants that travel across state lines. When the Supreme Court later overturned Judge Kavanaugh’s decision 6-2, they noted that Judge Kavanaugh wrote “an unwritten exception” into the text of the Clean Air Act, and failed to “apply the text, [rather than attempt to] improve upon it.”

Judge Kavanaugh’s recent 2018 decision in ***PHH Corporation v. Consumer Finance Protection Bureau*** captured his hostility to independent federal agencies that are often charged with protecting consumer interests and civil rights, including the rights of people with disabilities. In his opinion, Judge Kavanaugh wrote that such agencies “pose a significant threat to individual liberty and to the constitutional system of separation of powers and check and balances.” The opinion reveals a concept of individual liberty that preserves an imagined status quo where individuals are already equal and the judiciary needs to restrain government interference, including action intended to eliminate long-standing biases and disparities. Thankfully, the full *en banc* hearing of the case by the Fifth Circuit overturned Judge Kavanaugh’s decision.

Arlene Mayerson, DREDF’s directing attorney reminded Disability Scoop on July 16 that Kavanaugh is known for striking down agency regulations, which often spell out the details of what statutes require. Architectural requirements, for instance, give the ADA teeth in providing full and equal access.

“He really is a poster boy for not honoring agency regulations,” Mayerson said. “We want more enforcement of our laws by the federal government, not less.”

DREDF’s review of Judge Kavanaugh’s available decisions and writings suggests that he does not understand what people with disabilities experience. This much seems clear: He will not protect civil rights. He will not ensure that people with disabilities, women, people of different races and ethnicities, different sexual orientations and gender identities, receive needed healthcare without discrimination. He will not ensure that parents of children with disabilities will not face the modern equivalent of Sophie’s Choice—trapped between options because of contradictory rules that force one to choose between getting one’s child the educational services that they need right now and giving up those rights under federal law. Instead, Kavanaugh’s record shows that he will override both Congressional laws and federal agency regulations when **he** determines that they go too far. On the other hand, he appears poised to cede judicial authority by giving the President wide discretion to decide which validly enacted laws are constitutional and which parts he prefers to ignore or actively undermine.

It doesn’t matter if Judge Kavanaugh is a nice guy. Serving on the Supreme Court is not only a matter of personal integrity or professional expertise. What matters is how he sees the world, how he interprets the role of the judiciary, and how he believes our time-honored system of checks and balances relates to corporate and political institutions and the power they hold over individuals with little economic or political influence who are subject to discrimination by those who do.

By the very nature of his job, **Judge Kavanaugh’s words are his actions.** Even though only 1% of Judge Kavanaugh’s words from his White House tenure have been made public, we know

from his opinions who and what he questions (and what he does not), and who he gives a pass to. DREDF shares the informed alarm of other disability advocates and legal experts in the civil rights community about the long-lasting consequences of Judge Kavanaugh's appointment to the United States Supreme Court.

For these reasons, DREDF vows to fight his nomination and we encourage those committed to our common core values of liberty, opportunity and equality to do the same.

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Commentary: How Congress is hacking away at disability rights

Samuel R. Bagenstos

7 MIN READ

On September 7, on a straight party-line vote, the Republican-controlled House Judiciary Committee moved forward a bill that would gut key protections for people with disabilities. Although versions of this legislation had been introduced in prior years, the bill did not go anywhere while President Barack Obama stood ready to veto it. But now that President Donald Trump, whose actions have demonstrated hostility to civil rights, occupies the White House, the proposal presents a real risk of passage. If Republicans in Congress do eviscerate the Americans with Disabilities Act (ADA), it will be the culmination of their recent abandonment of the bipartisan consensus in favor of inclusion and equality for disabled persons.

A protester is escorted away by police at a demonstration outside Senate Majority Leader Mitch McConnell's constituent office after Senate Republicans unveiled their healthcare bill on Capitol Hill in Washington, June 22, 2017. REUTERS/Kevin Lamarque

Although the partisan divide in Washington has often seemed unbridgeable, disability rights long united lawmakers. Republican President George H.W. Bush referred to the ADA, which he signed in 1990, as one of his “proudest achievements.” The law guaranteed that people with disabilities would have access to, and be free from discrimination by, employers, businesses, and government agencies. In 2008, after a series of court

decisions that gave a narrow reading to the ADA, a Democratic Congress passed amendments to the ADA reasserting the statute's broad coverage - and President George W. Bush signed it.

The Trump administration is hacking away at disability rights online and in the workplace, while Trump and congressional Republicans work to gut funding for programs people with disabilities rely on such as Medicaid. The partial ADA-repeal bill is only the most overt assault on disability rights - the culmination of a shift that began when, in December 2012, 38 Republican senators denied the two-thirds vote needed for ratification of the Convention on the Rights of Persons with Disabilities, which was modeled on the ADA and ardently supported by disabled GOP luminaries such as former Senate Majority Leader Bob Dole. But while that action was merely symbolic red meat for their base – conservatives worried it would inhibit homeschooling and infringe U.S. sovereignty - this new proposal could cause tangible and long-lasting harm.

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The current bill, misleadingly titled the “ADA Education and Reform Act of 2017,” would render largely unenforceable key ADA requirements that businesses be accessible to disabled consumers – requirements that they provide ramps instead of stairs where possible, that doorways be wide enough for wheelchairs and so forth.

For wheelchair users, a single step – or a door that is a bit too narrow – can be the barrier that prevents them from patronizing a store. A few inches can make the difference between being full participants in civic and economic life

and being dependent on others and shut off from the community.

Businesses have had 27 years to learn about and conform to the ADA's requirements. But too many still fail to comply with the law, because enforcement relies principally on suits by disabled individuals. Wheelchair users, blind persons, and other people with disabilities encounter inaccessible businesses on a daily basis. According to 2016 Department of Labor statistics, only 31.2 percent of working-age Americans with disabilities had jobs, compared to 76.4 percent of working-age nondisabled Americans. The failure of employers, including stores and restaurants, to provide required accommodations is one of the key reasons for this persistent gap. Surveys show inaccessibility also causes people with disabilities to eat out less often.

The ADA does not give a disabled customer the right to receive damages for a denial of service, just an injunction that requires the owner to remove the barrier. This limitation already creates an incentive for inaccessible businesses to wait until they are sued before complying. Under the bill that recently passed the judiciary committee, the incentive to wait and see will be even greater. The proposal would prevent a disabled person from suing a business that violates the ADA as long as the business makes "substantial progress in removing the barrier," within six months of being notified. A business might be able to avoid ever complying with the ADA or facing a lawsuit. It's a system designed to allow businesses to delay until the victim runs out of energy or money to keep pursuing them.

Sponsors of the “ADA Education and Reform Act,” such as Texas Republican Ted Poe, say that the bill is necessary to stop unscrupulous lawyers from bringing frivolous or abusive ADA cases against small businesses. But state bars, and individual judges, already have ample authority to sanction attorneys who engage in such unprofessional conduct. And the ADA itself protects the interests of business owners by providing that an existing facility need not remove accessibility barriers unless doing so is easy to accomplish without significant expense.

Rather than protecting legitimate business interests, the bill pending in Congress would give a reprieve to enterprises that have had 27 years to comply with the law but have not yet done so. That is a betrayal of the basic promise of the ADA – that people with disabilities would be treated as equal citizens, with full access to America’s civic and economic life.

It is just the latest Republican betrayal of the historic bipartisan support for disability rights. In the Trump administration, attacks on disability rights have accelerated. Attorney General Jeff Sessions’ Justice Department has already reversed course in a key lawsuit, prosecuted by the Obama administration, involving the rights of disabled workers to retain their jobs. The White House has also signaled a halt to the Obama-era efforts to adopt regulations ensuring that the Internet is accessible to blind people and others with disabilities.

Perhaps the biggest threat to disability rights isn’t even in the realm of civil rights law, but healthcare: the GOP’s endless efforts to repeal the Affordable Care Act and cut

funding for Medicaid. If they succeed Republicans would remove benefits that allow people with disabilities to access health insurance and home health services. Instead of staying in their communities and possibly working, many would be institutionalized. Trump has also proposed in his budget to cut drastically into Social Security Disability Insurance, the only source of income for millions of Americans unable to work.

The bipartisan consensus favoring disability rights represented the best of America's ideals of equality, opportunity, and fair play. The Republican Party's turn against disability rights is a rejection of those core American values.

ABOUT THE AUTHOR

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The views expressed in this article are not those of Reuters News.
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EMPOWER Care Act Gets Individuals with Disabilities & Seniors Back Home

S. 2227, the Bipartisan Empower Care Act, introduced by Sens. Portman (R-OH) and Cantwell (D-WA) extends and improves the Money Follows the Person program (MFP). First authorized by President Bush in 2005 with strong bipartisan support, MFP gets individuals with disabilities and seniors out of nursing homes and back in their communities with family and friends.

MFP Enhances Opportunities to Live Independently and Age with Dignity

Medicaid requires states to provide care in nursing homes, but makes home and community-based services (HCBS) optional. MFP better rebalances Medicaid by providing grants to states to cover transitional services for individuals that wish to leave a nursing home or other institution. Thanks to MFP, over 75 thousand individuals with chronic conditions and disabilities and seniors have decided to transition from institutions back into the community through 2015.

MFP Rebalancing Demonstration is a Success Story – Improves Quality of Life

At the end of 2015, more than 43 states and the District of Columbia were participating in the MFP demonstration. As part of an evaluation provided to Congress in a 2017 report, the Centers for Medicare and Medicaid Services (CMS) concludes there is strong evidence beneficiaries' quality of life improves when they transition from institutional to community-based LTSS. MFP participants experienced increases across all seven quality-of-life domains measured, and the improvements were largely sustained after two years.

States Save with Money Follows the Person

Providing LTSS in the home is more cost effective than institutional care, among other reasons because it eliminates the need for Medicaid to cover the cost of room and board in a nursing home. On average, per-beneficiary per-month expenditures for those participating in the rebalancing demonstration declined by \$1,840 (23 percent) during the first year of transitioning from a nursing homes to home and community-based LTSS, saving \$978 million. CMS also finds that MFP participants are less likely to be readmitted to institutional care than other beneficiaries who transition but do not participate in the program.

The Time is Now: Money Follows the Person Expired in September 2016

Unfortunately, the MFP program expired over a year ago. States can continue to use their remaining grant funding through 2020, but that is not enough to maintain the program at current levels, and certainly will not allow states to expand the number of participants. Overall, states have had to scale back plans submitted to CMS by approximately 40%. This means fewer individuals will be able to be transitioned out of institutional settings into the care setting of their choice. *The EMPOWER Care Act resolves that by reauthorizing the program through 2022.*

The EMPOWER Care Act Makes Improvements to the Program

S. 2227 improves the MFP program by reducing the number of days someone must be in a nursing home before becoming eligible to transition from 90 to 60. (Evidence shows that the longer someone remains in a nursing home, the harder it can be for them to transition out.) The legislation also enhances the reporting and accountability of MFP funding and requires HHS to conduct a best practices evaluation of the program that will include the most effective state strategies for transitioning beneficiaries from institutional to qualified community settings, and how such strategies may vary for different types of beneficiaries.

Conclusion: Sponsor the EMPOWER Care Act Today!

REVIEW OF DISABILITY-RELATED CASES INVOLVING JUDGE BRETT KAVANAUGH

The Bazelon Center for Mental Health Law strongly opposes the nomination of Judge Brett Kavanaugh to serve on the U.S. Supreme Court. The appointment of Judge Kavanaugh would threaten hard-won rights and protections for people with disabilities. Judge Kavanaugh’s record demonstrates his great skepticism of the Affordable Care Act, his hostility to civil rights—including the rights of people with disabilities—and his narrow view of the authority of executive branch agencies to interpret and enforce the law. His confirmation could add a fifth vote for such regressive views. A summary of his record is provided below.

I. Access to Health Care

Access to health care is crucial to ensuring that people with disabilities are able to live, work, and succeed in their communities. Troublingly, in a series of public appearances, Judge Kavanaugh has repeatedly expressed skepticism of the Affordable Care Act (ACA), criticism of Chief Justice Roberts’ reasoning in upholding the ACA, and concerns about its “unprecedented” nature.¹ These comments indicate that Judge Kavanaugh would embrace the various challenges to the ACA that continue to make their way through the courts.

Judge Kavanaugh’s judicial opinions support this view. He has written dissenting opinions in three ACA cases, advocating positions that, if accepted, would undermine crucial elements of the ACA and hinder its implementation. First, in *Seven-Sky v. Holder*,² the panel majority upheld

¹ *The Joseph Story Distinguished Lecture*, The Heritage Foundation (Oct. 25, 2017), <https://www.heritage.org/josephstory2017>, at 34-37 min. (criticizing Chief Justice Roberts’ use of the constitutional avoidance canon in upholding the ACA in *NFIB v. Sebelius*); *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, American Enterprise Institute (Sept. 18, 2017), <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>, at 15 (lauding former Chief Justice Rehnquist for “putting the brakes on the Commerce Clause” and commenting positively on the fact that a five-judge majority on the Supreme Court ruled against the ACA under the Commerce Clause); *The Administrative State After the Health Care Cases*, The Federalist Society (Nov. 17, 2012), 55:30-57:25 and 1:01:20-1:02:55, <https://www.youtube.com/watch?v=zRImAlbJOt8>, at 55-59 min. (calling the ACA “unprecedented” and an “erosion of federalism” and speaking approvingly about Chief Justice Roberts’ ruling against the ACA on Commerce Clause grounds).

² 661 F.3d 1 (D.C. Cir. 2011), *abrogated by* Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

the constitutionality of the ACA's individual mandate. Judge Kavanaugh dissented, arguing that the court lacked jurisdiction to decide the issue.³ But Judge Kavanaugh also revealed his distaste for the ACA, describing it as “unprecedented on the federal level in American history” and writing that this fact “counsels the Judiciary to exercise great caution” in finding it constitutional.⁴ He also made the concerning statement that the president could decide not to enforce the ACA's individual mandate if the president concluded that it was unconstitutional, even if the courts had already ruled that it was constitutional.⁵

Second, Judge Kavanaugh dissented in another case challenging the constitutionality of the ACA, *Sissel v. U.S. Department of Health and Human Services*.⁶ The majority denied a petition for rehearing en banc, leaving in place a decision upholding the ACA. Judge Kavanaugh argued for a rehearing because the case raised the “serious constitutional question” of whether the ACA violated the Origination Clause of the Constitution, which requires that bills to raise revenue originate in the House of Representatives.⁷ Judge Kavanaugh agreed, on different grounds than the majority, that there was no Origination Clause violation, but his extremely broad view of this Clause as applicable to any legislation that “raises revenue for general governmental purposes”⁸ places important laws in jeopardy. Several judges joining the majority wrote separately to explain why Judge Kavanaugh's dissent was wrong, noting that it “forecloses the approach that the Supreme Court has used for more than a century and that we applied in this case.”⁹

Finally, in *Priests for Life v. U.S. Department of Health & Human Services*,¹⁰ Judge Kavanaugh argued to rehear en banc a decision against an employer's religious liberty challenge to the ACA's contraception coverage mandate. The majority held that the religious accommodation regulation, which exempted religious organizations from the mandate if they submitted a form to either their insurer or the Secretary of Health and Human Services, distinguished this case from the Supreme Court's holding in *Hobby Lobby*. Judge Kavanaugh disagreed, arguing that even submitting the form substantially burdened the employer's religious freedom.¹¹ His arguments also have implications for people with disabilities—particularly those served by religiously affiliated providers.

³ *Id.* at 22 (Kavanaugh, J., dissenting).

⁴ *Id.* at 51.

⁵ *Id.* at 50.

⁶ 799 F.3d 1035 (D.C. Cir. 2015).

⁷ *Id.* at 1049 (Kavanaugh, J., dissenting).

⁸ *Id.* at 1060.

⁹ *Id.* at 1042 (Rogers, Pillard, and Wilkins, J.J., concurring).

¹⁰ 808 F.3d 1 (D.C. Cir. 2015).

¹¹ *Id.* at 21 (Kavanaugh, J., dissenting). In 2016, the Supreme Court vacated the D.C. Circuit opinion and other decisions to allow the parties to resolve the matter and to “arrive at an approach going forward.” *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

Based on Judge Kavanaugh's repeated and open willingness to undermine fundamental protections of the ACA, including the individual mandate, his confirmation to the Supreme Court likely endangers other important elements of the Act as well, such as requiring insurers to offer coverage to people with pre-existing conditions.

II. Self-Determination

Like all people, the decisions of people with disabilities, including their choices about the medical care they receive, should be respected to the maximum extent possible. Despite this basic principle, people with disabilities, and particularly people with intellectual and developmental disabilities, have experienced a long and shameful history of forced sterilization and other state-sanctioned intrusions into their physical autonomy.

Judge Kavanaugh demonstrated a disturbing lack of regard for the rights of individuals with disabilities in *Doe ex rel. Tarlow v. D.C.*,¹² a challenge brought by a class of people with intellectual disabilities who lived in District of Columbia facilities and were subjected to elective surgeries based on the consent of District officials. The plaintiffs alleged that the District provided consent for elective surgeries (including unwanted abortions) on class members without attempting to ascertain their wishes, in violation of the Constitution and the District's own law; further, the plaintiffs alleged that District officials had signed off on *every* proposed elective surgery for class members for the past 30 years, indicating an unlawful rubber-stamp approach. The district court ruled in favor of the plaintiffs, noting that an individual who was legally incompetent to make medical decisions may nevertheless be capable of expressing a choice or preference regarding medical treatment and those wishes should be given weight under D.C. law, which requires that the District base medical decisions on the wishes of individuals who lack the capacity to make medical decisions unless those wishes cannot be ascertained.¹³ The district court permanently enjoined the District from consenting to elective surgeries before attempting to ascertain the known wishes of the patient.¹⁴

On appeal, Judge Kavanaugh vacated the injunction and directed judgment in favor of the District, writing that "accepting the wishes of patients who lack (and have always lacked) the mental capacity to make medical decisions does not make logical sense and would cause erroneous medical decisions—with harmful or even deadly consequences to intellectually disabled persons."¹⁵ In addition, Judge Kavanaugh held that no substantive due process claims were implicated because "plaintiffs have not shown that consideration of the wishes of a never-competent patient is 'deeply rooted in this Nation's history and tradition' and 'implicit in the

¹² 489 F.3d 376 (D.C. Cir. 2007).

¹³ *Does v. D.C.*, 374 F. Supp. 2d 107, 115 (D.D.C. 2005). Indeed, a District official had acknowledged in her testimony that at least one of the named plaintiffs was capable of making her wishes known. Brief of Appellees, 2006 WL 3532947, at *7.

¹⁴ *Does I through III v. D.C.*, 232 F.R.D. 18, 34 (D.D.C. 2005), *rev'd in part, vacated in part sub nom. Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376 (D.C. Cir. 2007).

¹⁵ *Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376, 382 (D.C. Cir. 2007).

concept of ordered liberty.”¹⁶ This language raises serious concerns about Judge Kavanaugh’s views on the rights and abilities of people with disabilities to determine the course of their own lives.¹⁷ It is also inconsistent with the approach required by numerous states and used in many court decisions, which requires some consideration of the individual’s wishes even if the individual is not legally competent to make the decision.

III. Employment Discrimination

In employment discrimination cases, Judge Kavanaugh has consistently demonstrated undue deference to employers and a particularly narrow understanding of antidiscrimination protections.

Judge Kavanaugh dissented from the majority opinion in *Miller v. Clinton*,¹⁸ which held that the Age Discrimination in Employment Act (ADEA) barred the State Department from imposing a mandatory retirement age for workers abroad and terminating an employee solely because he turned 65. Observing that the State Department’s reasoning would extend beyond the ADEA to other statutes, including the ADA, the majority wrote: “We simply do not believe [Congress] would have authorized the State Department to ignore statutory proscriptions against discrimination on the basis of age, disability, race, religion, or sex through the use of ambiguous language.”¹⁹ Indeed, the majority noted that “Congress has made clear that it regards those protections as extremely important,” and that a contrary holding would exempt a class of U.S. citizens “from the protections of the entire edifice of its antidiscrimination canon.”²⁰

In his dissent, Judge Kavanaugh dismissed these concerns, accusing the majority of “raising the specter of rampant race, sex, and religious discrimination by the U.S. State Department against U.S. citizens employed abroad.”²¹ Notably, although Judge Kavanaugh posited that the Constitution would still bar the State Department from discriminating against workers abroad

¹⁶ *Id.* at 383. Notably, the case proceeded following Judge Kavanaugh’s remand, and the District Court ultimately found that the District’s consent for the unwanted abortions on two of the women was unconstitutional and constituted batteries. *Doe v. D.C.*, 206 F. Supp. 3d 583 (D.D.C. 2016).

¹⁷ Judge Kavanaugh expressed similar views in *Garza v. Hargan*, in which he dissented from an en banc decision that allowed an undocumented minor in government custody to access abortion care. Even though the minor had already obtained a judicial bypass order confirming that she was capable of deciding to have an abortion, Judge Kavanaugh believed that she should wait to make this “major life decision” until she was placed with a sponsor and “in a better place when deciding whether to have an abortion.” *Garza v. Hargan*, 874 F.3d 735, 755 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *cert. granted, judgment vacated sub nom. Azar v. Garza*, 138 S. Ct. 1790 (2018). Like his opinion in *Doe*, Judge Kavanaugh’s dissent in *Garza* demonstrates a troubling disregard for an individual’s right to medical and physical autonomy.

¹⁸ 687 F.3d 1332 (D.C. Cir. 2012).

¹⁹ *Id.* at 1337.

²⁰ *Id.* at 1338.

²¹ *Id.* at 1357 (Kavanaugh, J., dissenting).

“on the basis of race, sex, or religion” even if antidiscrimination laws did not apply,²² he offered no such comfort to workers with disabilities (and the Supreme Court has applied less searching constitutional scrutiny of policies treating people with disabilities differently). Judge Kavanaugh’s eagerness to read this broad exemption into the nation’s antidiscrimination laws is deeply troubling.

In employment discrimination cases, Judge Kavanaugh has routinely disregarded the experiences of people with disabilities in order to side with employers. For example, in *Stewart v. St. Elizabeths Hospital*,²³ he ruled for the employer, a psychiatric hospital, because he found insufficient evidence that the employer had notice of the worker’s disability—despite her allegation that her supervisors knew she had been hired under a “patient hire” program at the hospital that provided jobs to hospital residents with disabilities.²⁴

Judge Kavanaugh again demonstrated great reluctance to scrutinize an employer’s actions in *Adeyemi v. District of Columbia*,²⁵ in which he ruled against the plaintiff, a Deaf job applicant who was turned down for an information technology position in the D.C. public school system. Judge Kavanaugh set out a high bar for job applicants alleging discrimination in the hiring process, writing that, in order to put his or her case to a jury, an applicant must provide evidence that he or she was “*significantly* better qualified for the job than those ultimately chosen.”²⁶ To allow judicial scrutiny in a case where the “comparative qualifications” between the applicants “are close,” he wrote, would turn the court into “a super-personnel department that reexamines an entity’s business decisions.”²⁷

Similarly, in *Baloch v. Kempthorne*,²⁸ Judge Kavanaugh rejected a worker’s disability discrimination and retaliation claims, unpersuaded by the worker’s allegations that, after he filed an administrative complaint, his supervisor imposed onerous sick leave restrictions requiring him to submit a physician certification each time he requested leave; gave him low performance reviews and a formal reprimand; and directed “profanity-laden yelling” at the worker on four separate occasions. Rather than considering these experiences as adverse actions that could support the worker’s retaliation claim, Judge Kavanaugh viewed them as examples of the employer’s ability to decide “[g]ood institutional administration.”²⁹

²² *Id.* at 1359.

²³ 589 F.3d 1305 (D.C. Cir. 2010).

²⁴ Appellant’s Brief, 2009 WL 3126602.

²⁵ 525 F.3d 1222 (D.C. Cir. 2008).

²⁶ *Id.* at 1227 (emphasis added).

²⁷ *Id.* (quoting *Jackson v. Gonzales*, 496 F.3d 703, 707 (D.C. Cir. 2007)).

²⁸ 550 F.3d 1191 (D.C. Cir. 2013).

²⁹ *Id.* at 1200.

Most recently, in *Johnson v. Interstate Management Company*,³⁰ Judge Kavanaugh again ruled for the employer, holding that the worker had not shown sufficient evidence that his employer terminated him as retaliation after he filed disability discrimination complaints. In reaching his conclusion, Judge Kavanaugh deferred to the employer's testimony alleging "repeated performance failings" by the worker;³¹ he discounted or ignored significant evidence presented by the worker, including the absence of a single complaint in the worker's nearly 15 years with the company until a new executive chef came on board, and fact questions around the performance complaints relied on by the employer.³² Indeed, another judge on the panel specifically noted in her concurring opinion that she disagreed with Judge Kavanaugh's analysis of the record on the retaliation issue.³³

IV. Equal Educational Opportunities

Judge Kavanaugh has long been a proponent of voucher programs, previously serving as co-chairman of the Federalist Society's "School Choice Practice Group."³⁴ As an attorney, he defended a Florida school voucher program called the Opportunity Scholarship Program, which provided state funding for some students to enroll in private schools. In 2006, the Florida Supreme Court declared that the Opportunity Scholarship Program violated the state constitution's guarantee of "a uniform, efficient, safe, secure, and high quality system of free public schools."³⁵ Students with disabilities who participate in school voucher programs are typically forced to waive their rights under the Individuals with Disabilities Education Act (IDEA), including the right to receive a free and appropriate education (FAPE). The Supreme Court's 2017 decision in *Endrew F. v. Douglas County School District*, in which the Court held that the IDEA requires schools to provide "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances,"³⁶ underscored the importance of these rights for students with disabilities. Judge Kavanaugh's advocacy on behalf of school voucher programs raises concerns about his understanding of the importance of the IDEA's protections for students with disabilities.

³⁰ 849 F.3d 1093 (D.C. Cir. 2017). Judge Kavanaugh also rejected the worker's claim that he was fired in retaliation for filing a workplace safety complaint with the Occupational Safety and Health Administration, holding that the Occupational Safety and Health Act did not provide workers a private cause of action. *Id.* at 1098.

³¹ *Id.* at 1099.

³² Opening Brief of Appointed Amicus Curiae in Support of the Appellant, 2016 WL 389495, at **5-6 and *12.

³³ 849 F.3d at 1101 (Millett, J., concurring).

³⁴ *Confirmation Hearing on the Nomination of Brett M. Kavanaugh to Be Circuit Judge for the District of Columbia Circuit Before the Committee on the Judiciary*, 108th Cong. 72-73 (2004).

³⁵ *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

³⁶ 137 S. Ct. 988, 1001 (2017).

Judge Kavanaugh’s decision in *Hester v. D.C.*³⁷ further confirms that he lacks an appreciation for the IDEA’s high standards for educating children with disabilities. In this case, he overturned a district court order requiring the District of Columbia to provide compensatory education to a student with a disability who had been incarcerated in a Maryland facility. The student and the District had entered into a settlement agreement in which the District agreed to provide the student with educational services during his incarceration. However, the Maryland facility denied access to the District’s education provider. The facility indicated that it would itself provide the student with educational services, but testimony at the trial indicated that he received minimal educational benefit while at the facility: his testing scores declined; he did not receive transition services; there were significant reductions in the number of hours of both special and general education he received; and he spent a significant amount of time in segregation, during which he received no general education and only two hours per week of special education.³⁸ The district court held the District to its obligations under the settlement agreement and required the District to provide appropriate compensatory education.³⁹ Judge Kavanaugh reversed, writing that as a matter of contract law, the District was relieved from its obligations because the Maryland facility had made it impracticable for the District’s provider to enter the facility.⁴⁰ Judge Kavanaugh’s commitment to the high standards required under the IDEA is less than clear, given his approach to this case.

V. Access to Justice and Voting Rights

Judge Kavanaugh’s record on other fundamental rights, including the right to pursue claims in court, also raises concerns about his willingness to ensure justice for all Americans. For example, he authored a strongly worded dissent in *Cohen v. U.S.*,⁴¹ a challenge to a refund mechanism established by the Internal Revenue Service brought by a putative class of taxpayers. Judge Kavanaugh charged the plaintiffs with seeking a “class-wide jackpot” by filing a class-action lawsuit requesting “billions of dollars in additional refunds to millions of as-yet-unnamed individuals.”⁴² He also contended that the court should have barred the plaintiffs from bringing their challenge as a class until after they had filed claims under the refund mechanism to which they objected.⁴³ The class action is an indispensable tool that enables people with disabilities and others with limited means to pursue justice as a group, rather than being forced to litigate separately at great cost and effort. As the majority opinion in *Cohen* observed, “it would be cold comfort to direct Appellants to proceed in a series of individual suits, submitting themselves one by one to the very refund procedures that they claim to be unlawful.”⁴⁴ Judge Kavanaugh’s alarm

³⁷ 505 F.3d 1283 (D.C. Cir. 2007)

³⁸ *Hester v. D.C.*, 433 F. Supp. 2d 71, 80 (D.D.C. 2006), *rev'd and remanded*, 505 F.3d 1283 (D.C. Cir. 2007).

³⁹ *Id.* at 81.

⁴⁰ 505 F.3d at 1286.

⁴¹ 650 F.3d 717 (D.C. Cir. 2011).

⁴² *Id.* at 737 (Kavanaugh, J., dissenting).

⁴³ *Id.* at 738.

⁴⁴ 650 F.3d at 733.

in this case at the basic functions of the class action reveals a troubling hostility to this important legal mechanism.⁴⁵

Judge Kavanaugh's dissent in a housing discrimination case, *Redman v. Graham*,⁴⁶ again demonstrates the barriers he would impose for individuals seeking access to courts. In this case, a tenant alleged that the law firm that had represented her former landlord in eviction proceedings had engaged in disability discrimination and retaliation. The majority vacated the dismissal of this claim and allowed her the opportunity to clarify her legal theory and present evidence in support of her claim.⁴⁷ Judge Kavanaugh would have prevented her from proceeding based on his strict and formalistic reading of the Fair Housing Act and the corresponding District of Columbia law, writing dismissively that neither law authorized a claim against an attorney.⁴⁸

Judge Kavanaugh's record also reveals a permissive attitude toward state's efforts to restrict voting rights. In *South Carolina v. U.S.*,⁴⁹ Judge Kavanaugh upheld a South Carolina voter identification law that the Department of Justice (DOJ) had previously blocked under the Voting Rights Act. DOJ observed that 8.9% of the state's registered voters, or 239,333 people, did not possess DMV-issued identification that would satisfy the South Carolina law, and that non-white registered voters were more likely to lack such identification.⁵⁰ While DOJ did not discuss the impact of the law on voters with disabilities, these voters may also face particular financial or practical challenges in obtaining the required identification. A conservative majority on the Supreme Court has subsequently voted to roll back the protections of the Voting Rights Act, opening the door for states to impose even more burdensome voting restrictions that will disproportionately affect voters with disabilities. Judge Kavanaugh's decision in *South Carolina* indicates that he will not stand in their way.

VI. Agency Authority

Administrative agencies, such as the Departments of Justice, Education, and Health and Human Services, play a large role in enforcing civil rights protections and managing federal healthcare and benefits programs that are crucial to many people with disabilities. Judge Kavanaugh's writings and opinions demonstrate that he shares Justice Gorsuch's antipathy for agencies' role in interpreting and implementing laws, including limiting their ability to make decisions regarding the laws they are expressly charged with implementing. For example, he has called for

⁴⁵ It should be noted, however, that in one case, Judge Kavanaugh joined an opinion affirming the certification of a class of Medicaid recipients with disabilities who were segregated and isolated in violation of the ADA. In re D.C., 792 F.3d 96 (D.C. Cir. 2015).

⁴⁶ 2006 U.S. App. LEXIS 28147 (D.C. Cir. 2006).

⁴⁷ *Id.* at **6-7.

⁴⁸ *Id.* at **8-9 (Kavanaugh, J., dissenting).

⁴⁹ 898 F. Supp. 2d 30 (D.D.C. 2012).

⁵⁰ Letter from Thomas E. Perez, Assistant Att. General, U.S. Department of Justice, Civil Rights Division, 2 (Dec. 23, 2011), <https://action.naacp.org/page/-/DOJ%20SC%20memo.pdf>.

judges to limit the application of *Chevron* deference⁵¹—the long-accepted canon under which courts defer to an agency’s reasonable interpretation of the statutes they are responsible for implementing—calling it “an atextual invention by courts” and “a judicially orchestrated shift of power from Congress to the Executive Branch.”⁵² Judge Kavanaugh has also suggested that some agencies should be reduced or eliminated, citing “extraordinary duplication, overlap, and confusion among the missions of different agencies”⁵³ and writing that the existence of independent agencies is not “wise” and “has clear costs in terms of democratic accountability.”⁵⁴

Judge Kavanaugh has also imposed these beliefs in the cases before him as a judge. For example, in *EME Homer City Generation, L.P. v. E.P.A.*,⁵⁵ Judge Kavanaugh attempted to strike down an Environmental Protection Agency (EPA) rule intended to address air pollutants that cross state lines. Judge Kavanaugh vacated the rule in its entirety, writing that the EPA had exceeded its statutory authority. The Supreme Court voted 6-2 to overturn Judge Kavanaugh’s decision, holding that the plain text of the Clean Air Act supported the EPA’s rule.⁵⁶ The Court observed that Judge Kavanaugh’s decision wrote “an unwritten exception” into the text and violated the precept that the task of a reviewing court “is to apply the text [of the statute], not to improve upon it.”⁵⁷

In another troubling case, *PHH Corporation v. Consumer Finance Protection Bureau*,⁵⁸ Judge Kavanaugh found that the Consumer Financial Protection Bureau (CFPB) was unconstitutionally structured and struck down the relevant provision of the Dodd-Frank Act. Judge Kavanaugh evinced outright hostility to independent agencies—a group that includes not only the CFPB but also other agencies such as the National Labor Relations Board, the Equal Employment Opportunity Commission, and the Social Security Administration—writing that they “pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.”⁵⁹ The full Circuit Court reheard the case en banc and upheld the constitutionality of the agency, overturning Judge Kavanaugh’s decision.⁶⁰

⁵¹ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 128 Harvard L.J. 2118, 2154 (2016), <http://cdn.harvardlawreview.org/wp-content/uploads/2016/06/2118-2163-Online.pdf>.

⁵² *Id.* at 2150.

⁵³ Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L.R. 1454, 1469-70 (2009), http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf.

⁵⁴ *Id.* at 1472.

⁵⁵ 696 F.3d 7 (D.C. Cir. 2012), *rev'd and remanded*, 134 S. Ct. 1584 (2014).

⁵⁶ *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

⁵⁷ *Id.* at 1600.

⁵⁸ 839 F.3d 1 (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).

⁵⁹ *Id.* at 5-6.

⁶⁰ 881 F.3d 75.

ROBERT P. CASEY, JR.
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SPECIAL COMMITTEE ON AGING

United States Senate

WASHINGTON, DC 20510

August 22, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

I am writing to respectfully request you share all records under your control pertaining to Judge Brett Kavanaugh's involvement in any matters related to older Americans and Americans with disabilities during his tenure at the White House as Staff Secretary and as White House Counsel. I also respectfully ask that you request all records from the National Archives regarding Judge Kavanaugh's time as Staff Secretary and as White House Counsel related to older adults and people with disabilities and share those with me and my staff.

As the Ranking Member of the Special Committee on Aging, I believe I have a duty to review the Judge's writings and opinions related to seniors and people with disabilities. The Centers for Disease Control and Prevention just released a new study indicating there are over 62 million Americans with disabilities.¹ Many of the decisions Judge Kavanaugh will be asked to make if he is confirmed will affect citizens with disabilities, as well as the 49 million Americans over 65 years of age.²

The Supreme Court's work in recent years has had significant impact on seniors and people with disabilities. The 2017 *Endrew F. v. Douglas County School District* decision defines adequate instruction for students with disabilities. The 2018 *Husted v. A. Philip Randolph Institute* decision will have an impact on voting accessibility for older Americans and people with disabilities. The 2018 *Epic Systems Corp. v. Lewis* decision will have a direct impact on the ability of older Americans to create a class in disputes with employers.

While I have opposed the process by which Judge Kavanaugh has been nominated, as a member of the Senate, I have a responsibility to advise the President and inform the citizens of Pennsylvania regarding the Judge's record. As a co-equal branch of the United States

¹ Centers for Disease Control and Prevention, "*Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults — United States, 2016*," (Last modified: August 17, 2018), available at: https://www.cdc.gov/mmwr/volumes/67/wr/mm6732a3.htm?s_cid=mm6732a3_w

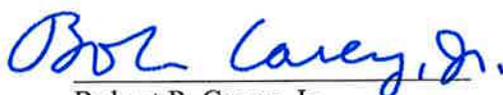
² Administration for Community Living, "*2017 Profile of Older Americans*," (April 2018), available at: <https://www.acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2017OlderAmericansProfile.pdf>

government, the Supreme Court's influence on all Americans is substantial. Our courts are designed to provide equal protection to all Americans. Older adults and people with disabilities need to know that members of the highest court will hear their cases fairly. Access to Judge Kavanaugh's record relating to older Americans and Americans with disabilities will allow me to carry-out my responsibility to represent my constituents as I advise the President on this nominee.

I look forward to reviewing the documents held by the Judiciary Committee and those from the National Archives related to older Americans and Americans with disabilities.

Please contact Kevin Barstow at (202) 224-0086 or via email at kevin_barstow@aging.senate.gov, or Michael Gamel-McCormick at (202) 224-4193 or via e-mail at michael_gamel-mccormick@aging.senate.gov if you have questions.

Sincerely,

A handwritten signature in blue ink that reads "Bob Casey, Jr." with a stylized flourish at the end.

Robert P. Casey, Jr.
Ranking Member
Special Committee on Aging



SUPREME COURT NOMINEE'S RECORD ON SENIORS AND PEOPLE WITH DISABILITIES RAISES ALARMS

President Trump's nomination of Brett Kavanaugh to the Supreme Court threatens the basic rights, health care and economic security of people with disabilities and seniors. A review of Kavanaugh's opinions indicates that he could chip away at the civil rights of people with disabilities, undermine a secure retirement for American workers, eliminate health care protections for people with pre-existing conditions and enable financial predators to take advantage of unsuspecting consumers.

The Record Shows: Kavanaugh Could Eliminate Key Health Care Protections

President Trump is using the courts to sabotage the Affordable Care Act (ACA) and is appointing judges who he believes will strike down the law.¹ Kavanaugh has disagreed with rulings upholding the ACA and could obliterate key health care coverage protections for people with pre-existing conditions.

- [More than 130 million](#) Americans have a pre-existing condition, such as diabetes or cancer, including over [30 million](#) people ages 55 to 64. The ACA advanced critical protections to ensure these individuals cannot be dropped from coverage or charged more due to an existing injury or illness.
- Right now, the courts are considering whether people with pre-existing conditions should continue to be protected from being charged more, being denied coverage or being dropped from their insurance simply because of their health status.² The Supreme Court might be the last line of defense in maintaining these protections for people with pre-existing conditions and Kavanaugh could be the deciding vote.
- In two cases, Kavanaugh disagreed with rulings upholding the ACA.³ A former Kavanaugh law clerk said it best when she [spoke](#) about Kavanaugh's view of the ACA: "No other contender on President Trump's list is on record so vigorously criticizing the law."

The Record Shows: Kavanaugh Would Jeopardize the Rights of People with Disabilities

People with disabilities have faced decades of discrimination, such as forced sterilization, institutionalization and a basic, underlying disregard for their autonomy. Kavanaugh's prior rulings indicate he could roll back decades of progress to secure the civil rights, liberty and individual dignity of people with disabilities.

- **Taking Away the Right of Self-Determination:** Kavanaugh has ruled against the rights of people with disabilities to make decisions about their own lives. In one case, three women with intellectual disabilities

¹ As a candidate, Trump made his intention to overturn the ACA through the courts clear when he [said](#), "[M]y judicial appointments will do the right thing, unlike Bush's appointee John Roberts on *ObamaCare*."

² In [Texas v. United States](#), the Trump Administration has sided with 20 Republican state attorneys general and is refusing to defend the ACA's protections for people with pre-existing conditions.

³ In [Seven-Sky v. Holder](#) and [Sissel v. HHS](#), Kavanaugh dissented from rulings upholding the ACA. The reasoning behind one of his dissents paved the way for other ACA dissenters, including justices on the Supreme Court.

challenged a District of Columbia policy allowing medical professionals to decide what elective surgeries would be performed on them. The District Court ruled in favor of the women, requiring that the city attempt to determine the wishes of individuals before making medical decisions for them. Kavanaugh overturned this decision, questioning the basic liberty of individuals with intellectual disabilities and allowing the government to make medical decisions on their behalf without ever attempting to determine their wishes ([*Doe ex rel. Tarlow v. D.C.*](#)).

- **Siding with Employers Over Employees with Disabilities:** Kavanaugh sided with an employer who placed onerous sick leave requirements on an employee with a disability, citing these actions as “*good institutional administration*” rather than as discrimination and retaliation, as the employee alleged ([*Baloch v. Kempthorne*](#)).
- **Leaving Workers with Disabilities Behind:** When a deaf job applicant was turned down for a job in the public school system, Kavanaugh set a high bar for any allegations of discrimination in the hiring process, stating that an applicant must prove he or she was “*significantly better qualified for the job than those ultimately chosen*” in order to have his or her case tried in front of a jury. The high standard set by Kavanaugh would make it very difficult for an applicant alleging discrimination in the hiring process to have their case heard by a jury of their peers ([*Adeyemi v. D.C.*](#)).
- **Allowing Disability Discrimination:** Kavanaugh sided with the employer in response to allegations of disability discrimination by ruling that a worker had not shown sufficient evidence that his employer terminated him as retaliation for filing disability discrimination complaints. Notably, until a new manager was hired, the employee had not a single performance complaint in over 10 years ([*Johnson v. Interstate Management Company*](#)).

The Record Shows: Kavanaugh Would Favor Wealthy Corporations Over Seniors

At all levels of the federal judicial system, President Trump and Congressional Republicans have nominated judges who are sympathetic to corporations and the wealthy, stacking the deck against all Americans and their families. Time and again, Kavanaugh has sided with the interests of corporations over older and retired workers, jeopardizing their fair shot at economic security and a secure retirement.

- **Facilitating Age Discrimination:** Kavanaugh argued that the Age Discrimination in Employment Act (ADEA), an anti-discrimination law that has protected the rights of older workers for decades, should not apply to certain federal government employees ([*Miller v. Clinton*](#)).
- **Gutting Consumer Protections for Seniors:** Kavanaugh ruled that the Consumer Financial Protection Bureau (CFPB), an independent agency created to protect retirees and consumers from predatory practices engaged in by lenders, banks and other financial institutions, is “*unconstitutionally structured*” and should be dismantled in its current form ([*PHH Corp. v. CFPB*](#)). If the CFPB were dissolved, older Americans would lose a key source of unbiased information on financial products, retirement planning and how to protect themselves from unscrupulous fraudsters.

NASUAD FY19 Budget Chart:
Key HHS Programs Serving Seniors and Persons with Disabilities
As of February 12, 2018 (Dollars in Millions)

Program	FY17 Omnibus	FY18 President's Request	FY18 House	FY18 Senate	FY18 Omnibus ¹	FY19 President's Request
Administration for Community Living						
<i>Health and Independence</i>						
HCBS Supportive Services	350.2	347	350.2	350.2		350
Nutrition Services ²						838
Congregate Nutrition	450.3	447	450.3	450.3		Included Above
Home-Delivered Nutrition	227.3	226	227.3	227.3		Included Above
Nutrition Services Incentive Program	160	160	160	160		Included Above
Preventive Health	19.8	20	19.8	19.8		25
Chronic Disease Self-Management	8	5	5	8		-- ³
Elder Falls Prevention	5	5	5	5		--
Native American Nutrition and Supportive Services	31.2	31	31.2	31.2		31
<i>Caregiver Services</i>						
Family Caregiver Support Services	150.5	150	150.5	150.5		151
Native American Caregiver Support Services	7.55	8	7.55	7.55		8

¹ The final FY18 levels are not yet set and agencies have been operating under FY17 levels. A final deal is expected to be reached in Congress by the end of the current continuing resolution (CR) period, which expires March 23, 2018.

² The FY19 Budget proposal includes an aggregate figure that includes congregate, home-delivered meals, and nutrition services incentive program.

³ The FY19 Budget proposes to consolidate the Falls Prevention Program and the Chronic Disease Self-Management Program into the Preventative Health Service Program.

Program	FY17 Omnibus	FY18 President's Request	FY18 House	FY18 Senate	FY18 Omnibus ¹	FY19 President's Request
Alzheimer's Disease Program ⁴		19	19.6			19
Alzheimer's Disease Demonstration Grants				4.8		--
Lifespan Respite Care	3.36	3	3.36	3.36		3
<i>Protection of Vulnerable Adults</i>						
Elder Rights Support Activities	13.87 ⁵	12	11.8	13.87		12
Protection of Vulnerable Older Americans ⁶	--	--	20.6	20.6		--
Prevention of Elder Abuse & Neglect	4.8	5	Included Above	Included Above		5
Long-Term Care Ombudsman Program	15.8	16	Included Above	Included Above		16
Senior Medicare Patrol Program	-- ⁷	18	--	-- ⁸		18
Alzheimer's Disease Initiative ⁹	14.7	--	--	14.7		--
<i>Programs for Individuals with Disabilities</i>						
National Institute on Disability, Independent Living, and Rehabilitation Research	103.9	95	103.9	103.9		-- ¹⁰
Paralysis Resource Center	6.7	--	6.7	6.7		--

⁴ Consolidates three Alzheimer's disease programs: Demo Grants ADSSP, Communications Campaign, and Services.

⁵ Of this funding, \$10 million is directed to be used for the Elder Justice and Adult Protective Services program.

⁶ Includes funding for both the Long-Term Care Ombudsman program and the Prevention of Elder Abuse & Neglect programs. Both the House and Senate propose to level-fund these programs in FY18 but do not specify separate amounts for each program in the legislation. The FY19 President's budget also proposes to level-fund them.

⁷ The FY16 & FY17 Omnibus Appropriations acts do not specifically provide money for the Senior Medicare Patrol Program, but instead include language directing HHS to fully fund it via the Health Care Fraud and Abuse account.

⁸ The FY18 House and Senate appropriations bills also direct HHS to fully fund SMP via the Health Care Fraud and Abuse Account but do not directly appropriate funding for the program.

⁹ The FY18 and FY19 Budgets proposed to consolidate all Alzheimer's disease activities across ACL into a single grant program, funded at \$19 million.

¹⁰ The FY19 Budget proposes moving this program from ACL to NIH, and alters funding levels to \$95 million.

Program	FY17 Omnibus	FY18 President's Request	FY18 House	FY18 Senate	FY18 Omnibus ¹	FY19 President's Request
Independent Living State Grants	22.8	--	22.8	-- ¹¹		--
Independent Living (CILs)	78.3	78	78.3	101.1		96
Assistive Technology	34	32	34	34		32
Voting Access for People with Disabilities	4.96	5	4.96	4.96		5
Limb Loss Resource Center	2.5	--	2.5	2.5		--
Traumatic Brain Injury	9.3	3	9.3	9.3		9
State Councils on Developmental Disabilities	73	--	73	73		56
<i>Consumer Information, Access, and Outreach</i>						
Aging and Disability Resource Centers	6	6	6	6		6
State Health Insurance Assistance Program	47.1	--	--	47.1		-- ¹²
Aging Network Support Activities	9.96	10	9.96	9.96		9
Holocaust Survivor Assistance Fund	2.5	--	3	2.5		--
<i>Administration</i>						
ACL Program Administration	40	38	37.9	40		38
Administration for Children and Families						
Community Services Block Grant	742.3	--	607.5	700		--
Low income Home Energy Assistance Program	3,390	--	3,390	3,390		--

¹¹ The Senate appropriations bill included level funding for Independent Living programs but did not delineate between CILs and State Grants

¹² The FY19 Budget proposes to eliminate the \$47 million in dedicated SHIP funding. However, the budget also proposes to maintain \$38 million for ADRCs, AAAs, the National Center for Benefits Outreach and Enrollment, and the SHIP program authorized by MIPPA.

Program	FY17 Omnibus	FY18 President's Request	FY18 House	FY18 Senate	FY18 Omnibus ¹	FY19 President's Request
Social Services Block Grant	1,700	--	1,700	1,700		--
Department of Education						
IDEA Grants to States	12,002	12,942	13,252	12,002		11,162
Vocational Rehabilitation Grants to States	3,398	3,453	3,453	3,453		3,522
Supported Employment State Grants	27.5	--	27.5	--		--
Independent Living State Grants for Older Persons who are Blind	33	33	33	33		33
Department of Labor						
Office of Disability Employment Policy	38.2	27.2	36.8	38.2		27
Senior Community Service Employment Program ¹³	400	--	300	400		--
Department of Agriculture						
Supplemental Nutrition Assistance Program	78,840	70,703	73,609	73,612		70,303
Department of Housing and Urban Development						
Section 202 Supportive Housing for the Elderly	502.4	510	573	573		601
Section 811 Housing for Persons with Disabilities	146.2	121.3	147	147		140
National Institutes of Health						
National Institute on Aging	2,049					1,988
National Institute on Disability, Independent Living, and Rehabilitation Research						95

¹³ Moved to ACL under in FY18 House appropriations bill. This proposal was not included in the FY18 and FY19 President's Budgets, which would eliminate the program, or the Senate bill, which would level-fund SCSEP and keep it in DOL.

Program	FY17 Omnibus	FY18 President's Request	FY18 House	FY18 Senate	FY18 Omnibus ¹	FY19 President's Request
Centers for Disease Control						
Heart Disease and Stroke Prevention Formula Program ¹⁴	130	--	136	130		--
Diabetes Prevention Formula Program	140	--	144	140		--
Corporation for National and Community Service						
National Senior Volunteer Corps				202.1 ¹⁵		--
Foster Grandparents Program ¹⁶	107.7	--	107.7	Included Above		0.117
Senior Companion Program	45.5	--	45.5	Included Above		0.117
Retired Senior Volunteer Program	48.9	--	48.9	Included Above		0.117
Department of Veterans Affairs						
Veterans Choice Program ^{17 18}		2,900		--		1,900

¹⁴ The President's FY18 Budget Requests contained a new block grant—*America's Health* Block Grant Program—that allocates \$500 million to states to implement state-specific interventions to address leading causes of death and disability, such as heart disease and stroke, and diabetes. The House and Senate appropriations bills did not include this item in FY18. The FY2019 budget contains the same proposal.

¹⁵ The Senate Appropriations bill level funds the three CNCS programs but does not distinguish individual funding levels for each.

¹⁶ The President's budget proposes eliminating the Corporation for National and Community Service, which would also eliminate all of the programs listed here. The remaining funding in FY2019 would be provided for close-out activities and the programs would not receive any funding in subsequent years.

¹⁷ The Veterans Choice Program allows veterans to receive care in the community based on distance and wait time to see a VA medical professional. The program was initially authorized \$10 billion in 2014 to be used through August 2017, but the program was extended in April 2017 with the passage of the Veterans Choice Improvement Act. The \$2.9 billion request in FY18 would be combined with \$626 million in carryover funds. The Senate bill notes that there is separate, mandatory, funding for the choice program and does not allocate additional funding. It instead requires the VA to develop a plan for merging the Choice program with a separate Medical Community Care funding account in the future.

¹⁸ The President's FY19 budget request proposes to create a Veteran Coordinated Access & Rewarding Experience (CARE) program, that would consolidate VA's community care programs as well as requesting an additional \$1.9 billion in mandatory budget authority. VA would also merge the Medical Community Care and Medical Services Accounts to improve operations.

Program	FY17 Omnibus	FY18 President's Request	FY18 House	FY18 Senate	FY18 Omnibus ¹	FY19 President's Request
Veterans Caregivers (Title I) Programs	494	571		839		510
LTSS: Home & Community Based Services	--	2,747		2,747		3,719
LTSS: Institutional Services				6,073		6,168

HOW CORPORATIONS ARE SPENDING THEIR TRUMP TAX CUTS

Data is from April 9, 2018, and will be updated regularly.

Corporations are not sharing much of their huge Trump tax cuts with employees through bonuses and wage hikes, according to a major study by **Americans for Tax Fairness**. Here are the facts.

4% OF WORKERS are getting bonuses &/or wage hikes



VERY FEW BUSINESSES are giving workers bonuses &/or wage hikes



Corporations are getting **9 TIMES** as much in tax cuts as they are giving out in **workers' bonuses & wage hikes**.



Corporations are spending **37 TIMES** as much to buy back stock, as they are spending on **workers' bonuses & wage hikes**.



CONGRESS SHOULD REPEAL THE TRUMP TAX CUTS FOR THE WEALTHY AND BIG CORPORATIONS TO PROTECT MEDICARE, MEDICAID, SOCIAL SECURITY AND EDUCATION FROM CUTS!

Presume this was prepared by Voice of the Retarded (VOR) and Others

Summary: CMS's Home- and Community-Based Settings Regulation and Policy

- Section 1915(c) of the Social Security Act authorizes States to operate waiver programs to provide Medicaid home- and community-based services (“HCBS”) to individuals with disabilities as an alternative to receiving services in a hospital, nursing facility, or intermediate care facility for individuals with intellectual disabilities (“ICF/IID”).
- Since enactment of Section 1915(c) in 1981, CMS has interpreted the statute to allow States to provide HCBS anywhere that is not a hospital, nursing facility, or ICF/IID.
 - This interpretation reflected congressional intent underlying Section 1915(c), which was to provide individuals with disabilities an option to receive services without living in a hospital, nursing facility, or ICF/IID.
 - This interpretation allowed a broad range of settings from which individuals with disabilities and/or their families could choose, including: their family’s home; their own apartment; an apartment with roommates; a small group home; or an “intentional community” designed to serve individuals with disabilities (e.g., an apartment complex developed for individuals with disabilities, a farmstead community for individuals with disabilities, a campus setting).
 - Medicaid programs were not permitted to dictate the setting in which an individual lived or received services; individual choice in setting was required.
- In 2014, CMS changed its interpretation of Section 1915(c) to narrowly define an HCBS setting and prohibit States from providing HCBS in any other setting. 79 Fed. Reg. 2948 (Jan. 16, 2014) (codified at 42 C.F.R. § 441.301(c)(4)) (the “Settings Rule”).
 - The Settings Rule includes a litany of requirements that every setting must meet, including (for some settings) such minutiae as access to food and visitors.
 - CMS’s Settings Rule also lists settings that cannot be community-based settings.
 - Besides hospitals, nursing facilities, and ICF/IIDs, there is a “catch-all” provision that disqualifies any “setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community,” “unless the Secretary determines through heightened scrutiny . . . that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings”. § 441.301(c)(5)(v). Individuals are not permitted to live or receive HCBS in these settings, even if the individual and the family choose that setting.

