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S. HRG. 115–545, Part 2 of 2

CONFIRMATION HEARING ON THE NOMINATION OF HON. BRETT M. KAVANAUGH TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 4, 5, 6, 7, and 27, 2018

Serial No. J–115–61

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[SOME SUBMISSIONS CONTAIN REDACTIONS.]

Senator Chuck Grassley, Chairman
Senate Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Senator Dianne Feinstein, Ranking Member
Senate Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

September 7, 2018

Re: Nearly 1.5 Million Petition Signatures Submitted To Senate Opposing Brett Kavanaugh's Nomination

Dear Chairman Grassley, Ranking Member Feinstein,

We are reproductive rights, civil rights, health, justice, and advocacy organizations that have, as of today, submitted nearly 1.5 million petition signatures to the Senate in opposition to Brett Kavanaugh's nomination to the Supreme Court.

During Brett Kavanaugh's hearing in the Senate Judiciary Committee this week, hundreds have gathered in protest at the Capitol to make their opposition clear. The 1.5 million petitions submitted from people around the country follow a groundswell of activity that began immediately after Trump announced his nomination. The petitions accompany nearly 100,000 calls to the U.S. Senate and hundreds of events across the country demanding that senators reject Brett Kavanaugh's nomination to the Supreme Court.

Brett Kavanaugh has faced unprecedented unpopularity that has only gotten worse — especially among women. The more people learn about Kavanaugh, the less they like him. Americans know Kavanaugh is extreme and a threat to their most basic freedoms — a new CNN poll confirms that this is true especially amongst women. Gallup has also reported a record-breaking lack of support for Trump's nominee: For as long as Gallup has been tracking (the last 30 years), there has **never** been a Supreme Court nominee who more Americans opposed than supported.

If confirmed, Brett Kavanaugh would determine the future of civil rights, immigrant rights, voting rights, LGBTQ rights, disability rights, the environment, and the right to be free from discrimination in this country. Under the Trump-Pence administration, often the courts are the last and only check on the Administration's harmful policies. People have seen the impact of courts on major issues, such as abortion, health care, environmental issues, DACA, birth control, labor rights, and the Muslim ban. Brett Kavanaugh's nomination poses a clear threat to the future of our country, and on behalf of millions, we urge you to strongly oppose the confirmation of Brett Kavanaugh to the Supreme Court of the United States.

Sincerely,

Planned Parenthood Action Fund
CREDO Action
MoveOn
AFL-CIO
League of Conservation Voters
NARAL Pro-Choice America
National Women's Law Center
Friends of the Earth
Sierra Club
MoveOn
People for the American Way
Jobs With Justice
The Leadership Conference on Civil and Human Rights
National Council of Jewish Women
Brigade
MomsRising

September 18, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Diane Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

CC: Members, Senate Judiciary Committee

Dear Chairman Grassley and Ranking Member Feinstein

On Sunday, our friend, Christine Blasey Ford, made the incredibly brave decision to come forward about a deeply painful experience that she has been forced to live with for most of her life. As members of her local community, we write to you now to express our total support for Christine and her family.

Christine is an extremely kind and warm person. Despite having a demanding career, she is a great mom who is actively involved, not only in the lives of her own children, but also in the lives of many other young people in our community. She is always patient and understanding with our children, whether it is talking them through school concerns, teaching them to surf, encouraging them in sports, academics, social and emotional issues, or discussing what to do about college applications and careers. She mentors people with generosity, wisdom, honesty and compassion and always provides constructive, thoughtful suggestions on how to approach tough challenges.

Christine is also a great friend. She has endured a lot. But, her experiences have left her with a firm grasp on what is most important in life -- integrity, community and care for others -- and we have all, at one time or another, benefited from that wisdom. She is informal and genuine and is as at home and relaxed at a Stanford football game as she is standing in front of a bunch of Ph.D. candidates.

Christine's bravery and sacrifice in coming forward with her story while knowing the all-but-certain to follow devastating consequences for and retaliation against her and family does not surprise those of us who know her. We are all very proud of Christine, grateful to have her as a member of our community, and stand in solidarity with her.

Respectfully,

Deepa Lalla
Elizabeth C Hewitt
Dinraj Shetty
Keith Koegler
Kirsten Leimroth
Kristen Owen
Amy Greenfield Santullo
Claire Kirner
Shashank V. Joshi
Richard Ogawa
Ryan and Stephanie Frick
Scott Peters
Colleen Backstrand
Jennifer Raymond
Al Yuen
Janet Shah
Kerei Yuen
Carleen Arii Ho
Adela Gildo-Mazzon
Tanya Dargel
Laura Glader
M. Susan Hurst
Mark Bradford
Stella Taylor Bergan
Jean Kavanagh
Chris Conroy
Shawn Purcell
Jeanne Connolly
Jennifer Sechrist
Sharon Chin
Ly Doan
Matt Holleran
Bethany Kay
Suzanne Tran
Maureen Bradford
Lucy Dathan
Dana Kramer
abbie knopper
Madhuri Roy
Berkeley Revenaugh
Amy Kacher
Kannan Ranganathan
Alyssa Brennan

Deanna Schroder
Amy & Scott Bokker
Olivia Viveros
Pamela Hornik
Natalie Jackson
Layna S
Keley R Petersen
Susan Posen
Cecilia Lancaster
Jonathan Kaplan
Elissa Freund Kaplan
Goly barar
Alpa Shah
Cynthia L. Reilly
Sarah Dondysh
Ingrid Rulifson
Ruth Levine Ekhaus
Joanna Strober
Susan Harrison
John Harrison
Julie Dubrouillet
Gina yanez
Aleksandar Totic
Ingrid Totic
Shadi Rostami
Helen Waters
Rajiv Parikh
Jay Backstrand
Bonnie Cegielski
Julia Lodoen
Jim Gensheimer
Sachiko Bussey
Jennifer Fryhling
Barbara Young
Mark Fadil
Tata McCann
Eva Born
Michael Lodoen
Mike Anderson
Aruna Subramanian
Lyn Swyryd-Smith
GenÃ© Teare
Darrow Hornik
Alicia Thesing
Diheng (Dan) Qu

Allison Taylor
Belinda Nivaggioli
Gisell Quihuis
Julie Floyd
Elizabeth Gaither
Tze-Ying Ni
Jochen Profit
Julie Zelenski
Teri Wilde
Ariadna Kaplan
Amanda Ross
Sunita Raja
Hilda Crady
Silvia Cabal
Craig Kaplan
Suzanne Andrews
Jamie Barnett
Keri Wagner
Sandi Yeh
Nolan Lee
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Chris Morris
Lena Plamondon
Cindy Krieger
Chang H. Kim
Kori Shaw
Betty wong
John Foster
Lisa Oldham
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Ryan Frick
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Rev. Lindsay L. Fulmer
Miriam Rotman
Rebecca Thompson
Daniel Mitz
R Clancy

Matt Vaska
Minaj Riahi
Christie L Achor
Stephanie Nix
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Sarah Eisner

NETWORK LOBBY FOR CATHOLIC SOCIAL JUSTICE

September 4, 2018

United States Senators
Capitol Building
Washington, DC 20510

Dear Senator,

We, the undersigned 1,550 Catholic Faith Leaders write today because we believe the impending confirmation hearing for Judge Brett Kavanaugh to the Supreme Court calls for serious consideration. **You have a responsibility to evaluate his previous decisions, examine his concern for the common good, and ultimately determine whether or not Judge Kavanaugh respects *stare decisis* and precedent.**

A lack of respect for *stare decisis* could add further chaos to our nation and tear apart the sense of the common good. As Catholics, we believe that any government official – including a Supreme Court Justice – must be concerned with the needs of people who are marginalized, not just the rich and powerful or a member of one's own political party. As you consider how you will vote on the question of confirmation, we ask you to consider Judge Kavanaugh's stance on these principles as demonstrated on his prior decisions and statements on issues such as healthcare, immigration, labor, the death penalty, and voting rights.

Healthcare: As Catholics, we know that healthcare is a right. The Affordable Care Act was an important effort to meet this right for all. The ACA has already faced multiple trials in front of the Supreme Court. It is not clear whether Judge Kavanaugh believes that healthcare is a right, even for the most vulnerable in our nation. His history of undermining the Affordable Care Act – attacking the individual mandate and access to healthcare for women – indicates his disagreement with this basic principle. Will Judge Kavanaugh support the common good and defend against attacks on the health of the most vulnerable?

Immigration: Our faith teaches that we must welcome the stranger and love our neighbor. We believe that any Supreme Court nominee must recognize that ours is a nation of many immigrants, rather than impose harsh policies that seek to villainize immigrants. We are concerned that Judge Kavanaugh's previous decisions indicate he will not treat the immigrant community with the respect our faith and our nation teach they deserve. Will Judge Kavanaugh uphold the dignity of all people and respect international human rights law?

Labor Rights: Catholic Social Teaching upholds the dignity of work and the right of workers to organize collectively. However, Judge Kavanaugh has a record of not treating workers with the dignity and respect they deserve. In one ruling, he held that employers could force their employees to waive their right to picket. How does Judge Kavanaugh balance the rights of workers with the rights of employers to achieve the common good?

Voting Rights and Discrimination: As Catholics, we believe that every citizen has a responsibility and a right to take part in the political process. Over the past several years, the Supreme Court has been at the forefront of some of our biggest challenges to voting rights and voter participation. Judge Kavanaugh's record indicates he appears to choose to disenfranchise voters rather than include people in our

democracy. In one opinion, he upheld a discriminatory practice of requiring voters to show their photo ID at the poll booth, effectively preventing already vulnerable people from voting. Will Judge Kavanaugh uphold our faith and democratic principles of civic engagement, especially for marginalized communities

Death Penalty: Just this month, Pope Francis clarified church teaching that the death penalty is wrong in all cases. Capital punishment is an affront to human dignity. Judge Kavanaugh's record on capital punishment is unclear. What is Judge Kavanaugh's position on capital punishment, and is it consistent with the common good?

On crucial issues such as healthcare, immigration, labor rights, voting rights, and the death penalty, we know that our faith teaching and our Constitution intersect. As Catholics, we share a faith tradition with Judge Kavanaugh. As people of the United States, we know that in our diverse society, where we meet is in the Constitution.

In the confirmation process, we urge you to evaluate whether Judge Brett Kavanaugh would work for the common good. This common good protects the rights of all people, especially the most marginalized.

By prioritizing these issues as you make your deliberations, we believe you can ensure that the religious consciences of all people are honored and protected, rather than preferencing the beliefs of the few.

We are praying for you during this deliberative time.

Sincerely,

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Sr. Josie Chrosniak
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Mt. St. Joseph, OH

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Sylvania, OH

Sr. Geraldine Paluszak
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Sr. Faith Cosky
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Sr. Carolyn Giera
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Rev. Dr. Sydney Condray
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Sr. Sister Judith Mary Frederick
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Sr. Mary Alice Henkel
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Sr. Patricia Gardner
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Sr. Barbara Stallman
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Erie, PA

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Erie, PA

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Flourtown, PA

Sr. Betty McVeigh
Flourtown, PA

Sr. Vera Green
Flourtown, PA

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Sr. Sister Clare DiGregorio
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Sr. Adele Solari
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Sr. Pauline Plefka
Flourtown, PA

Sr. Catherine McConnell
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Sr. Kathleen Mackerer
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Sr. Anne Quirk
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Sr. Anne Toner
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McSherrystown, PA

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Merion, PA

Sr. Renee Yann
Merion, PA

Sr. Beverly Palumbo
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Sr. Pat Rogan
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philadelphia, PA

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Philadelphia, PA

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Sr. Pat McCormick
Green Bay, WI

Sr. Irene Zimmerman
Greenfield, WI

Sr. Ann Koerner
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Sr. Carla Crave
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Fr. james murphy
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Sr. Nina Shephard
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Sr. Bea Eichten
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Sr. Janet Dielen
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Sr. Helen Gourlay
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Sr. Regina McKillip
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Sr. Catherine Houtakker
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Sr. Joan Brichacek
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Sr. Christa Cunningham
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Sr. Florence Miller
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Sr. Miriam Ross
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Clendenin, WV

Sr. Therese Carew
Kermit, WV

Sr. Molly Bauer
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Abbot Christine Riley
Wheeling, WV

Sr. Kathleen Durkin
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Sr. Theresa Metz
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Dr. Jim & Rosemary Doyle
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Cheyenne, WY

Sr. Therese Steiner
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Sr. Marie Martin
Medicine Bow, WY

To Whom It May Concern:

We are writing as private citizens to communicate our unequivocal support of Dr. Christine Blasey Ford. We are her colleagues, current and former students, and mentors: those who can attest to her integrity as a professional and as a person.

We are writing in the hopes that Dr. Blasey Ford's voice is not dismissed as someone who is "politically motivated," or because "she did not report it earlier," or because she initially decided to speak anonymously, or for any other of the multitude of reasons victims of sexual assault are often silenced or silence themselves. We feel compelled to use our voice, the voice of those who know her, to communicate our full support, and to attest to her character and integrity.

Dr. Blasey Ford has put herself in the crossfire of a national debate, which is no small act. Her family and her life will be scrutinized. Her integrity will be questioned. She spoke out because she felt morally compelled to provide additional data on the character and moral code of a man who may be determining our citizens' futures for his lifetime. This is Christine Blasey Ford the scientist, the biostatistician, the teacher. It is her dedication to the data and creating the fullest and most balanced picture that has led her to be a highly respected colleague and mentor.

We are now living in a time in history where we are beginning to do better by giving space to those voices that are less powerful. By coming forward, Dr. Blasey Ford has spoken for men and women in this country whose voices have been silenced. It is our turn to rally around her brave and selfless act, made simply because her moral code dictates that we must have all of the information before coming to conclusions. It is our responsibility to continue in this effort and speak up to support her.

We implore those who read this and hear others trying to silence Dr. Blasey Ford's voice, by way of character attacks, to stop and listen to what she has to say. We know her and know that she is of the highest moral fortitude, but for those of you who do not we have written this letter to explain why we believe she should be given the space to speak. We have a duty to protect brave voices who are seeking to shed light on the truth. Otherwise democracy fails.

Respectfully,

Debra Safer, M.D.
Sarah Adler, Psy.D.
David Spiegel, M.D.
Helena Kraemer, Ph.D.
Timothy J. Avery, Psy.D. (U.S. Navy/OIF Veteran)
Chloe Koeffler, M.S.
Diana Corwin Gordon, Psy.D.
Nancy A. Haug, Ph.D.
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Carolina Borges Knight, Psy.D.
Jennifer Brysacz, Psy.D.
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Peter Aston, M.S.
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Alina Kurland, Psy.D.
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Iris Hsiao-Jung Lin, Psy.D.
Monica Allen
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Kate Hardy, Clin.Psych.D.
Caroline Dickens
Lauren Callahan
Patrick MacLeamy, Psy.D.
Kristin LaCross, Psy.D.
Chaniga Vorasarun, Psy.D.
Kate Corcoran, Ph.D.
Elizabeth Solomon, Psy.D.
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Melissa Yanovitch, MSc., Psy.D.
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Anneliese Radke, Psy.D.
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Sarah Lustiger
Elizabeth Michael, M.Sc.
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Aliza Goldberg
Emily Felber
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Pascale Stemmle, Psy.D.
Jakkz Raines, Psy.D.
Sarah Burton, Psy.D.
Zach Rosenberg, M.S.
Alena Lee, M.S.
Eliza Kienitz, Psy.D.
Chloe Russell, M.S., M.S.Ed.
Katie Flanagan, M.S.
Nicole Kramer-Lange, M.S., M.A.
Alison Alderdice, Psy.D.
Mira Kaufman
Ariane Olsen, M.A.
Chelsea Acker, M.S.
Alix Simonson
Melanie Fox, M.S.
E. Megan Goodwin, Psy.D.
Amanda Mahnke, M.S.
Irene Chui, Psy.D.
Adeline Bortz
Lisa Baldini, M.S.

Emily Pereira, M.S.
Elizabeth Cameron, M.S.
Steffanie Tinsley, M.A., M.S.
Kimberly Wilson, Ph.D.
Melissa McMullin, Psy.D.
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Chaniga Vorasarun, Psy.D.
Patricia Gisbert, Psy.D.
Cristin Runfola, Ph.D.
Raquel Osorno, Psy.D.
Theresa Brown
Yvette Rico, M.S.
Elise Gibbs, Psy.D.
Julia Yasser, M.S.
Malin Kimoto, Psy.D.

Alaska Wilderness League * Bold Alliance * Center for Biological Diversity
Clean Water Action * Climate Hawks Vote * Defenders of Wildlife * Earthjustice
Endangered Species Coalition * Environmental Working Group * Friends of Earth
Green For All * GreenLatinos * Greenpeace USA * Hip Hop Caucus
Hoosier Environmental Council * Indivisible * League of Conservation Voters
National Lawyer Guild Environmental Justice Committee * National Lawyers Guild
Oil Change International * Sierra Club * Southern Utah Wilderness Alliance
The Wilderness Society * Waterkeeper Alliance * WE ACT for Environmental Justice

August 10, 2018

The Honorable Chuck Grassley, Chairman
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Diane Feinstein, Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: Environmental Groups Oppose the Supreme Court Nomination of Judge Brett Kavanaugh

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned environmental groups write today on behalf of our millions of members and supporters to express our strong opposition to the confirmation of D.C. Circuit Judge Brett Kavanaugh to a lifetime seat on the United States Supreme Court. Judge Kavanaugh is an unacceptable choice for the Supreme Court, and we urge the Senate to reject his nomination.

Judge Kavanaugh's lengthy record on the federal bench exposes him as an activist judge who has used cases to effectively rewrite statutes, creating new obstacles for agency regulation and scuttling protective regulatory outcomes. His hundreds of judicial opinions and legal writings reveal a judicial philosophy that is hostile to the power of government (especially agencies like the Environmental Protection Agency), and that values corporate profits over people and the health of the public. Moreover, Judge Kavanaugh's decisions reveal a tendency to limit the public's right to access justice through the courts (such as by adopting obstructive "standing" requirements), while at the same time removing barriers for polluters. As a result, a Supreme Court informed by Judge Kavanaugh's brand of judging would mean that courthouse doors will often be closed to people seeking to protect the air they breathe, the water they drink, and the planet on which they live. At a time when too many communities of color bear a disproportionate impact from toxic wastes, loose emission standards, dangerous petrochemical facilities and pipelines placed in their communities, we need a Supreme Court Justice that will combat environmental racism and fight for environmental justice for all, regardless of race, ethnicity, national origin, citizenship status, or income – not someone who will bar the courthouse doors on them.

The stakes for the current Supreme Court vacancy could not be higher. United States Supreme Court Justices do not simply decide cases; they determine whether and how the law works, and for whom. They define what the law means for generations to come, and the lower federal courts are bound to follow the precedent they set. An appointment of a new Justice affects the very nature of our democracy, fundamentally defining the landscape of American law.

Who serves as a Supreme Court Justice is among the most profoundly important choices we make as a nation, and one of the most solemn duties that our constitution entrusts to the U.S. Senate. In carrying out that duty, is it incumbent on the Senate to carefully, and thoroughly, scrutinize every nominee, to thoughtfully consider every aspect of his or her judicial record and legal philosophy, and to ensure a robust, fully informed, and transparent confirmation process. The integrity of our system of laws depends on vetting that is both open and honest. In this regard, we urge the Senate to demand all pertinent records from Judge Kavanaugh's years as a political lawyer in the George W. Bush White House (as provided under the Presidential Records Act), and fully consider these materials before proceeding with confirmation hearings. In the end, a nominee to the Supreme Court should be rejected unless he or she is willing to uphold the values, protect the rights, and serve in the interests of the American people – not just corporations, the wealthy, and the political elites.

I. Judge Kavanaugh's Environmental Record Results in Dirtier Air and Water

In key cases, Judge Kavanaugh has backed the right of corporations to pollute the air and water over the public's right to breathe clean air, drink clean water, and live in safe communities.

As shown in dissents written by Judge Kavanaugh in *White Stallion*[1] and *Mingo Logan,*[2] he reads burdensome obligations into the Clean Air Act and the Clean Water Act that the statutes do not include in their text. For example, in *White Stallion,* he argued that the EPA could not even consider limiting toxic mercury pollution from power plants without first evaluating the cost to the power companies. And in *Mingo Logan*, he argued that before vetoing a permit that would have allowed coal companies to dump toxic mining wastes into public waterways, EPA should have considered the cost to coal companies. In both of these cases, he invented the requirement to consider costs to industry where Congress did not include that requirement, while at the same time seeking to force the EPA to ignore important real-world benefits – all in order to stack the deck in favor of the outcomes desired by corporate polluters. This tendency to read into a statute the requirement to consider costs to the corporate elites – while ignoring benefits to the environment, and improvements in the health of children, families, and the American public – not only usurps Congressional authority; it puts our health and well-being at risk.

Several of Judge Kavanaugh's decisions would significantly reduce agency power to protect public health, by recrafting statutes to eliminate authority that Congress has given agencies. For example, his narrow interpretation of the Clean Air Act expressed in *EME Homer City*[3] (an interpretation later overturned by the Supreme Court) would have severely constrained EPA's ability to protect the people in downwind states from pollution emanating from upwind sources. His interpretation in the *Mexichem*[4] case prevented the EPA from requiring replacement of a harmful chemical substitute for chlorofluorocarbons. His narrow reading of the phrase "air pollutant" in *Coalition for Responsible Regulation*[5] could undermine the regulation of greenhouse gases under the Clean Air Act.

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[1] *White Stallion Energy Center v. EPA*, 748 F. 3d 1222, 1258-73 (D.C. Cir. 2014).
[2] *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710 (D.C. Cir. 2016).
[3] *EME Homer City Generation L.P. v EPA*, 696 F. 3d 7 (D.C. Cir 2012).
[4] *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017).
[5] *Coal. for Responsible Regulation Inc. v. EPA*, 2012 U.S. App. LEXIS 25997 (D.C. Cir. Dec. 20, 2012).

His judicial writings also reveal his anti-regulatory approach to evaluating whether an agency action is appropriate under the relevant statute. In cases that raise questions about whether an agency has acted within the scope of its regulatory authority, Judge Kavanaugh favors a deeply subjective "common sense" test – where the statute means whatever he thinks makes sense. Rather than requiring an agency to fully divulge and explain its interpretation of a law that Congress has entrusted it with administering, requiring notice and opportunity for public comment on such interpretation, and then giving special consideration to the agency's conclusions, Kavanaugh would have judges simply impose their own, "common sense," ad-hoc "best reading of the statute."[6] When Judge Kavanaugh has utilized this approach, his "best reading" has been in service of his inclinations toward limited federal authority to regulate, not in the best interest of achieving Congress' protective aims under the relevant statutory program. For example, in his dissent in *US Telecom Ass'n v FCC*,[7] Judge Kavanaugh outlined a novel "major questions" doctrine that he would have used to reject the FCC's rational interpretation of legislative language and thereby undermine its "net neutrality" rules that are intended to protect consumers. As a Supreme Court Justice, we could expect more of the same, and such an ad-hoc approach to statutory interpretation could ultimately increase regulatory uncertainty and create a perverse incentive for agencies to under-regulate in the first instance.

II. Judge Kavanaugh Politicizes Agency Decision-Making Processes

Judge Kavanaugh's record demonstrates a belief that federal agencies should be more inherently political, which would compromise both the integrity and continuity of their decision-making. He has argued that all federal agencies should operate directly under the political thumb of the President, and should function merely as political extensions of executive branch policy-making. He believes that any degree of separation from direct presidential control is unconstitutional.

In *Free Enter. Fund*,[8] Judge Kavanaugh's dissent argued that the establishment of the Public Company Accounting Oversight Board, an independent agency, violated separation of powers principles because the board's members are insulated from "at will" presidential removal. Application of this legal principle would make all agencies more political, would increase regulatory uncertainty, would undermine policy continuity, and would destabilize decision-making related to important issues of safety, economic stability, consumer protection, public health, and the environment. Part and parcel to this extreme view of separation of powers, Judge Kavanaugh believes that sitting Presidents are all but immune from the legal consequence of their actions while they are in office – effectively rendering them constitutionally above the law.

III. Judge Kavanaugh's Corporate-serving Double Standard Blocks Access to Courts

One of the most troubling judicial philosophies revealed by Judge Kavanaugh's decisions is his limited view of the rights of ordinary people and public interest groups to access our court system, and his contrastingly permissive view of corporations' right to do so. Critical public health

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[6] *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907, 1912 (2017).
[7] *US Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).
[8] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F. 3d 667 (D.C. Cir. 2008); see also *PIHH Corp v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2017).

and environmental laws would have little power and meaning in practice if the public cannot get into court to enforce them.

For example, in *Grocery Mfrs. Ass'n v. EPA*[9] Judge Kavanaugh argued in dissent for giving processed-food manufactures standing to challenge EPA's approval of certain ethanol-containing gasoline blends based solely on the mere chance of increased corn prices, even without quantification of the speculative economic injury. Conversely, in *Public Citizen, Inc. v. National Highway Traffic Safety Admin,*[10] Judge Kavanaugh ruled against the public interest group and its members' right to be in court to challenge the adequacy of vehicle tire-safety standards on behalf of highway drivers. He did so because Public Citizen did not demonstrate "with certainty" that its members would suffer some particularized and currently identifiable harm other than an increased risk from more severe accidents.

Judge Kavanaugh has a troubling pattern of siding with corporations, the wealthy, and the powerful while erecting barriers for those defending the health, safety, and well-being of the American people. It is essential that whoever occupies a seat on the Supreme Court upholds the right of access to the courts for all, and honors the constitutional obligation to provide an impartial check on the power of Congress and the President.

Conclusion

Judge Kavanaugh's approach to the law threatens key elements of environmental and public health protections, and makes it harder for people to hold the government and big corporate polluters accountable. His confirmation to the United States Supreme Court would create a deeply conservative majority that would tip the scales of justice and the law further away from the people's rights and more towards corporate control of our democracy. We strongly oppose Judge Kavanaugh as a nominee and assert that careful scrutiny of his record reveals a predisposition to subordinate the rights of people to the interests of corporate profit making. These qualities in a Supreme Court Justice would threaten the health and well-being of children, families, workers, and communities, and undermine efforts to protect the ecosystems, natural resources, and global climate systems upon which we all rely. Accordingly, we strongly urge you to reject his nomination and vote against his confirmation.

Sincerely,

Alaska Wilderness League
Bold Alliance
Center for Biological Diversity
Clean Water Action
Climate Hawks Vote
Defenders of Wildlife

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[9] *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (2012).
[10] *Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 489 F. 3d 1279 (D.C. Cir. 2008).

Earthjustice
Endangered Species Coalition
Environmental Working Group
Friends of Earth
Green For All
GreenLatinos
Greenpeace USA
Hip Hop Caucus
Hoosier Environmental Council
Indivisible
League of Conservation Voters
National Lawyer Guild Environmental Justice Committee
National Lawyers Guild
Oil Change International
Sierra Club
Southern Utah Wilderness Alliance
The Wilderness Society
Waterkeeper Alliance
WE ACT for Environmental Justice

Dear Senators,

We are many, but we speak with one voice: Believe us, trust us, stand with us.

We write to you on behalf of ourselves and on behalf of all survivors of rape and sexual assault. We write to you in support of Dr. Christine Blasey Ford, who has, like so many of us, had to put her life on the line to simply state her truth and share her story with the world.

When a survivor chooses to share their story publicly, it's often because they know they are not alone. All too often, they know they are not the only victim this person has harmed.

On Thursday, Dr. Blasey Ford will testify openly at the Senate - she will share her story with you and with the world. She will tell the Senate and the world about a deeply painful night when a 17 year-old Brett Kavanaugh physically and sexually assaulted her.

Dr. Blasey Ford's story, all too familiar to many of us, is not to be taken lightly. It is not to be dismissed as "boys being boys." It is not to be swept under the rug or denied.

You have the power to make sure that doesn't happen.

We ask that you remember that Dr. Blasey Ford is not on trial. She is, instead, bearing witness. She is testifying. She is speaking her truth. She is telling all of our stories.

For this, she has already received death threats. Her credibility has been questioned. She has had her family and career uprooted - all because she told her story. For us.

What is happening to her has happened to so many others. It happened to Anita Hill. It happened to Rosanna Arquette. It happened to Phyllis Golden-Gottlieb. And it continues to happen as long as we as a society refuse to believe survivors.

We as survivors don't share our stories in hopes of fame or fortune. We are not opportunists. We have nothing to gain and everything to lose when we share our stories. And yet, we do it, time and again, because we know that it will help others to come forward, to speak out, to feel safe. In sharing our stories we hold our abusers accountable in a way the criminal legal system so often does not.

In Dr. Blasey Ford's case, it is to help the nation.

A sexual abuser has no business serving on the highest court in the land. The nomination of Brett Kavanaugh is an insult to all of us -- to every survivor who has come forward. Our liberty, our dignity, our humanity demand to be heard and validated. That is impossible with Brett Kavanaugh on the Supreme Court.

Senators, we ask that you remember our voices and stories on Thursday. We believe Dr. Blasey Ford and so should you. Hear her story. Bear witness to her truth. Cancel the vote and demand that the White House rescind Brett Kavanaugh's nomination to the Supreme Court.

We are survivors and we will not be silenced. We stand with Dr. Christine Blasey Ford and with all survivors. The question is -- will you?

Signed,
Survivors and victims of sexual assault and rape against the nomination of Brett Kavanaugh to the U.S. Supreme Court

written by Alison Turkos

Alison Turkos (NY)
Laura Lewis (CA)
Jessie Losch (PA)
Katherine Leslie (PA)
Dr. Jamila Taylor (VA)
Kathryn Post (FL)
Dionne Scott (NJ)
Jessica Gagliardo (NC)
Sarah (TX)
Lauren (NY)
Tawana Jacobs (MD)
Madeleine Durante (NY)
Erica Pivko (NY)
Caitlin Gaffin (WV)
Lauren Vallese (NJ)
Rebecca Baskin (MI)
Robyn Dayton (NC)
Maren Hurley Matz (NC)
Calla Hales (NC)
Survivor (FL)
Alex Rush (NY)
Mallory McMaster (OH)
Jacqueline Dismuke (FL)
Maureen Shaw (NJ)
Christine Marrewa Karwoski (ME)
Kathleen Eckhardt (TN)
Diane Piecara (TX)
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Emily Bishop NY)
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Danielle (IL)
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Marj Connelly (NY)
Lauren McCulloch (PA)
Helmi Henkin (AL)
Megan Boisseau (CA)
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Carrie A. Weaver (NJ)
Valerie Hunter Teetor (AZ)
Christine Parker (NY)
Colleen Kennedy (TX)
Allyson Downey (CO)
Margit Detweiler (CA)
Shannon Sollitt (WY)
Sara Loughman (CT)
Karen Gerwin (NY)
Jennifer Sweeney (PA)
Audrey Herbst (CA)
Megan Kovacs (OR)
Diana Prescott (GA)
Sarah Milstein (NY)
Lara Chelian (MI)
Julie Parr (CT)
Darbi Worley (NY)
Katherine Hanley (RI)
Jessica Randazza-Pade (WI)
Shandle A Blaha (VA)

Nanea Hoffman (CA)
Emily Gannett (CA)
Marybeth Barber (MA)
Sophie Hansen (MA)
Rayma Homran (TX)
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Chi Nguyen (NY)
Tara Smith (OH)
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Mary Anne Cox (CA)
JMB (FL)
Lindsey Lockwood (ID)
Deborah Emmett-Pike (MA)
Kelly Clark (TX)
Domino Gehred-O'Connell (IL)
Erin Kane (NH)
Margaret Fasolo (MA)
Astra Lincoln (CA)
Jessica H (CA)
Leslie McMillin (TX)
Jennifer (TX)
Michelle R. Mizerak (TX)
Shivana Jorawar (NY)
Emily Gallagher (NY)
Alice Brown (AZ)
AB (DE)
Elena Ailes (IL)
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Nina Johnson (OR)
Christina Umbreit (MI)
Barb Newsome (MI)
Sarah (NY)
Miriam Arthur (NY)
Staley Stidham (OK)
Katie O'Connor (DC)
Vandana Ranjan (MD)
Kelsey Woida (PA)
Gail Ishimoto (CA)
Rachel Marshall (VA)
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Jackie Blank (DC)
Lacey Merica (NE)
Rebecca Windinwood (CA)
Rachel Reeder (CA)
Michele Lessirard (FL)
Andy Kopsa (NY)
Christine Sloane (VA)
Victoria Fine (Puerto Rico)
Shireen Rose Shakouri (NY)
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Kellie Overbey (NY)
Judy Capozza (TX)
Kir Selert (LA)
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Deb Garriott (TN)
Emily Demarest (PA)
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Janine Burnes (NV)
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Tanny Martin (MA)
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Sarah Hogg (MA)
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Mary Cadwallader (MO)
Linda Thornburg (VA)
OK (NC)
Rachael Barratt (IL)
Rebecca (DC)
NO (NY)
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Brittany Tatum (NJ)
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Rosalyn Hummel (CA)
Lexy Pazul (GA)
Amanda Sautner (NJ)
Lyle Friedman (CA)
Jennifer Kling (IN)
Jennifer Barnier (CA)
Samara Kirith (TN)
Olivia Miller (WA)
Nora Gonzalez (IL)
Nicole Wisler (FL)
Noell Milota (CA)
M. A. Daniel (OH)
Callie Wallace (NC)
Franky T (NJ)
Jacqueline Jacovidis (WV)
Cosette Audi (OH)
Deanna Bobadilla (NY)
Shenandoah Sowash (DC)
Victoria T (CO)
Kadie Sow (NY)
Hilary Andersen (IN)
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Senator Chuck Grassley, Chairman
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Washington, D.C. 20510

Senator Dianne Feinstein, Ranking Member
Senate Committee on the Judiciary
United States Senate
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Washington, D.C. 20510

September 4, 2018

Re: Nomination of Brett Kavanaugh to the U.S. Supreme Court

Dear Chairman Grassley, Ranking Member Feinstein,

We are 31 reproductive rights, health, and justice organizations writing to express our strong opposition to President Trump's nomination of Brett Kavanaugh to the Supreme Court. Kavanaugh has made it clear throughout his career that he stands firmly in opposition to reproductive freedom. His record, his close association with anti-choice groups and actors, and his passage of the Trump *Roe v. Wade* litmus test demonstrate that his nomination poses an imminent threat to our constitutional rights to abortion and birth control.

Kavanaugh's record on and off the bench clearly indicates a long-held anti-reproductive health care conviction. From the bench Kavanaugh has taken a number of anti-reproductive health care positions. Just last year he issued a heated dissent against a decision that allowed an undocumented young woman to access abortion care.[i] He asserted that, despite the fact that she had already met all of Texas' burdensome requirements for young women seeking abortion care (including a mandatory ultrasound, state-mandated biased counseling, a mandatory delay between when she received that state-mandated counseling and when she could get the procedure, and a judge's order, or judicial bypass, affirming that she was mature, well-informed, and capable of making the decision herself), she *still* should have to wait until she had an immigration sponsor to make "that momentous life decision" – a position that flouts Supreme Court precedent and one that the government themselves did not even take. [ii] He also issued a dissent that outlined his support for allowing employers' religious beliefs to override employees' right to birth control coverage.[iii] He argued that the Affordable Care Act's existing accommodation allowing employers with objections to birth control coverage to opt-out of the contraceptive coverage requirement still placed a substantial burden on the employers' beliefs, even "if the religious organizations are misguided in thinking that this scheme…makes them complicit in facilitating contraception or abortion."[iv] Moreover, Kavanaugh has spoken in his personal capacity about his admiration for Chief Justice Rehnquist's rejection of the idea of a "wall of separation between church and state," and his efforts to stem "the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition," including, in Kavanaugh's view, *Roe* and the right to privacy.[v]

Aside from his record, the most important detail about Kavanaugh's nomination is the fact that he passed the Trump litmus test and his nomination poses an immediate threat to the

constitutional protections guaranteed by *Roe v. Wade*. Trump told us again and again in interviews and debates that he would only nominate judges who would overturn *Roe* "automatically."[vi] His own spokeswoman laid out his plan before he was even elected: "[When he is president] he will change the law through his judicial appointments and allow states to protect the unborn."[vii] Kavanaugh's nomination represents the culmination of that plan.

And if promises made during the campaign weren't enough, the process through which Kavanaugh was selected only confirms his anti-abortion agenda. Trump entrusted Leonard Leo, the anti-abortion activist known for his leadership of the Federalist Society, with his selection of judicial nominees.[viii] Leo is also co-chairman of the anti-abortion group Students for Life[ix] and has called abortion an "act of force" and "a threat to human life."[x] Trump gave Leo the power to hand-pick an anti-abortion extremist to fill the vacancy created by Anthony Kennedy's retirement, and with Brett Kavanaugh he has done just that. One need look no further for proof than the outpouring of support Kavanaugh has received from the anti-abortion movement since he was announced as the nominee. Anti-abortion extremists have not been shy about their conviction that Kavanaugh meets Trump's litmus test and will establish a conservative majority on the Supreme Court that will turn back the clock for women in this country. Human Coalition president Brian Fisher said "Kavanaugh gives great hope to the pro-life movement that the end of *Roe v. Wade* and legal abortion is in sight."[xi] 40 Days for Life called Kavanaugh's nomination "a big win for pro-lifers" and emphasized the "unprecedented opportunity to overturn *Roe v. Wade*."[xii]

Nominees to our highest court must respect and protect women's constitutional rights, including abortion, not seek to undermine them. Reproductive rights are under intense attack in Congress and in the states and the Trump administration has repeatedly demonstrated that it will take extreme, unprecedented, and discriminatory executive actions. Now, more than ever, the courts must be a check on the other branches of government to protect the rights of the American people.

This nomination represents a clear and present threat to the reproductive freedom and the constitutional right to privacy. **We urge you to vigorously and vocally oppose the confirmation of Brett Kavanaugh to the Supreme Court of the United States.**

Sincerely,

Advocates for Youth
All----Options
American Medical Student Association
Catholics for Choice
Center for Health and Gender Equity (CHANGE)
Feminist Majority Foundation
In Our Own Voice: National Black Women"s Reproductive Justice Agenda
International Women"s Health Coalition

Ipas
Jewish Women International
Lady Parts Justice League
NARAL Pro----Choice America
National Abortion Federation
National Asian Pacific American Women"s Forum (NAPAWF)
National Council of Jewish Women
National Health Law Program
National Latina Institute for Reproductive Health
National Partnership for Women & Families
National Women"s Health Network
National Women"s Law Center
PAI
Physicians for Reproductive Health
Planned Parenthood Federation of America
Population Connection Action Fund
Population Institute
Religious Institute
Reproductive Health Access Project
Sexuality Information and Education Council of the United States (SIECUS)
SIA Legal Team
URGE: Unite for Reproductive & Gender Equity
Women"s Media Center

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[i] Garza v. Hargan, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)
[ii] Garza v. Hargan, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)
[iii] Priests for Life v. HHS, 808 F.3d 1, 2 (D.C. Cir. 2015) (Kavanaugh, J., dissenting)
[iv] Priests for Life v. HHS, 808 F.3d 1, 2 (D.C. Cir. 2015) (Kavanaugh, J., dissenting)
[v] Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, Remarks to the American Enterprise Institute, http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.
[vi] Aaron Blake, *The final Trump-Clinton debate transcript*, WASHINGTON POST (Oct. 19, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/?utm_term=.7b5ad335fc8a
[vii] Jose DelReal, *Trump draws fire for saying abortion laws are set, 'we have to leave it that way,'* WASHINGTON POST (April 2, 2016), https://www.washingtonpost.com/politics/trump-says-us-abortion-laws-are-set-and-we-have-to-leave-it-that-way/2016/04/02/f90c8ea0-f8ef-11e5-a3ce-f06b5ba21f33_story.html?utm_term=.bc5a25776083
[viii] David Savage, *Leonard Leo of the Federalist Society is the man to see if you aspire to the Supreme Court*, LOS ANGELES TIMES (July 6, 2018), http://www.latimes.com/politics/la-na-pol-leo-court-search-20180706-story.html
[ix] *Board of Directors*, STUDENTS FOR LIFE, http://studentsforlife.org/supporters/board-of-directors-1 (last visited July 5, 2018)

[x] Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, THE NEW YORKER (April 17, 2017), https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court

[xi] Human Coalition (@HumanCoalition), Twitter (July 9, 2018, 8:16 PM), https://twitter.com/HumanCoalition/status/1016491246326632448

[xii] 40 Days for Life email (July 10, 2018) (on file with the NARAL Pro-Choice America Research Department)

August 29, 2018

Senator Susan Collins
413 Dirksen Senate Office Building
Washington, DC 20510

Senator Lisa Murkowski
522 Hart Senate Office Building
Washington, DC 20510

Re: Nomination of Judge Brett Kavanaugh
Associate Justice of the Supreme Court Hearing,
September 4, 2018

Dear Senators Collins and Murkowski:

As law professors concerned about reproductive rights and justice, we applaud your past statements in support of *Roe v. Wade*. The 336 of us write now because, with the nomination of Judge Brett Kavanaugh to the Supreme Court, we believe you are possibly all that stands between an America in which abortion is safe, accessible, and legal, and an America in which women are threatened with criminal punishment for seeking reproductive health care.

President Donald Trump has promised repeatedly that he would appoint Justices to overturn *Roe v. Wade*.[1] By nominating Judge Kavanaugh, President Trump has lived up to that promise, potentially providing the critical fifth vote to the anti-*Roe* wing of the Court. Ever since Justice Anthony Kennedy announced his retirement, there has been much debate about the future of *Roe*. We are writing to confirm that, with the nomination of Judge Kavanaugh, **the threat to *Roe* is imminent and real**.

As you know, in *Planned Parenthood v. Casey*, in 1992, Justice Kennedy was a key vote to preserve *Roe v. Wade*. More recently, in the 2016 case of *Whole Woman's Health v. Hellerstedt*, Justice Kennedy's vote was critical to the five-justice majority again affirming the right to choose as fundamental. In contrast to Justice Kennedy, we know that Judge Kavanaugh disagrees with *Roe* and with *Whole Woman's Health*. Just last September, Judge Kavanaugh gave a speech in which he lavished praise on Chief Justice William Rehnquist's opinions, singling out for extended praise then-Justice Rehnquist's dissent in *Roe*.[2] Also last year, Judge Kavanaugh dissented in an important abortion rights case, arguing that forcing an immigrant minor to remain pregnant was not an undue burden.[3]

Although Judge Kavanaugh has described *Roe* as settled precedent, the doctrine of *stare decisis* and Judge Kavanaugh's purported commitment to precedent are not likely to save *Roe*. It is standard practice for Supreme Court nominees to publicly embrace precedent and the principle

[1] Mark Berman, *Trump Promised Judges Who Would Overturn Roe v. Wade*, Wash. Post, Mar. 21, 2017.
[2] David Savage, *Supreme Court Nominee Brett Kavanaugh Lauded Late Chief Justice Rehnquist for Dissenting in Roe v. Wade and Supporting School Prayer*, L.A. Times, Jul. 11, 2018.
[3] *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017).

of *stare decisis*.[4] Even Justice Scalia, one of the Court's most vocal critics of *Roe*, promised to respect precedent during his confirmation hearings.[5]

It is clear that professed allegiance to precedent during the confirmation process does not translate to any meaningful allegiance as a Justice. For instance, Chief Justice Roberts (together with Justices Kennedy, Thomas, Alito, and Gorsuch) voted last month in *Janus v. AFSCME* to overturn a forty-year old precedent validating service fees paid by union-represented employees. Justice Gorsuch, in particular, has been skeptical of precedent, voting to overturn two well-established precedents in *South Dakota v. Wayfair* and advocating in many other cases to overturn or re-visit long-standing caselaw, including the half-century-old *Katz* standard for the Fourth Amendment[6] and the entire area of Contracts Clause doctrine.[7]

There are numerous cases already pending in the federal courts that could become the vehicle for the Supreme Court to eviscerate *Roe*. For example, the newly-composed Supreme Court could decide to take up the constitutionality of Indiana's pre-viability ban on seeking abortion for certain reasons. The law has been enjoined based on *Roe* and *Casey* and is now just a step away from the Supreme Court.[8] A newly-composed Court could decide to hear this or any number of other abortion cases and then uphold those laws on the ground that *Roe* was incorrect and a new legal standard should apply to abortion restrictions. Or it could read *Roe* and its progeny narrowly to provide almost no protection against the most severe abortion restrictions — a result which was one vote from reality in *Whole Woman's Health*. Just months from today, *Roe v. Wade* could be dismantled entirely or rendered essentially meaningless.

If that were to happen, the effects would be devastating. Returning to a world where states can make abortion illegal or extremely difficult to access will harm women's health, particularly for poor women, rural women, and women of color. We know from the pre-*Roe* era that women will resort to desperate measures when facing an unplanned pregnancy. In 1965, illegal abortion in the United States accounted for 17% of all deaths attributed to pregnancy and childbirth that year. These are officially reported numbers; the actual number of deaths was likely much higher. Poor women and their families were in the past and will be in the future disproportionately impacted, as wealthier women possess the means to travel to access legal abortion care.

Overturning or completely gutting *Roe* would also have racially disparate effects. Racial disparities were evident in the pre-*Roe* two-tiered system of access to care. The mortality rate due to illegal abortion for nonwhite women was twelve times higher than that for white women. Racially disparate access to reproductive health care is a pattern that continues in the U.S. and would be exacerbated if abortion became illegal (for example, in the U.S. today the maternal mortality rate for black women is three to four times that of white women). Moreover, we will likely see racially disparate prosecutions of women for obtaining illegal abortions and, as a

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[4] *See, e.g., Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 144 (2005).

[5] *See Scalia Denies Taking Aim at Abortion*, Orlando Sentinel, August 6, 1986, at A3.

[6] *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

[7] *Sveen v. Mellin*, 138 S. Ct. 1815 (2018).

[8] *Planned Parenthood of Indiana & Kentucky v. Indiana State Department of Health*, 888 F.3d 300 (7th Cir. 2018).

result, women being deterred from seeking life-saving health care for fear of criminal prosecution.

Roe dramatically improved health for all women, and allowed women to have abortions earlier in pregnancy when the procedure is safest. If the Supreme Court restricts the constitutional right to abortion, we will witness devastating public health consequences, with poor women, rural women, and women of color disproportionately dying or suffering serious health injuries from illegal abortion. Women in states like Maine and Alaska in particular could be among the most affected, as they are both geographically large states with widely dispersed populations, creating challenges for health care access.

In addition to endangering women's lives, overturning *Roe* would undercut women's pursuit of economic equality and their ability to keep their families out of poverty. Sixty percent of women seeking abortion care in the United States are already mothers, and seventy-five percent of women seeking abortion care are poor or low income. Volumes of evidence indicate that the socioeconomic consequences for women denied abortion care are substantial, with women denied care being more likely to receive public assistance and to live below the federal poverty level than women who received abortion care.[9] As the Supreme Court declared in *Casey*, "The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives."

Finally, beyond imperiling the life and liberty of millions of women, overturning *Roe* will threaten the jurisprudence of liberty and equality that follows from them. Notably, from *Roe* and *Casey* flow the critically important line of cases establishing and defending gay rights. In *Lawrence v. Texas*, the Court relied on *Casey* in holding that the Constitution protects gay people from the stigma of criminality because intimate adult consensual relationships are protected like other deeply rooted privacy rights "relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Obergefell v. Hodges*, the Court's decision that announced the right of all adults to marry irrespective of sexual orientation, also relied on the substantive due process doctrine that undergirds *Casey* and *Roe*.

If *Casey* and *Roe* were to be weakened or overturned, the principle that both cases have cemented into our nation — that "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment" — could be undermined not just for abortion but also for the lives, dignity, and autonomy of our gay brothers and sisters (and their children). No less than fundamental liberty for all is at stake.

Roe was decided 45 years ago, and *Casey* 26. Recognition of the importance of abortion to women's freedom and equality has only grown stronger since both were decided. Women rely on *Roe* and *Casey* to exercise control over their bodies as full citizens under the Constitution, as do all people who seek the liberties of "marriage, contraception, parental rights, and consensual sexual intimacy," all deriving from the reasoning of *Roe* and *Casey*. The Court's "obligation is to define the liberty of all, not to mandate [its] own moral code." Judge Kavanaugh's record

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[9] ANSIRH, *Introduction to the Turnaway Study*, *available at* https://www.ansirh.org/sites/default/files/publications/files/turnaway-intro_5-23-2018.pdf

demonstrates that he will very likely ignore this wise precedent that promises women and the LGBT community — and all of us — freedom and equality.

As law professors who understand the law of abortion and reproductive rights, the 336 of us **strongly urge you to vote against Judge Kavanaugh**. A "no" vote is necessary to protect women and families throughout this country. We urge you, as Senators who have long supported the right to choose, to make your legacy the protection of these fundamental constitutional rights for generations to come.

Respectfully yours,[10]

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University of New Mexico School of Law

Patricia W. Moore
St. Thomas University School of Law

Adele M. Morrison
Wayne State University Law School

Jill C. Morrison
Georgetown University Law Center

Jane Murphy
University of Baltimore School of Law

Kimberly Mutcherson
Rutgers University Law School

William Myers
University of Tampa

Vinuta Naik
East Bay Community Law Center

Marie Stefanini Newman
Elisabeth Haub School of Law, Pace University

Julie Novkov
University at Albany, SUNY

Michelle Oberman
Santa Clara University School of Law

Aviva Orenstein
Indiana University Maurer School of Law

Francesca Ortiz
South Texas College of Law Houston

Laura Padilla
California Western School of Law

Sarah Paoletti
University of Pennsylvania School of Law

Jonathan Parent
Le Moyne College

Debra Parkes
Peter A. Allard School of Law

Wendy Parmet
Northeastern University School of Law

Carla Perrotta
Northeastern University School of Law

Michael A. Pezza Jr.
Northeastern University School of Law

Tamara R. Piety
University of Tulsa College of Law

Alicia Plerhoples
Georgetown University Law Center

Nancy Polikoff
American University Washington College of Law

Andrew S. Pollis
Case Western Reserve University School of Law

James Gray Pope
Rutgers University Law School

Nicole Porter
University of Toledo College of Law

Dara Purvis
Penn State Law

Mae C. Quinn
University of Florida Levin College of Law

Gowri Ramachandran
Southwestern Law School

Jaya Ramji-Nogales
Temple University Beasley School of Law

Radhika Rao
UC Hastings College of Law

Louis Raveson
Rutgers University Law School

Rachel Rebouche
Temple University Beasley School of Law

Sarah E. Redfield
University of New Hampshire School of Law

Deborah L. Rhode
Stanford Law School

Sarah E. Ricks
Rutgers University Law School

Kalyani Robbins
Florida International University College of Law

Ruth Anne Robbins
Rutgers University Law School

Ruthann Robson
CUNY School of Law

Florence Wagman Roisman
Indiana University Robert H. McKinney School of Law

Sonia E. Rolland
Northeastern University School of Law

Leslie Rose
Golden Gate University School of Law

Mindy Jane Roseman
Yale Law School

Sara Rosenbaum
George Washington University Law School

Gerald Rosenberg
University of Chicago Law School

Darren Rosenblum
Elisabeth Haub School of Law, Pace School

Catherine J. Ross
George Washington University Law School

Andrew Rothman
Rutgers University Law School

James Rowan
Northeastern University School of Law

Judith Royster
University of Tulsa College of Law

Steve Sanders
Indiana University Maurer School of Law

Carol Sanger
Columbia Law School

Nadia N. Sawicki
Loyola University Chicago School of Law

Thomas A. Schaaf
Golden Gate University School of Law

Joan Schaffner
George Washington University Law School

Elizabeth M. Schneider
Brooklyn Law School

Vicki Schultz
Yale Law School

Elizabeth Sepper
Washington University School of Law

Peter B. Sessa
Northeastern University School of Law

Sudha Setty
Western New England University School of Law

Ragini Shah
Suffolk University Law School

James A.W. Shaw
Northeastern University School of Law

Elizabeth Sheehy
University of Ottawa Faculty of Law

Lois Shepherd
University of Virginia School of Law

Jessica Silbey
Northeastern University School of Law

Ishpal Sidhu
University of Notre Dame Law School

Reva Siegel
Yale Law School

Ira Sills
Northeastern University School of Law

Sandra Simkins
Rutgers University Law School

Charisa Smith
CUNY School of Law

Priscilla Smith
Yale Law School

Cynthia Soohoo
CUNY School of Law

Emily Spieler
Northeastern University School of Law

Jane M. Spinak
Columbia Law School

Kathryn Stanchi
Temple University Beasley School of Law

Barbara Stark
Hofstra Law School

Richard Storrow
CUNY School of Law
Edward Stein
Cardozo School of Law, Yeshiva University

Joan Steinman
Chicago-Kent College of Law, Illinois Institute of Technology

Jeffrey W. Stempel
University of Nevada Las Vegas William S. Boyd School of Law

Robert Strassfeld
Case Western Reserve University School of Law

S.I. Strong
University of Missouri School of Law

Madhavi Sunder
Georgetown University Law Center

Sonia M Suter
George Washington University Law School

Sarah Swan
Florida State University College of Law

JoAnne Sweeny
University of Louisville Brandeis School of Law

Daniel Tagliarina
Utica College

Allison Tait
University of Richmond School of Law

Leslie Garfield Tenzer
Elisabeth Haub School of Law, Pace University

Chantal Thomas
Cornell University Law School

Trina Tinglum
University of Wisconsin Law School

Grace Calabrese Tonner
UC Irvine School of Law

Michelle Travis
University of San Francisco School of Law

Enid Trucios-Haynes
University of Louisville Brandeis School of Law

Lisa Tucker
Drexel University Kline School of Law

Deborah Tuerkheimer
Northwestern University Pritzker School of Law

L. Danielle Tully
Suffolk University Law School

Jennifer Rosen Valverde
Rutgers University Law School

Inge Van der Cruysse
Indiana University Maurer School of Law

Maria Carmela Venuti
Università di Palermo

Joan Vogel
Vermont Law School

Rachel Vorspan
Fordham University School of Law

Alec Walen
Rutgers University Law School

Bela August Walker
CUNY School of Law

Kevin F. Wall
Northeastern University Law School

Jessica Dixon Weaver
SMU Dedman School of Law

D. Kelly Weisberg
UC Hastings College of the Law

Deborah M. Weissman
University of North Carolina School of Law

Gayl S. Westerman
Elisabeth Haub School of Law, Pace University

Deborah Widiss
Indiana University Maurer School of Law

Stephanie Wildman, Professor Emerita
Santa Clara University School of Law

Lucy Williams
Northeastern University School of Law

Susan Williams
Indiana University Maurer School of Law

Laurence H. Winer
Sandra Day O'Connor College of Law Arizona State University

Christopher Wurster
Northeastern University School of Law

Deborah Zalesne
CUNY School of Law

Mary Ziegler
Florida State University College of Law

Rebecca Zietlow
University of Toledo College of Law

Emily Zimmerman
Drexel University Kline School of Law

CC: The Honorable Charles Grassley
Chairman
U.S. Senate Committee on the Judiciary

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary

August 27, 2018

Dear Senator:

The undersigned 37 national faith-based, nontheist, and religious liberty organizations share a commitment to individual freedom and the separation of religion and government, two of the tenets on which this country was founded. We are united in our our genuine concerns about the nomination of Judge Brett Kavanaugh to be the next Supreme Court justice. In particular, Judge Kavanaugh's record suggests that he would not preserve the wall of separation between church and state, long used to ensure the protections guaranteed to us in the First Amendment to the U.S. Constitution. As you fulfill your role to advise and consent on the nomination, we urge you to ask Judge Kavanaugh hard questions and demand the release of relevant records that will help to determine whether he will uphold the protections guaranteed to all by the Establishment Clause of the United States Constitution.

The separation of church and state is the linchpin of religious freedom and one of the hallmarks of American democracy. It ensures that each person has the right to choose whether to be religious or nonreligious without pressure from the government. It safeguards houses of worship from intrusion by the government and prevents religious institutions from using the mechanisms of government to impose their religion on others. It protects parents who want to send their children to public schools without fear that they will be coerced into participating in prayer or religious activities. It protects taxpayers from being forced to fund the religious activities and education of others. And, it ensures that all Americans feel welcome and treated equally under the law regardless of their religion.

Judge Brett Kavanaugh, however, appears to reject the commonly accepted legal principle that the Establishment Clause creates a "wall of separation." In a 2017 lecture given to the American Enterprise Institute, he praised former Chief Justice William Rehnquist for, in Judge Kavanaugh's words, "convincing the Court that the wall metaphor was wrong as a matter of law and history." Before voting on his nomination, it is important that the Senate determine whether Judge Kavanaugh supports or rejects this fundamental constitutional principle. We cannot afford to have a Supreme Court that undermines the separation of church and state.

In his AEI speech, Judge Brett Kavanaugh also applauded Justice Rehnquist for dissenting from opinions that struck down public school-sponsored prayer at graduations and sporting events. This speech, along with the amicus brief he authored in *Santa Fe Independent School District v. Doe* in the Supreme Court, suggests the he may reject five decades of Supreme Court rulings that bar public schools from sponsoring prayer and religious activities. In his brief, Judge Kavanaugh not only contends that school-sponsored prayers at football games are constitutional, but that the Constitution requires public schools in some circumstances to allow students to deliver prayers and religious messages to a captive audience of other students in the classroom and at public school events. Justice Kennedy joined the 6-3 opinion rejecting the arguments Judge Kavanaugh made in his brief, but Judge Kavanaugh's nomination could change the outcome of future cases. The Senate must ensure that Judge Kavanaugh will protect the right of parents and students to

attend our public schools without being coerced to participate in religious activities or proselytized at school events.

In addition, Judge Kavanaugh's writings and positions suggest that if he were confirmed, the Court could erase one of the Establishment Clause's most important protections: the prohibition on taxpayer dollars being used to fund religious organizations, activities, and institutions. In the briefs he authored in both *Santa Fe* and *Good News Club v. Milford Central School*, Judge Kavanaugh indicated that he opposes the constitutional bar on using taxpayer dollars to pay for religious activities in circumstances where the funds are available to both religious and nonreligious applicants. And in *Bush v. Holmes*, he argued that a Florida private school voucher program that funded religious schools did not violate the state constitution's bar on funding religious institutions. Although unsuccessful in *Holmes*, the adoption of his arguments could leave Florida's constitutional provision and those like it in 37 other states with little to no meaning, ushering in private school voucher programs that fund religious schools and education. We urge the Senate, therefore, to ensure that Judge Kavanaugh would follow longstanding constitutional jurisprudence holding taxpayers should never be forced to fund religious activities and education. That is not the role of the government.

Judge Brett Kavanaugh's opinions and writings raise concerns that he would allow broad religious exemptions that could harm other people. He issued a dissent in *Priests for Life v. U.S. Department of Health and Human Services*, siding with a religious organization that argued that filling out a form to request a religious exemption burdened its religious exercise. His opinion, which would have made it more difficult for the government to ensure that women had access to birth control, is at odds with eight of the nine federal appeals courts that heard challenges to the same religious exemption. It raises concerns that Judge Kavanaugh could require the government to carve out religious exemptions even when they would cause real harm to other people.

The separation of church and state ensures religious freedom for all. Accordingly, we urge you to ask Judge Kavanaugh pointed questions and seek relevant documents that will shed light on whether he will uphold this fundamental protection.

Sincerely,

African American Ministers in Action
African Methodist Episcopal Church - Social Action Commission
Ameinu
American Atheists
American Conference of Cantors
American Humanist Association
Americans United for Separation of Church and State
Aytzim: Ecological Judaism
Bend the Arc Jewish Action
Center for Inquiry
Central Conference of American Rabbis
Disciples Center for Public Witness
Disciples Justice Action Network

Friends Committee on National Legislation
Global Justice Institute
Hindu American Foundation
Interfaith Alliance
Interfaith Worker Justice
Jewish Council on Urban Affairs
Jewish Women International (JWI)
Keshet
Men of Reform Judaism
Metropolitan Community Churches
Muslim Public Affairs Council
National Council of Churches
National Council of Jewish Women
New Ways Ministry
Reconstructionist Rabbinical Association
Religious Coalition for Reproductive Choice
Religious Institute
Secular Coalition for America
Union for Reform Judaism
United Church of Christ, Justice and Witness Ministries
Unitarian Universalist Association
Unitarian Universalist Women's Federation
Women of Reform Judaism
Women's Alliance for Theology, Ethics, and Ritual (WATER)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Dr. Everett B. Kelley
National Secretary-Treasurer

J. David Cox, Sr.
National President

Jeremy A. Lannan
NVP for Women & Fair Practices

September 13, 2018

Dear Senator:

On behalf of more than 700,000 federal and District of Columbia workers represented by the American Federation of Government Employees, AFL-CIO (AFGE), I am writing to express our opposition to the confirmation of Judge Brett Kavanaugh to the United States Supreme Court. Judge Kavanaugh's opinions demonstrate a tendency to put his thumb on the scales in favor of corporations and employers over working families, making him ill-suited to fill Justice Anthony Kennedy's seat on the Supreme Court.

AFGE's experience with Judge Kavanaugh serves as an example of his apparent disregard for workers' rights. In *AFGE v. Gates*, a lower court held that the National Security Personnel System (NSPS) created by the Department of Defense (DoD) via the FY 2004 National Defense Authorization Act (NDAA), unlawfully denied protections afforded to federal workers guaranteed in the plain language of the statute. NSPS allowed DoD to eliminate collective bargaining even though the statute required that any personnel system created as a result "ensure that employees may organize collectively." The lower court's opinion also noted that NSPS failed to provide for independent third-party review of decisions of the National Security Labor Relations Board and that contrary to the statute the NSPS failed to provide employees with "fair treatment."

In reversing the lower court's decision and ruling to uphold the agency's regulations establishing the NSPS, Judge Kavanaugh opined that DoD could completely eliminate collective bargaining under NSPS, at least for a period of time—a position much further than that argued by DoD's attorneys. In the aftermath of the Supreme Court's decision in *Janus v. the American Federation of State County and Municipal Employees, AFL-CIO,* Judge Kavanaugh's confirmation to the Supreme *Court* would further weaken public sector collective bargaining rights.

The Supreme Court is often the last wall of defense for worker rights, and it is disconcerting that opinions of Judge Kavanaugh establish a pattern of failing to recognize the imbalance of power between employer and employee. Judge Kavanaugh's opinions demonstrate an indifference to this power dynamic. For example, in *Sea World of Fl., LLC v. Perez*, the DC Court of Appeals upheld the final order of the Occupational Safety and Health Review Commission finding that Sea World violated the Occupational Safety and Health Act's ("OSHA") general duty clause by exposing trainers to recognized hazards when working in close contact with killer whales during performances, and that the abatement procedures recommended by the Secretary of Labor were feasible. However, Judge Kavanaugh in a dissenting opinion expressed the view that OSHA's role in protecting Sea World employees was "paternalistic." This is an extraordinary view considering Sea World's knowledge of the previous death of another worker by the same killer whale.

In *NLRB v. CNN*, the DC Circuit Court of Appeals granted the NLRB's petition of enforcement in a matter in which it found that CNN's replacement of its unionized contractor with a nonunion, in-house workforce violated the National Labor Relations Act. The NLRB pointed to evidence of anti-union bias which motivated CNN's hiring decisions. The NLRB found supervisors *inter alia* drafted new position qualifications with the "purpose of getting out from under the Union's jurisdiction" and "minimizing the significance of former union employees' prior experience when they applied for new jobs." Indeed, one supervisor in an email wrote "the photojournalist position qualification should emphasize the use of DV cameras (since this isn't within [union] jurisdiction now." Moreover, a manager told a former union employee that because of his prior relationship with the union that he was not able to offer him freelance work. Despite the overwhelming evidence of anti-union bias, in a dissenting opinion Judge Kavanaugh stated he did not see substantial evidence that CNN discriminated against former union employees.

In *Miller v. Clinton*, the DC Circuit Court of Appeals reversed and remanded a decision by a lower court granting the Secretary of State's motion to dismiss a State Department employee's age discrimination lawsuit. In a dissenting opinion, Judge Kavanaugh wrote that notwithstanding his belief that the State Department should change its policy of mandating that its employees working abroad retire at age 65, the State Department had the authority to force the retirement of its employees based on age.

Prior labor opinions of Judge Kavanaugh indicate a predictable outcome in favor of employers that is contrary to the objective role the Supreme Court has played in labor-management relationships for almost a century. Judge Kavanaugh's inclination to side with corporations and employers over workers leads AFGE to conclude his confirmation to the Supreme Court would inevitably diminish decades of advancement for working families.

It is not a requirement that federal judges with lifetime appointments share the same education, economic status, or experience of petitioners to the Supreme Court. However, we do expect those judges to have an open mind and the ability to walk in the footsteps and gaze through the eyes of those seeking justice without bias. If confirmed, Judge Kavanaugh would fill the vacancy left by Judge Anthony Kennedy, a jurist who often staked the ground in the middle of the Supreme Court. AFGE believes Judge Kavanaugh falls well short of the criterion of fundamental fairness and urge you to oppose his confirmation to the Supreme Court.

Sincerely,

Thomas S. Kahn
Director, Legislative Affairs

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July 20, 2018

The Honorable Charles Grassley
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member, Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

In order for the Senate to fulfill its constitutionally prescribed duty to "advise and consent" on a Supreme Court nomination, it must first ensure that it has conducted a full and fair review of that nominee. Just as this review encompassed all records that the Senate Judiciary Committee was entitled to see from Justice Elena Kagan's service in the Clinton Administration, it now must include all records that the Committee is entitled to see from Judge Kavanaugh's extensive service in the George W. Bush Administration.

It has been less than a decade since the Senate considered Elena Kagan's Supreme Court nomination. When Justice Kagan was nominated to the U.S. Supreme Court, then-Chairman Leahy and then-Ranking Member Sessions jointly sent a letter requesting records from her tenure in the White House Counsel's Office and the Domestic Policy Council during the Clinton Administration. Critically, more than 170,000 pages of responsive materials were produced, including virtually every email sent and received by Justice Kagan while she was at the White House. Even more important than the sheer number of pages produced are the following:

- President Obama did not assert executive privilege over a single document.
- Even the small number of records on which President Clinton asserted statutory restrictions against public release were provided to the Senate Judiciary Committee on a "Committee Confidential" basis.
- Only 1,600 pages of records—less than 1% of the total number of pages of records—were withheld, and only on personal privacy grounds.

There is no reason that the Committee should undertake a different process for considering Judge Kavanaugh's nomination than it undertook for Justice Kagan's. While Justice Kagan was a pending Supreme Court nominee, then-Ranking Member Jeff Sessions noted that the Committee had special authority to obtain records from presidential libraries. On May 24, 2010, Senator Sessions spoke extensively about the document requests that had been submitted to the Clinton Library and noted that "[t]he restrictions that apply to run-of-the-mill Freedom of Information Act requests do not apply when the Committee requests document[s]" and that "under the Presidential Records Act, President Clinton would normally be able to block the release of certain documents for up to 12 years. But under the PRA, the Committee's request overrides any attempt by President Clinton to block the release of these records. Faced with a Committee request, the only basis for withholding documents is executive privilege, and President Obama has apparently decided not to do that." To be clear: no records were withheld from the Senate Judiciary Committee on the basis of executive privilege by President Obama or statutory restrictions asserted by President Clinton.

The Senate should require similar disclosure for Judge Kavanaugh.

Fix the Court, a nonpartisan watchdog group, filed Freedom of Information Act requests last year, seeking Kavanaugh's records from the George W. Bush Presidential Library and Museum. The Library identified approximately 429,870 pages and 667,824 electronic files of potentially responsive records.

We agree with Senator Sessions' statement from May 24, 2010, that "[t]he public record of a nominee to such a lifetime position as Justice on the Supreme Court is of such importance that we cannot go forward without these documents."

Chairman Grassley, you echoed Senator Sessions' concerns on June 15, 2010, and said that "[i]n order for the Senate to fulfill its constitutional responsibility of advise and consent, we must get all of her documents from the Clinton Library and have enough time to analyze them so we can determine whether she should be a Justice." The Senate's constitutional responsibility remains the same today.

While some of the undersigned organizations believe that further conditions must be met before Judge Kavanaugh's nomination is considered by the Senate, all of us agree that **Judge Kavanaugh's hearing must not be scheduled until the Senate has seen every single record it is entitled to see.**

Sincerely,

Action NC
Advocates for Youth
Alliance for Justice
American Association of University Women
American Civil Liberties Union
American Constitution Society
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers
Americans for Democratic Action (ADA)
Americans United for Separation of Church & State
Asian Pacific American Labor Alliance (APALA)
Autistic Self Advocacy Network
Battle Born Progress (NV)
Bend the Arc Jewish Action
Blue Future
Center for American Progress
Center for Biological Diversity
Center for Reproductive Rights
Change Begins With Me (Indivisible San Diego District 52)
CHOICES. Memphis Center for Reproductive Health
Citizen Action of the Hudson Valley (NY)
Citizen Action/Illinois
Communications Workers of America (CWA)
Connecticut Citizen Action Group
Constitutional Accountability Center
CREDO Action
Daily Kos
Demand Justice
End Citizens United
Equal Rights Advocates
Equality California
Every Voice
Faith in Indiana
Faith in Public Life
Family Equality Council
Freedom for All Americans
Gender Justice

Generation Progress
Health Care for America Now
Healthy and Free Tennessee
Herd on the Hill
Human Rights Campaign
Human Rights Watch
Indivisible Acton (MA)
Indivisible CA-33
Indivisible Carbondale (IL)
Indivisible Elk Grove Township (IL)
Indivisible Evanston (IL)
Indivisible Illinois
Indivisible Metro East (IL)
Indivisible Norman (OK)
Indivisible South Suburban Chicago
Indivisible Western Springs (IL)
Iowa Citizen Action Network
Iowa Main Street Alliance
Jobs With Justice
Joint Action Committee
Lambda Legal
League of Conservation Voters
Maine Women's Lobby
Mainers for Accountable Leadership
MomsRising
Muslim Advocates
NARAL Pro-Choice America
National Action Network
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women
National Education Association
National Employment Law Project
National Employment Lawyers Association
National Equality Action Team (NEAT)
National Health Law Program
National Institute for Reproductive Health (NIRH)
National Partnership for Women & Families
National Resources Defense Council
National Women's Law Center
New Jersey Citizen Action
Organize Florida
Orinda Progressive Action Alliance (CA)
People For the American Way
Postcards for America – MN
Progress Iowa
Progress Virginia
Progressive Change Campaign Committee
Progressive Indivisible Berwyn (IL)
Progressive Turnout Project
ProgressOhio
Protect Our Care
Service Employees International Union (SEIU)
Sierra Club
Stand Up America
States United to Prevent Gun Violence
Strong Economy For All Coalition (NY)
The Leadership Conference on Civil and Human Rights
The Washington Bar Association Young Lawyers Division
TIME'S UP
Toledoans United for Social Change (OH)
United Vision for Idaho
Universal Health Care Action Network
Violence Policy Center
Voices for Progress
Working America North Carolina
WV Citizen Action Group

August 20, 2018

Hon. Charles Grassley
Chairman, Committee on Judiciary
135 Hart Senate Office Building
Washington, DC 20510

Hon. Dianne Feinstein
Ranking Member, Committee on Judiciary
331 Hart Senate Office Building
Washington, DC 20510

Re: Kavanaugh Nomination

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned organizations, which represent the interests of millions of Americans with disabilities, write to express our strong opposition to the nomination of Judge Brett Kavanaugh to be an Associate Justice on the United States Supreme Court. Our review of Judge Kavanaugh's record indicates that his confirmation would place at risk access to health care and civil rights protections for people with disabilities, opportunities for people with disabilities to make choices about their own lives, and the ability of executive branch agencies to interpret and enforce the law. Because Judge Kavanaugh's confirmation would tip the balance of the Supreme Court toward such regressive views, we ask that you vote against his confirmation.

Access to Health Care. Judge Kavanaugh's distaste for the Affordable Care Act (ACA) is clear. In public appearances, he has repeatedly expressed his skepticism about the ACA and his criticism of the Supreme Court's basis for upholding it.[1] He has also written dissenting opinions in cases upholding the ACA, advocating positions that, if accepted, would undermine fundamental protections of the ACA, including the individual mandate.[2] He has described the ACA as "unprecedented on the federal level in American history,"[3] urged the court to "exercise great caution" in finding it constitutional,[4] and 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] The ACA expanded access to health care for millions of people with disabilities and enacted other crucial protections, including the requirement that insurers offer coverage to people with pre-existing conditions, and remains under constant attack in the courts. Judge Kavanaugh's confirmation to the Supreme Court likely endangers this life-changing—and life-saving—progress.

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[1] *The Administrative State After the Health Care Cases*, FEDERALIST SOC'Y (Nov. 17, 2012), 55:30-57:25 and 1:01:20-1:02:55, https://www.youtube.com/watch?v=zRImAIbJOt8, at 55-59 min.; *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, AM. ENTER. INST. (Sept. 18, 2017), http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf, at 15; *The Joseph Story Distinguished Lecture*, HERITAGE FOUNDATION (Oct. 25, 2017), https://www.heritage.org/josephstory2017, at 34-37 min.
[2] *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); *Sissel v. U.S. Dep't of Health and Human Servs.*, 799 F.3d 1035 (D.C. Cir. 2015); *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 808 F.3d 1 (D.C. Cir. 2015).
[3] 661 F.3d at 51.
[4] *Id.*
[5] *Id.* at 50.

Self-Determination. In a case called *Doe v. D.C.*,[6] Judge Kavanaugh demonstrated a disturbing lack of regard for the fundamental rights and autonomy of people with disabilities. He reversed a district court ruling that had stopped District of Columbia officials from consenting to elective surgeries (including unwanted abortions) on people with intellectual disabilities living in District of Columbia facilities, unless the officials had first attempted to ascertain the known wishes of the individual. Judge Kavanaugh rejected the district court's finding that an individual who lacks the capacity to make medical decisions may nevertheless be capable of expressing a choice or preference regarding medical treatment; he claimed that this idea "does not make logical sense"[7] and that the District's actions did not violate the due process rights of the individuals subjected to the surgeries. He also overruled the district court's holding that the individual's 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.

Judge Kavanaugh's decision is extremely troubling, especially in light of the long and shameful history of forced sterilizations and other state-sanctioned intrusions into the physical autonomy of people with disabilities, particularly people with intellectual and developmental disabilities.

Civil Rights Protections. Judge Kavanaugh has revealed an exceedingly narrow understanding of the important antidiscrimination laws that protect the rights of people with disabilities. In one case, he wrote a dissenting opinion arguing that workers abroad were exempted from the Age Discrimination in Employment Act (ADEA),[8] despite the warning from the majority that his position would exempt these workers "from the protections of the entire edifice of [Congress's] antidiscrimination canon."[9] In other employment discrimination cases, he has routinely discounted or ignored the experiences of people with disabilities and the evidence they present, affording great deference to the explanations of employers.[10] Similarly, he has demonstrated a lack of appreciation for the importance of the rights of students with disabilities under the Individuals with Disabilities Education Act (IDEA),[11] and he has advocated for school voucher programs,[12] which often force students with disabilities to waive their IDEA rights—including the right to receive a free and appropriate education—in order to participate. Judge Kavanaugh

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[6] 489 F.3d 376 (D.C. Cir. 2007). Notably, the case proceeded following Judge Kavanaugh's remand, and the district court ultimately found that the unwanted abortions on two of the women were unconstitutional batteries. Doe v. D.C., 206 F. Supp. 3d 583 (D.D.C. 2016).

[7] *Id.* at 382.

[8] *Miller v. Clinton*, 687 F.3d 1332 (D.C. Cir. 2012).

[9] *Id.* at 1338.

[10] *See, e.g., Stewart v. St. Elizabeths Hospital*, 589 F.3d 1305 (D.C. Cir. 2010); *Adeyemi v. D.C.*, 525 F.3d 1222 (D.C. Cir. 2008); Baloch v. Kempthorne, 550 F.3d 1191 (D.C. Cir. 2013); *Johnson v. Interstate Management Co.*, 849 F.3d 1093 (D.C. Cir. 2017).

[11] *Hester v. D.C.*, 505 F.3d 1283 (D.C. Cir. 2007).

[12] Judge Kavanaugh has served as co-chairman of the Federalist Society's "School Choice Practice Group," *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), and as an attorney, he defended a Florida school voucher program that was ultimately found to violate the state constitution, *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

would also permit states to restrict voting rights through voter identification laws,[13] which impose financial and practical burdens on many voters with disabilities.

Agency Authority. Finally, Judge Kavanaugh has expressed distaste for the administrative agencies that play a key role in enforcing civil rights protections and managing federal healthcare, employment, and benefits programs that are crucial to many people with disabilities. He has called for judges to limit the application of *Chevron* deference—the long-accepted rule under which courts defer to an agency's reasonable interpretation of the laws 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."[14] In one particularly troubling case, Judge Kavanaugh ruled that the Consumer Financial Protection Bureau (CFPB) was unconstitutionally structured; in his opinion, he demonstrated outright hostility to independent agencies—a group that includes many important 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."[15]

Judge Kavanaugh's record reveals his skepticism of the ACA, his particularly narrow view of disability and other civil rights protections, and his disdain for the important role played by administrative agencies in interpreting and implementing the law. His confirmation to the Supreme Court would affect the lives of millions of people with disabilities for decades to come. Because of the serious concerns discussed in this letter, we urge you to vote against his confirmation.

Thank you for your consideration of the important concerns that this nomination poses for people with disabilities and the crucial rights and protections that are at stake.

Sincerely,

National organizations:

ADAPT
The Advocacy Institute
American Association of People with Disabilities
The Arc of the United States
Association of Programs for Rural Independent Living
Association of University Centers on Disabilities
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Campaign for Trauma-Informed Policy and Practice

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[13] *South Carolina v. U.S.*, 898 F. Supp. 2d 30 (D.D.C. 2012).
[14] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 128 HARV. L. REV. 2118, 2150-54 (2016), http://cdn.harvardlawreview.org/wp-content/uploads/2016/06/2118-2163-Online.pdf.
[15] *PHH Corporation v. Consumer Finance Protection Bureau*, 839 F.3d 1, 5–6 (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).

Center for HIV Law and Policy
Center for Public Representation
Civil Rights Education and Enforcement Center
Clinical Social Work Association
Disability Power and Pride
Disability Rights Education and Defense Fund
Harriet Tubman Collective
Helping Educate to Advance the Rights of Deaf Communities
Judith Heumann LLC
Justice in Aging
Legal Action Center
Mental Health America
National Association of Community Behavioral Health and Developmental Disability Directors
National Association of the Deaf
National Association for Rights Protection and Advocacy
National Association for Rural Mental Health
National Association of Social Workers
National Black Justice Coalition
National Council on Independent Living
National Health Law Program
National Mental Health Consumers' Self-Help Clearinghouse
Not Dead Yet
TASH
United Spinal Association

State and local organizations:

Ability Resources (OK)
Able Opportunities, Inc. (WA)
Access Living (IL)
ADAPT-Arizona
ADAPT Montana
AIM Center for Independent Living (IL)
Alliance Center for Independence (NJ)
Aloha Independent Living Hawaii
Appalachian Independence Center, Inc. (VA)
Atlantis Community, Inc. (CO)
ATTIC-Inc. (IN)
Autism Alliance of Michigan
Cape Organization for Rights of the Disabled (MA)
Center for Independence (WA)
Center for Independent Living of North Central Pennsylvania
Center for Independent Living for Western Wisconsin
Colorado Cross-Disability Coalition
Connecticut Cross Disability Lifespan Alliance

Connecticut Legal Rights Project
Counseling DIRECTions (AZ)
Democratic Disability Caucus of Florida
DIRECT Center for Independence (AZ)
Disabilities Resource Center of Siouxland (IA)
Disability Achievement Center (FL)
Disability Advocates for Rights and Transition (PA)
Disability Community Resource Center (CA)
Disability in Action (TX)
disABILITY LINK (GA)
Disability Partners (NC)
Disability Policy Consortium of Massachusetts
Disability Resource Center (IL)
Disability Rights Maine
Disability Rights Pennsylvania
D.C. Metro ADAPT
Empower Tennessee
Federations of Organizations (NY)
Florida Democratic Disability Caucus
Healing Hearts and Minds (NY)
Healthy Mind of Niagara (NY)
Illinois-Iowa Center for Independent Living
IMPACT Center for Independent Living (IL)
Independent Living Center of Southern California
Indiana United Methodist Church Disability Advocacy Team
Lake County Center for Independent Living (IL)
LIFE Center for Independent Living (IL)
Living Independence Network Corporation (LINC) (ID)
Montana Independent Living Project
Morgantown Pastoral Counseling Center, Inc. (WV)
Mountain State Centers for Independent Living (WV)
NAMI Huntington (NY)
National Association of Social Workers-Michigan
New York Association of Psychiatric Rehabilitation Services
New York Association on Independent Living
Nevada Disability Advocacy and Law Center
North Country Access to Health Care Committee (NY)
Northern Regional Center for Independent Living (NY)
Open Doors For Multicultural Families (WA)
Options Center for Independent Living (IL)
Options for Independent Living (WI)
Organize Florida
Progress Center for Independent Living (IL)
Psychotherapy Associates of Westchester (NY)
Putnam Independent Living Services (NY)

Self-Advocates in Leadership (SAIL) (WA)
Southwest Center for Independence (CO)
Springfield Center for Independent Living (IL)
St. Joseph's Medical Center (NY)
Statewide Independent Living Council of Alaska
Texas Advocates
Urban Justice Center Mental Health Project (NY)
West Central Illinois Center for Independent Living

cc: all Senate offices

September 18, 2018

U.S. Senate
Washington DC 20510

RE: Young People Call on You to Oppose Brett Kavanaugh's Confirmation to the Supreme Court

Dear Senators,

Today, our bodies, lives, and futures hang in the balance as we face the possibility of a Supreme Court Justice whose decisions will deny our rights and harm our communities for decades to come. As youth-led and serving organizations, we are outraged and alarmed by the nomination of Brett Kavanaugh and the devastating repercussions he would have on the lives of young people in this country. As the largest voting bloc in the country, we are writing to strongly urge you to oppose Brett Kavanaugh's confirmation to the Supreme Court.

This is more than one vote—this is a moral vote for our present and our futures. Kavanaugh is a threat to all of our hard-earned and critical rights. Rights which, shamefully, have never been equitably accessible to all people in this country. But instead of working to expand and promote justice for all, Kavanaugh would dismantle critical protections and plunge us further into oppression. We want to be very clear: as young people working towards justice, we know that true liberation is shared. We will not apologize for having the audacity to believe that equal protection under the law means equal for all, not just for those who can afford it. We will not allow Kavanaugh to deepen existing inequities, to pick and choose whose futures are worth protecting.

A vote to confirm Kavanaugh is a decision to silence our voices in the decisions made about our bodies, our lives, and our futures. Throughout his career, Kavanaugh has argued in favor of further disenfranchising already marginalized communities in our workplaces and throughout our democracy. In *Howard v. Office of Chief Admin. Officer of U.S. House of Representatives*, he argued a Congressional staffer had no right to bring her racial discrimination case to court; he argued there should be no judicial oversight to ensure she receives equal and just treatment in her workplace. In *Agri Processor Co. v. N.L.R.B,* he voted to deny workers representation at the bargaining table because he deems undocumented workers a "taint" on union elections.

The threat to representation continues from our workplaces into our very electoral process. Kavanaugh's approval of voter ID laws in *South Carolina v. United States* and voter roll purges denies too many the right to participate in our democracy. Obtaining proper voter identification comes with a price tag—with direct costs ranging from $14.50 to $58.50, according to a GAO report. This effectively allows voter ID laws to serve as modern-day poll taxes. Voter ID laws also create opportunities for voter intimidation at the polls because, as the 2015 U.S. Transgender Survey found, about 68 percent of respondents did not

have any identification that reflects both their preferred name and gender. While transgender voters maintain the right to vote even if the gender marker on their identification is incorrect, it requires transgender voters to justify their identity in order to obtain a ballot.

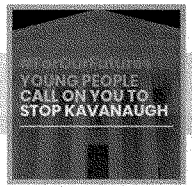
Our right to vote is tied to the Supreme Court, and in 2013 when the Supreme Court failed us in its ruling of *Shelby County v. Holder*, people of color and students suffered. North Carolina jumped at the opportunity to remove voters from its rolls and as a result 56 Black student voters from historically Black university Elizabeth City State University, were removed. With Kavanaugh on the bench, this will be but one example of students and people of color being stripped of their right to vote.

While it is critical we protect and expand the right to decide who represents us, we also know that we do not need representatives to tell us how we care for our bodies and health. In referring to birth control as "abortion-inducing drugs," Kavanaugh proved that his ignorance of reproductive health and scientific fact is a threat to our reproductive lives. While we should not have to justify our use of birth control, birth control is healthcare and paramount to our ability to live our lives fully. It is healthcare for survivors of sexual violence who should never have to worry about carrying their rapist's baby. It is healthcare for those who suffer from endometriosis, which can lead to menstrual cramps that doctors consider more painful than a heart attack. It is healthcare for individuals who rely on birth control to treat their epilepsy.

Make no mistake, just as birth control is critical healthcare, abortion access is also essential for many young women and nonbinary people. Seven out of ten Americans believe in abortion access, and one in four women will obtain one in her lifetime. These numbers matter. They represent people and experiences and stories and lives that deserve dignity and humanity, not barriers and restrictions. If *Roe v. Wade* is dismantled, 20 states are poised to ban or severely restrict access to abortion.

Kavanaugh may say that he considers Roe settled law, but his past communications and record makes it clear that he will not hesitate to further restrict and police our bodies. In *Garza v. Hargan* in 2017, Kavanaugh used his power to block an undocumented immigrant minor from receiving an abortion. If abortion is increasingly restricted, we know low-income women will struggle to cross state lines and overcome cost and other barriers. We also know women of color will face increasing criminalization for daring to take ownership of their own bodies. Women will suffer, go to jail—even die. We cannot allow this to happen. Kavanaugh's record proves that his intent to restrict abortion access is a part of his larger agenda to control the bodies and decisions of women and patients. Disturbingly, in a 2007 case, *Doe ex rel. Tarlow v. D.C.* Kavanaugh ruled against three women with disabilities who were forced to get abortions. Reproductive freedom and abortion access is about allowing women and patients the basic right of making their own choices. No one deserves to be denied their power and autonomy.

Kavanaugh only believes in "choice" when it comes to school vouchers. He only believes in "choice" as it applies to some white children without disabilities. In most cases, school voucher programs require children with disabilities to waive their rights under the Individuals with Disabilities Education Act,

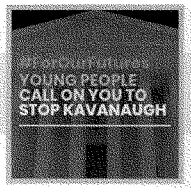


which was created to ensure equal opportunity and accessibility to receive an education. His support of school vouchers will also revert our schools to a time before desegregation, as voucher programs were created for white families hoping to avoid integrating schools. His support of school vouchers, coupled with his opposition to affirmative action will ensure that the opportunities education is supposed to provide will be closed to students of color.

We all deserve a quality education without fear of being defrauded by predatory colleges. With Kavanaugh on the bench, we could very well lose that protection as he works to dissolve the CFPB. We all deserve a quality education and to attend classes as well as movies, concerts, and walking down our streets without fearing for our safety. Yet, Kavanaugh favors protecting automatic weapons over the lives taken from them. We do not want to be afraid, but since Kavanaugh's nomination was announced, young people have been begging for our lives. We have been begging to not have to live under the fear of gun violence. We have been begging to live our lives fully.

We do not want to be afraid, nor do we want to be made sick by the air we breathe and the water we drink. Time and time again, Kavanaugh has ruled in favor of corporations polluting our earth, allowing our quality of life to be sacrificed in favor of the bottom line profit. In the 2014 case, *E.M.E Homer City Generation v. Environmental* Protection Agency, Kavanaugh opined against a federal program that sought to regulate air pollution from crossing state boundaries. His opinion was struck down by the Supreme Court, with both Justice Roberts and Judge Kennedy voting in favor of the pollution regulation, proving that Kavanaugh may be even more hostile to environmental protections than some of his conservative colleagues and predecessors. As we've seen from Flint to Standing Rock, the burdens of environmental degradation are often felt hardest by communities of color, Native communities, and low-income families. Already in Alaska, specifically in the Yup'ik tribal community, water levels are rising to dangerous levels and families are making contingency plans for when they inevitably have to flee their homes. This will not be the only community forced from their land when Kavanaugh limits federal ability to confront climate change. We deserve to live in a country where our government's decisions do not systematically poison us.

After the lack of environmental protections make Americans sick, the lack of affordable healthcare will make us sicker. We know that Kavanaugh is committed to dismantling the Affordable Care Act, particularly eliminating care for those with pre-existing conditions. Seventy-five percent of elderly people have pre-existing conditions, over half of all U.S. adults live with pre-existing conditions, and one in four children would also be harmed by this measure. Low-income families struggling to make ends meet will be slammed with new medical bills. For people with disabilities, the elimination of affordable care would be devastating. Furthermore, if the term "pre-existing conditions" ludicrously includes pregnancy, previous C-sections, and past domestic abuse, countless women will be denied care. Under this definition, Kavanaugh would also reprehensibly classify being transgender as "having a pre-existing condition" in order to routinely and hatefully deny care. The power to live our lives fully depends on access to



healthcare. Overturning the Affordable Care Act gives our decision-makers the ability to assign value to our lives, determining who is allowed to live and thrive, and who is not.

Finally, we must not only show our support for survivors of sexual violence, we must act on it– not just when it is politically convenient. We must take action if and when survivors choose to speak out, if and when they choose to report, and if and when they request care they need and deserve. It is unacceptable for survivors to be retraumatized by the government put in place to protect them. When Anita Hill spoke up during the confirmation hearings of Judge Clarence Thomas to the Supreme Court twenty-seven years ago, members of the Senate Judiciary Committee undermined her testimony and maligned her character and people in this country took note of the dangers of speaking up. A year ago, we watched as this chamber pledged a new era and new promises for survivors. Now, Dr. Christine Blasey Ford is speaking up and we will not sit idly while her story is shared without her consent, while her credibility is challenged, while the very people who promised justice for survivors attempt to silence her. Dr. Blasey Ford deserves better, all survivors deserve better, than to have their rights subject to partisan politics. When the perpetrator in the highest office in our country nominates a perpetrator to the highest court, we must unequivocally and unanimously say "no." Committing sexual violence should be disqualifying from public leadership.

Young people understand just how much is at stake with this nomination. We understand how severe a lifetime appointment with Kavanaugh would be. We are organized, engaged, and paying attention to the political decisions and representatives that dictate our freedoms and impact the trajectory of our lives. Our generation deserves so much more than to watch our hard-earned rights disappear. We deserve leaders who will listen to us when we say: Do not confirm Kavanaugh—our futures are on the line.

Signed:

Advocates for Youth
Alliance for Youth Action
End Rape on Campus
Feminist Campus
Generation Progress
Know Your IX
Million Hoodies
Planned Parenthood Generation Action
Platform
Power Shift Network
Rock the Vote
Young People For Action
Youth In Action
Youth Progressive Action Catalyst

PRESIDENT
NAN ARON

CHAIR
KEN GROSSINGER

September 1, 2018

Dear Senator,

On behalf of Alliance for Justice, a national association representing 130 groups committed to justice and civil rights, I write to oppose the confirmation of Brett Kavanaugh to the United States Supreme Court.

There are many compromising circumstances surrounding this nomination. At present, the President of the United States is an unindicted co-conspirator in a felony, according to a guilty plea by his former attorney. Future legal jeopardy for the President looms, and there are serious concerns that this Supreme Court appointment is made with a view primarily to shielding the President from legal consequences of his actions. Kavanaugh is on record opposing the investigation and/or indictment of sitting presidents.

Moreover, the records review process that has been cobbled together to push this confirmation process forward is both inadequate and highly politicized. Only a fraction of the records relating to Kavanaugh's White House tenure has been requested by the Judiciary Committee Chairman. The omitted records cover a significant period in which Kavanaugh served as staff secretary to President George W. Bush. The records that have been requested cannot be reviewed by the National Archives, the customary process, in time for the artificial deadline created by the Chairman when he insisted on a hearing in the first week of September. Therefore, a substitute review process, headed by a Republican lawyer and close associate of the administration, is under way. The only documents being reviewed and released have been carefully screened by partisan participants in what is now a sham review process. And many of these records are being kept under lock and key, hidden from the American people.

Even if these disturbing events had not taken place, Kavanaugh's record alone provides sufficient grounds to reject his nomination. We have serious concerns about Kavanaugh's record on health care and reproductive rights. There is every reason to believe that if he were confirmed to the Supreme Court, Kavanaugh would vote to take health care away from millions of people. He has certainly met President Trump's litmus test as a nominee who would "automatically" overturn or undermine *Roe v. Wade,* stripping women of a constitutionally protected right. On the D.C. Circuit, he ruled to put obstacles in the way of a young immigrant woman seeking to exercise her right to abortion care.

Kavanaugh has shown himself to be strongly biased toward the wealthy and powerful and big corporations, at the expense of workers and consumers. He has fought consumer protections in the areas of automobile safety, financial services, and a free and open internet. He has repeatedly ruled against workers, workplace protections, and safety regulations. Notably, in *SeaWorld of Fla., LLC, v. Perez*, he ruled in favor of the employer in a case in which an animal

trainer lost her life in a performance with a killer whale. In that case, he went so far as to characterize workplace safety protections as "paternalistic."

With regard to environmental safety, Kavanaugh shows himself to be a friend to polluters, rather than American families; his record reveals hostility toward efforts to combat climate change and the regulation of greenhouse gases. He has repeatedly ruled against protections for clean air.

Our concerns also extend to Kavanaugh's record on civil rights. Sadly, he has ruled to deny employees protection against discrimination, and to uphold a South Carolina voter photo ID law that disproportionately disadvantaged people of color.

Overall, we find that Brett Kavanaugh's record shows an alarming propensity to favor the interests of the one percent, of big business and our society's most privileged, over the rights of all others. It is also a record that is shot through with partisanship, a quality that this administration appears to prize above nearly all others. It is well known that Kavanaugh made a career as a loyal conservative partisan and political operative before joining the D.C. Circuit. On the bench, his rulings suggest that he has never left that political agenda behind.

Our report on Kavanaugh's record is available here. We urge you to read the report; we believe that when you do you will conclude, as we have, that Kavanaugh is unfit for a lifetime seat on the Supreme Court and will oppose his confirmation.

I and my staff stand ready to answer any questions you may have.

Sincerely,

Nan Aron

Eleven Dupont Circle NW, Ste 500 | Washington, DC 20036 | www.afj.org | t: 202-822-6070 | f: 202-822-6068

Field Offices

Oakland, CA | Los Angeles, CA | Dallas, TX

September 4, 2018

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
226 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Diane Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
425 Hart Senate Office Building
Washington, DC 20510

Re: Opposition to the Confirmation of Judge Brett Kavanaugh to the Supreme Court of the United States

Dear Chairman Grassley and Ranking Member Feinstein:

The American Association for Justice (AAJ), the world's largest trial bar, writes to express its opposition to the confirmation of Brett Kavanaugh to the Supreme Court of the United States. AAJ attorneys represent consumers, workers, and patients seeking justice and accountability under the law. Because Judge Kavanagh has dedicated the majority of his professional life to restricting access to the courts for individuals and has instead sided with corporate defendants time and time again, AAJ cannot support his nomination to the highest court in the land. The Senate should reject his nomination.

The Supreme Court is the ultimate interpreter of all laws in the United States and as a result, it is of the utmost importance that any Supreme Court Justice be fair and even handed in the application of those laws. Judge Kavanagh's rulings reveal a concerning trend of favoring the priorities of corporations over the rights of individuals. Moreover, his decisions indicate a willingness to give greater weight to arguments put forward by corporate interests and the executive branch, while giving far less deference to arguments put forward by consumers and workers. Especially at a time when the rights of individuals to access the courts are under excessive attack, AAJ believes that all nominees to the Supreme Court should hold equal the rights of individuals to those of corporations.

Indeed, the courts were always envisioned by the framers to be a place accessible by all, even when seeking to enforce rights against those with vastly more resources and power. The Seventh Amendment of the United States Constitution states: "*In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*" But if Judge Kavanagh's perspective and interpretations of the law become the basis for future Supreme Court rulings, it is likely that only corporations' unfettered access to the courts will be preserved.

It is not only Judge Kavanaugh's deference to corporations that is well documented, but so too is his long history of favoring expansive federal preemption of state law, including state tort law. The doctrine of federal preemption has long been used by powerful corporate interests to avoid complying with state and local laws that are often more protective of workers, consumers, and patients. Rather than protecting the rights of states to create and utilize their own common law, corporations often seek to immunize themselves from accountability through expanding the application of federal preemption. However, when state law is preempted, individuals are left without any way to access justice. While working for the Bush Administration, Judge Kavanaugh was heavily involved in a long-running strategy to wipe out state consumer protection laws via federal preemption.

Further, Judge Kavanaugh supported cutting off the ability of victims to hold corporate defendants fully accountable by limiting victims' rights to seek non-economic and punitive damages. Non-economic damages provide recovery for individuals who suffer a severe loss beyond lost wages and direct medical expenses. Punitive damages are meant to punish a corporation for the worst types of conduct and to discourage the same behavior from occurring in the future. Judge Kavanaugh indicated his disregard for the importance of these types of damages and the important role judges and juries play in determining the appropriate amount of recovery.[1]

Judge Kavanaugh also proposed limiting attorneys' fees in cases so that individuals would be financially disincentivized from pursuing claims against powerful actors. After 9/11, Judge Kavanaugh proposed prohibiting punitive damages, limiting attorneys' fees, and heightening the liability standard. He stated: "*One could rely, for example, on the private insurance system with government backup coverage and essentially preclude lawsuits for injuries arising out of terrorism incidents. Another somewhat less drastic approach is to manage the liability process in such a way that it does not spiral out of control; that can be done by consolidating cases, eliminating punitive and perhaps non-economic damage limiting attorneys' fees, establishing a federal cause of action with a heightened liability standard.*"[2]

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[1] See Brett Kavanaugh email to Philip Perry, No Subject, August 5, 2002, where Kavanaugh suggested the phrase "*reasonable federal limits on non-economic and punitive damages*" to Anne Campbell, White House speechwriter. Also see Brett Kavanaugh email to Courtney Elwood, Subject: "edits/comments welcome!" March 13, 2002, which attached a speech Kavanaugh drafted for then White House Counsel Alberto Gonzales that was to be given before the American Tort Reform Association ("ATRA"). An extract of the speech stated: "*The existing tort regime is often characterized by excessive payouts, lottery-style awards, and an inequitable division of the spoils among claimants and counsel... Escalating lawsuit abuse imposes enormous and varied costs on our economy.*"

[2] Brett Kavanaugh email to Kristen Silverberg, Subject: "terrorism insurance," October 2, 2001.

Judge Kavanagh's history exemplifies a disturbing disregard for the interests and arguments of individuals and a clear preference for the positions of powerful, corporate entities. Workers, consumers, and patients already face a steep, uphill battle to enforce their rights under the law; the American public deserves a Supreme Court nominee who will respect the rights of individuals as much as the rights of corporations. Since so much of Judge Kavanaugh's public record is being withheld from the American people, these examples here represent just a fraction of the totality of his anti-consumer and anti-worker activism. We strongly urge opposition to Judge Kavanaugh's nomination to the Supreme Court of the United States.

Sincerely,

Elise Sanguinetti
President
American Association for Justice

AAPD
American Association of People with Disabilities

September 4, 2018

The Honorable Charles Grassley, Chairman
United States Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
United States Judiciary Committee
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Grassley and Feinstein:

On behalf of the American Association of People with Disabilities (AAPD), we write to express our strong opposition to the nomination of Judge Brett Kavanaugh to the United States Supreme Court. His previous rulings as a DC Circuit Court Judge show that he devalues the lives and liberty of people with disabilities. As a national, cross-disability civil rights organization, our concerns regarding Judge Kavanaugh's nomination center around his previous rulings and statements with regard to health care, self-determination, employment, and education.

The Affordable Care Act (ACA) allowed millions more people with disabilities to gain access to health care by prohibiting discrimination on the basis of a pre-existing condition. Judge Kavanaugh has repeatedly expressed public skepticism of the ACA and has ruled in several cases to undermine elements of the law and hinder its implementation. We should expect more of the same, this time from our nation's highest court, should Judge Kavanaugh's nomination be confirmed. These rulings set a dangerous precedent for the disability community. AAPD will not support a Supreme Court nominee whose actions and record jeopardize disabled individuals' access to health care and, therefore, impact their ability to live, work, and participate in their communities.

The principle of self-determination holds that people with disabilities must have the freedom and authority to exercise control over their own lives. Based on his ruling in *Doe ex rel. Tarlow v. D.C.*, Judge Kavanaugh believes otherwise. The *Doe* plaintiffs were subjected to elective surgeries based on the consent of DC officials; Judge Kavanaugh dismissed the notion that the plaintiffs could express a choice or preference regarding medical treatment on the basis of their intellectual disability. AAPD will not support a Supreme Court nominee who does not affirm the rights and abilities of people with disabilities to determine the course of their own lives.

Regarding employment discrimination, Judge Kavanaugh has consistently ruled in favor of employers while routinely disregarding the experiences of people with disabilities. He has time and time again, demonstrated undue deference to employers and a narrow understanding of anti-discrimination protections. AAPD will not support a Supreme Court nominee who does not protect the rights of workers with disabilities.

Judge Kavanaugh is also a strong proponent of school voucher programs. Typically, students with disabilities who participate in these programs are forced to waive their rights under the Individuals with Disabilities Education Act (IDEA), including the right to receive a free and appropriate education (FAPE). Given the ongoing threats to a quality education for students with disabilities, AAPD will not support a Supreme Court nominee who is willing to trade away these protections.

We cannot sit idly by as a Judge who devalues the lives of people with disabilities may be appointed to a life-long term on the Supreme Court. One of our partner organizations, the Bazelon Center for Mental Health Law, prepared a thorough review of Judge Kavanaugh's record with regard to the disability community. AAPD has joined hundreds of other disability and civil rights organizations in opposition to this nomination. We urge you to oppose the confirmation of Judge Brett Kavanaugh to the Supreme Court of the United States.

Sincerely,

American Association of People with Disabilities

CC:

Senator Orrin G. Hatch
Senator Lindsey Graham
Senator John Cornyn
Senator Michael S. Lee
Senator Ted Cruz
Senator Ben Sasse
Senator Jeff Flake
Senator Mike Crapo
Senator Thom Tillis
Senator John Kennedy
Senator Patrick Leahy
Senator Dick Durbin
Senator Sheldon Whitehouse
Senator Amy Klobuchar
Senator Christopher A. Coons
Senator Richard Blumenthal
Senator Mazie Hirono
Senator Cory Booker
Senator Kamala Harris

Attachments:

Review of Disability-Related Cases Involving Judge Brett Kavanaugh – Bazelon Center for Mental Health Law

JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW

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=zRImAIbJOt8, 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.

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[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

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[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

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[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]

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[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.

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[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

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[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* deference[51]—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]

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[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.

August 30, 2018

Senator Chuck Grassley
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Senator Diane Feinstein
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the more than 170,000 bipartisan members and supporters of the American Association of University Women (AAUW), I urge you to oppose the confirmation of Judge Brett Kavanaugh to the United States Supreme Court. If confirmed to this lifetime appointment, Judge Kavanaugh will have a say in the health, education, and economic security of women and girls for decades to come. After careful review of Judge Kavanaugh's available record, including his record on the U.S. Court of Appeals for the D.C. Circuit, as well as his known speeches and writings over his legal career, I am concerned that he will do grave harm by undermining positions central to AAUW's mission, including upending employment and labor rights, curtailing reproductive rights and access to health care, entangling public education and religion, and restricting voting rights.

AAUW believes that, as with all nominations, a full and fair vetting process is vital to determine the nominee's qualifications and temperament. AAUW is looking for an independent, fair-minded jurist who will uphold the protections that are critical to the equity of women and girls. We support Supreme Court justices who are committed to upholding our hard-fought constitutional and fundamental rights that ensure equality for women in all the spheres of their lives. While we continue to urge Senators to demand full disclosure of Judge Kavanaugh's record and to inquire about these issues during his confirmation hearing, his existing record makes clear his hostility to AAUW's policy priorities.

AAUW opposes Judge Kavanaugh's confirmation to the Supreme Court for the following reasons:

Judge Kavanaugh has consistently failed to ensure that workers who have faced discrimination are protected. Judge Kavanaugh has showed little support for workers' rights, including low wage workers, workers of color, and immigrant workers, dismissing claims that a majority of his D.C. Circuit colleagues found to be meritorious. AAUW advocates for "pay equity and fairness in compensation and benefits [and] equitable access and advancement in employment, including vigorous enforcement of employment anti-discrimination statutes,"[1] positions to which Judge Kavanaugh has not demonstrated a commitment. His positions in several D.C. Circuit opinions illustrate these points. In *Howard v. Office of the Chief Administrative Officer of the U.S. House of Representatives,* Judge Kavanaugh authored a dissent arguing that an African American women fired from her position could not pursue her claims of racial discrimination and retaliation in federal court under the Congressional Accountability Act (CAA).[2] His argument would have limited workers in Congressional offices and throughout the legislative branch from pursuing most CAA claims in federal court, including sexual harassment, discrimination, and retaliation claims.

Similarly, in *Rattigan v. Holder*, the majority ruled that an African American FBI agent could pursue a case of retaliation for filing a discrimination claim, where the agency began a security investigation against him, if he

could show the agency employees acted with a retaliatory or discriminatory motive in reporting information they knew to be false.[3] Judge Kavanaugh disagreed with the majority and wanted to see the entire suit dismissed,[4] despite his colleagues' warning that this was not required by precedent and that the courts should preserve "to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation."[5]

Again, in *Miller v. Clinton*, the majority held that the State Department was not exempt from and had violated the Age Discrimination in Employment Act (ADEA) when it imposed a mandatory retirement age and fired an employee that turned 65.[6] Judge Kavanaugh sided against workers, arguing to permit age discrimination in the form of a mandatory retirement age,[7] something his colleagues in the majority pointed out could reach beyond age discrimination to limit other civil rights protections.[8] Finally, in his dissent in *Agri Processor Co., Inc. v. NLRB*, Judge Kavanaugh also demonstrated a willingness to interpret the law to side with employers and to limit the rights of unions and immigrant workers, by saying that undocumented workers were not covered by the National Labor Relations Act. [9] In this case, workers at Agri Processor decided to join a union, but their employer argued that the union vote did not count because of the immigration status of some workers. Judge Kavanaugh agreed. The majority opinion pointed out that Judge Kavanaugh's dissent both ignored the plain language of the law, as well as misread Supreme Court precedent regarding the protection of these workers.[10]

Judge Kavanaugh has demonstrated hostility to reproductive freedom and a lack of commitment to employees' vital health care coverage. AAUW believes that, "to guarantee equality, individual rights, and social justice for a diverse society, [we advocate for] self-determination of one's reproductive health decisions."[11] We take President Donald Trump at his word when he promised to nominate someone to the high court who would overturn *Roe v. Wade*. Judge Kavanaugh has shown hostility to women's reproductive freedom and we should expect, based on his record, that he would be willing to severely weaken or overturn women's right to access abortion. In *Garza v. Hargan*, as part of a three-judge panel, Judge Kavanaugh ruled to delay an abortion of a 17-year-old undocumented, young woman in government custody, holding this did not unduly burden her right to an abortion.[12] Four days later the full D.C. Circuit reheard the case and ruled that the young woman was entitled to exercise her right to choose without delay.[13] Judge Kavanaugh dissented from that second decision, adopting troubling language in his opinion, signaling his lack of support for this constitutional right.[14]

In addition, Kavanaugh has not shown support for contraceptive healthcare coverage, arguing in his dissent in the denial for an *en banc* review in *Priests for Life v. U.S. Department of Health and Human Services*, that the mere submission of a form opting out of ACA's birth control benefit (so that coverage may be guaranteed to employees elsewhere) burdens the religious beliefs and free exercise of religion of certain employers.[15] This raises significant concerns about Judge Kavanaugh's willingness to allow religious claims to be used as a basis to deny care to others.

Judge Kavanaugh has criticized the Affordable Care Act (ACA), making clear that he is not committed to protecting access to health care for women and those with preexisting conditions. AAUW supports, "increased access to quality, affordable health care and family planning services, including expansion of patients' rights."[16] The ACA has made a significant impact on women's health. Coverage of women's reproductive health services and preventive care is required. Fewer women of reproductive age are uninsured.[17] And, the millions of women and girls with preexisting conditions do not have to fear that they will be denied health insurance, as they had in the past.[18] Judge Kavanaugh has expressed opposition to upholding the ACA.

Seven-Sky v. Holder upheld the ACA's individual mandate as within Congress' authority under the Commerce Clause.[19] While in his dissent, Judge Kavanaugh did not take a position on the constitutionality of the ACA and instead argued that the court lacked jurisdiction to hear the case, he did outline the problems he saw with the individual mandate and asserted that the President "might not enforce the individual

mandate provision if the President concludes that enforcing it would be unconstitutional."[20] In a footnote, Judge Kavanaugh asserted "[u]nder the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional."[21]

Judge Kavanaugh has entangled church and state in public education. While in private practice, Kavanaugh argued for the permissibility of public school prayer and against long-standing precedent prohibiting the use of public funds for religious activities. For example, in *Santa Fe Independent School District v. Doe,*[22] Kavanaugh authored an amicus brief[23] arguing that student-led prayers at public high school football games did not violate the First Amendment. The Supreme Court soundly rejected this argument ruling that the school district's permitting student-led prayers using a public address system at football games violated the Establishment Clause of the First Amendment. AAUW believes in the separation of church and state and advocates for equal access to education.[24]

Judge Kavanaugh has undermined the fundamental right to vote. To guarantee equality, individual rights, and social justice for a diverse society, AAUW advocates for the expansion of voting rights.[25] In *South Carolina v. United States,*[26] Judge Kavanaugh authored the majority opinion that upheld the state's restrictive and discriminatory government photo ID law, objected to by the Department of Justice because of racial disparities in voting caused by the law's requirement. The Justice Department objected to the proposal, explaining that thousands of voters of color did not have the form of ID the new law would have required. South Carolina then made modest changes to the law and went to federal court in DC to seek approval of the new requirements. Judge Kavanaugh wrote the opinion for the three-judge court that approved the voter ID law, despite the Department of Justice's continued arguments that the law harmed voters of color. In a separate and notable concurrence, one of the other judges praised the vital role of the Voting Rights Act in deterring discriminatory voting changes[27] -- a point absent from Judge Kavanaugh's opinion. Judge Kavanaugh's opinion signals that he might continue this Supreme Court's rollbacks of the Voting Rights Act – a law which has protected the voting rights of millions of voters of color for decades.

Conclusion

The Supreme Court plays a critical role in our nation's system of checks and balances. It is the final arbiter when it comes to many of the most important legal challenges our country faces. Now more than ever we need a Supreme Court justice who will be an independent voice and will understand that the law has real impact on real people.

What we know so far about Judge Kavanaugh makes it clear that he is the wrong choice for women and girls. I urge you to oppose the confirmation of Judge Brett Kavanaugh to the United States Supreme Court. Votes associated with this nominee may be scored in the AAUW Action Fund *Congressional Voting Record for the 115th Congress.* Please do not hesitate to contact me at 202/785-7720 or Anne Hedgepeth, director of federal policy, at 202/785-7724, if you have any questions.

Sincerely,

Deborah J. Vagins
Senior Vice President, Public Policy and Research

cc: Members of the Senate Judiciary Committee

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[1] AAUW. (2017). *AAUW Public Policy Priorities.* www.aauw.org/resource/principles-and-priorities.
[2] 720 F.3d 939, 953-57 (D.C. Cir. 2013) (Kavanaugh, J., dissenting).

[3] 689 F.3d. 764 (D.C. Cir. 2012)
[4] *Id.* at 773-76 (Kavanaugh, J., dissenting).
[5] *Id.* at 770 (internal cites omitted).
[6] 687 F.3d 1332 (D.C. Cir. 2012).
[7] *Id.* at 1353-61 (Kavanaugh, J., dissenting)
[8] *Id.* at 1351-52
[9] 514 F.3d 1, 10-15 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).
[10] *Id.* at 6-7.
[11] AAUW. (2017). *AAUW Public Policy Priorities.* www.aauw.org/resource/principles-and-priorities.
[12] No. 17-5236, 2017 WL 9854552 (D.C. Cir. Oct 20, 2017).
[13] 874 F.3d 735 (D.C. Cir. 2017).
[14] *Id.* at 752 (Kavanaugh, J., dissenting).
[15] 808 F.3d 1, 14-26 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).
[16] AAUW. (2017). AAUW *Public Policy Priorities.* www.aauw.org/resource/principles-and-priorities.
[17] *Dramatic Gains in Insurance Coverage for Women of Reproductive Age are Now in Jeopardy*, www.guttmacher.org/article/2018/01/dramatic-gains-insurance-coverage-women-reproductive-age-are-now-jeopardy (Jan. 17, 2018).
[18] *Moving Backward: Efforts to Undo Pre-Existing condition Protections Put Millions of Women and Girls at Risk*, www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf (Jun. 2018).
[19] 661 F.3d 1 (D.C. Cir. 2011) (abrogated on other grounds by *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)).
[20] *Id.* at 50 (Kavanaugh, J., dissenting).
[21] *Id.* at n.43 (Kavanaugh, J., dissenting).
[22] 530 U.S. 290 (2000).
[23] Brief of Amici Curiae Congressman Steven Largent et al. in Support of Petitioner, No. 99-62, 1999 WL 1272963 (1999).
[24] AAUW. (2017). *AAUW Public Policy Priorities.* www.aauw.org/resource/principles-and-priorities.
[25] AAUW. (2017). *AAUW Public Policy Priorities.* www.aauw.org/resource/principles-and-priorities.
[26] 898 F.Supp.2d 30 (D.D.C. 2012).
[27] *Id.* at 53-4 (Bates, J., concurring).

September 17, 2018

Dear Senator,

On behalf of the more than 170,000 bipartisan members and supporters of the American Association of University Women (AAUW), I urge you to oppose the confirmation of Judge Brett Kavanaugh to the United States Supreme Court. If confirmed to this lifetime appointment, Judge Kavanaugh will have a say in the health, education, and economic security of women and girls for decades to come. After careful review of Judge Kavanaugh's available record, including his record on the U.S. Court of Appeals for the D.C. Circuit, his known speeches and writings over his legal career, and his responses to questions during his Senate Judiciary Committee hearing, I am concerned that he will do grave harm by undermining positions central to AAUW's mission, including upending employment and labor rights, curtailing reproductive rights and access to health care, entangling public education and religion, and restricting voting rights.

AAUW believes that, as with all nominations, a full and fair vetting process is vital to determine the nominee's qualifications and temperament. AAUW is looking for an independent, fair-minded jurist who will uphold the protections that are critical to the equity of women and girls. We support Supreme Court justices who are committed to upholding our hard-fought constitutional and fundamental rights that ensure equality for women in all the spheres of their lives.

Given recent credible allegations of sexual assault against Judge Kavanaugh, the Senate must allow time for his fitness to sit on the Court to be fairly and comprehensively investigated in a nonpartisan manner. To ensure that can happen, the Senate must delay any votes on his confirmation.

While we urge Senators to support a delay in the confirmation process to fully investigate Judge Kavanaugh's fitness for the Supreme Court and to ensure all Senators have access to his full record, his existing record makes clear his hostility to AAUW's policy priorities. If the vote were to proceed despite these significant process concerns, AAUW must oppose Judge Kavanaugh's confirmation to the Supreme Court for the following substantive reasons:

Judge Kavanaugh has consistently failed to ensure that workers who have faced discrimination are protected. Judge Kavanaugh has shown little support for workers' rights, including low wage workers, workers of color, and immigrant workers, dismissing claims that a majority of his D.C. Circuit colleagues found to be meritorious. AAUW advocates for "pay equity and fairness in compensation and benefits [and] equitable access and advancement in employment, including vigorous enforcement of employment anti-discrimination statutes,"[1] positions to which Judge Kavanaugh has not demonstrated a commitment. His positions in several D.C. Circuit opinions illustrate these points. In *Howard v. Office of the Chief Administrative Officer of the U.S. House of Representatives,* Judge Kavanaugh authored a dissent arguing that an African American women fired from her position could not pursue her claims of racial discrimination and retaliation in federal court under the Congressional Accountability Act (CAA).[2] His argument would have limited workers in Congressional offices and throughout the legislative branch from pursuing most CAA claims in federal court, including sexual harassment, discrimination, and retaliation claims.

Similarly, in *Rattigan v. Holder*, the majority ruled that an African American FBI agent could pursue a case of retaliation for filing a discrimination claim, where the agency began a security investigation against

him, if he could show the agency employees acted with a retaliatory or discriminatory motive in reporting information they knew to be false.[3] Judge Kavanaugh disagreed with the majority and wanted to see the entire suit dismissed,[4] despite his colleagues' warning that this was not required by precedent and that the courts should preserve "to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation."[5]

Again, in *Miller v. Clinton*, the majority held that the State Department was not exempt from and had violated the Age Discrimination in Employment Act (ADEA) when it imposed a mandatory retirement age and fired an employee that turned 65.[6] Judge Kavanaugh sided against workers, arguing to permit age discrimination in the form of a mandatory retirement age,[7] something his colleagues in the majority pointed out could reach beyond age discrimination to limit other civil rights protections.[8] Finally, in his dissent in *Agri Processor Co., Inc. v. NLRB*, Judge Kavanaugh also demonstrated a willingness to interpret the law to side with employers and to limit the rights of unions and immigrant workers, by saying that undocumented workers were not covered by the National Labor Relations Act. [9] In this case, workers at Agri Processor decided to join a union, but their employer argued that the union vote did not count because of the immigration status of some workers. Judge Kavanaugh agreed. The majority opinion pointed out that Judge Kavanaugh's dissent both ignored the plain language of the law, as well as misread Supreme Court precedent regarding the protection of these workers.[10]

Judge Kavanaugh has demonstrated hostility to reproductive freedom and a lack of commitment to employees' vital health care coverage. AAUW believes that "to guarantee equality, individual rights, and social justice for a diverse society, [we advocate for] self-determination of one's reproductive health decisions."[11] We take President Donald Trump at his word when he promised to nominate someone to the high court who would overturn *Roe v. Wade*. Judge Kavanaugh has shown hostility to women's reproductive freedom and we should expect, based on his record, that he would be willing to severely weaken or overturn women's right to access abortion. In *Garza v. Hargan*, as part of a three-judge panel, Judge Kavanaugh ruled to delay an abortion of a 17-year-old undocumented, young woman in government custody, holding this did not unduly burden her right to an abortion.[12] Four days later the full D.C. Circuit reheard the case and ruled that the young woman was entitled to exercise her right to choose without delay.[13] Judge Kavanaugh dissented from that second decision, adopting troubling language in his opinion, signaling his lack of support for this constitutional right.[14]

In addition, Kavanaugh has not shown support for contraceptive health care coverage, arguing in his dissent in the denial for an *en banc* review in *Priests for Life v. U.S. Department of Health and Human Services,* that the mere submission of a form opting out of ACA's birth control benefit (so that coverage may be guaranteed to employees elsewhere) burdens the religious beliefs and free exercise of religion of certain employers.[15] This raises significant concerns about Judge Kavanaugh's willingness to allow religious claims to be used as a basis to deny care to others.

Judge Kavanaugh has criticized the Affordable Care Act (ACA), making clear that he is not committed to protecting access to health care for women and those with preexisting conditions. AAUW supports, "increased access to quality, affordable health care and family planning services, including expansion of patients' rights."[16] The ACA has made a significant impact on women's health. Coverage of women's reproductive health services and preventive care is required. Fewer women of reproductive age are uninsured.[17] And, the millions of women and girls with preexisting conditions do not have to fear that they will be denied health insurance, as they had in the past.[18] Judge Kavanaugh has expressed opposition to upholding the ACA.

Seven-Sky v. Holder upheld the ACA's individual mandate as within Congress' authority under the Commerce Clause.[19] While in his dissent, Judge Kavanaugh did not take a position on the constitutionality of the ACA and instead argued that the court lacked jurisdiction to hear the case, he did outline the problems he saw with the individual mandate and asserted that the President "might not enforce the

individual mandate provision if the President concludes that enforcing it would be unconstitutional."[20] In a footnote, Judge Kavanaugh asserted "[u]nder the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional."[21]

Judge Kavanaugh has entangled church and state in public education. While in private practice, Kavanaugh argued for the permissibility of public school prayer and against long-standing precedent prohibiting the use of public funds for religious activities. For example, in *Santa Fe Independent School District v. Doe,*[22] Kavanaugh authored an amicus brief[23] arguing that student-led prayers at public high school football games did not violate the First Amendment. The Supreme Court soundly rejected this argument ruling that the school district's permitting student-led prayers using a public address system at football games violated the Establishment Clause of the First Amendment. AAUW believes in the separation of church and state and advocates for equal access to education.[24]

Judge Kavanaugh has undermined the fundamental right to vote. To guarantee equality, individual rights, and social justice for a diverse society, AAUW advocates for the expansion of voting rights.[25] In *South Carolina v. United States,*[26] Judge Kavanaugh authored the majority opinion that upheld the state's restrictive and discriminatory government photo ID law, objected to by the Department of Justice because of racial disparities in voting caused by the law's requirement. The Justice Department objected to the proposal, explaining that thousands of voters of color did not have the form of ID the new law would have required. South Carolina then made modest changes to the law and went to federal court in DC to seek approval of the new requirements. Judge Kavanaugh wrote the opinion for the three-judge court that approved the voter ID law, despite the Department of Justice's continued arguments that the law harmed voters of color. In a separate and notable concurrence, one of the other judges praised the vital role of the Voting Rights Act in deterring discriminatory voting changes—a point absent from Judge Kavanaugh's opinion.[27] Judge Kavanaugh's opinion signals that he might continue this Supreme Court's rollbacks of the Voting Rights Act, the law which has protected the voting rights of millions of voters of color for decades.

Conclusion
The Supreme Court plays a critical role in our nation's system of checks and balances. It is the final arbiter when it comes to many of the most important legal challenges our country faces. Now more than ever we need a Supreme Court justice who will be an independent voice and will understand that the law has real impact on real people.

What we know so far about Judge Kavanaugh makes it clear that he is the wrong choice for women and girls. I urge you to oppose the confirmation of Judge Brett Kavanaugh to the United States Supreme Court. Votes associated with this nominee may be scored in the AAUW Action Fund *Congressional Voting Record for the 115th Congress*. Please do not hesitate to contact me at 202/785-7720 or Anne Hedgepeth, director of federal policy, at 202/785-7724, if you have any questions.

Sincerely,

Deborah J. Vagins
Senior Vice President, Public Policy and Research

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[1] AAUW. (2017). *AAUW Public Policy Priorities.* www.aauw.org/resource/principles-and-priorities.
[2] 720 F.3d 939, 953-57 (D.C. Cir. 2013) (Kavanaugh, J., dissenting).
[3] 689 F.3d. 764 (D.C. Cir. 2012)

[4] *Id.* at 773-76 (Kavanaugh, J., dissenting).
[5] *Id.* at 770 (internal cites omitted).
[6] 687 F.3d 1332 (D.C. Cir. 2012).
[7] *Id.* at 1353-61 (Kavanaugh, J., dissenting)
[8] *Id.* at 1351-52
[9] 514 F.3d 1, 10-15 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).
[10] *Id.* at 6-7.
[11] AAUW. (2017). *AAUW Public Policy Priorities.* www.aauw.org/resource/principles-and-priorities.
[12] No. 17-5236, 2017 WL 9854552 (D.C. Cir. Oct 20, 2017).
[13] 874 F.3d 735 (D.C. Cir. 2017).
[14] *Id.* at 752 (Kavanaugh, J., dissenting).
[15] 808 F.3d 1, 14-26 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).
[16] AAUW. (2017). AAUW *Public Policy Priorities.* www.aauw.org/resource/principles-and-priorities.
[17] *Dramatic Gains in Insurance Coverage for Women of Reproductive Age are Now in Jeopardy,* www.guttmacher.org/article/2018/01/dramatic-gains-insurance-coverage-women-reproductive-age-are-now-jeopardy (Jan. 17, 2018).
[18] *Moving Backward: Efforts to Undo Pre-Existing condition Protections Put Millions of Women and Girls at Risk,* www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf (Jun. 2018).
[19] 661 F.3d 1 (D.C. Cir. 2011) (abrogated on other grounds by *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)).
[20] *Id.* at 50 (Kavanaugh, J., dissenting).
[21] *Id.* at n.43 (Kavanaugh, J., dissenting).
[22] 530 U.S. 290 (2000).
[23] Brief of Amici Curiae Congressman Steven Largent et al. in Support of Petitioner, No. 99-62, 1999 WL 1272963 (1999).
[24] AAUW. (2017). *AAUW Public Policy Priorities.* www.aauw.org/resource/principles-and-priorities.
[25] AAUW. (2017). *AAUW Public Policy Priorities.* www.aauw.org/resource/principles-and-priorities.
[26] 898 F.Supp.2d 30 (D.D.C. 2012).
[27] *Id.* at 53-4 (Bates, J., concurring).

Defending Liberty
Pursuing Justice

Robert M. Carlson
President

AMERICAN BAR ASSOCIATION

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abapresident@americanbar.org

September 27, 2018

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

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

Dear Chairman Grassley and Ranking Member Feinstein:

The American Bar Association urges the United States Senate Judiciary Committee (and, as appropriate, the full Senate) to conduct a confirmation vote on Judge Kavanaugh's nomination to the Supreme Court of the United States only after an appropriate background check into the allegations made by Professor Ford and others is completed by the Federal Bureau of Investigation.

We make this request because of the ABA's respect for the rule of law and due process under law. The basic principles that underscore the Senate's constitutional duty of advice and consent on federal judicial nominees require nothing less than a careful examination of the accusations and facts by the FBI.

Each appointment to our nation's Highest Court (as with all others) is simply too important to rush to a vote. Deciding to proceed without conducting additional investigation would not only have a lasting impact on the Senate's reputation, but it will also negatively affect the great trust necessary for the American people to have in the Supreme Court. It must remain an institution that will reliably follow the law and not politics.

Respectfully, the Senate should recognize that a thorough FBI investigation will demonstrate its commitment to a Supreme Court that is above reproach.

Thank you for your consideration of this critically important matter.

Sincerely,

Robert M. Carlson

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Salt Lake City, UT 84111

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AMERICAN BAR ASSOCIATION

Standing Committee on
the Federal Judiciary

Please respond to:
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E-mail: pmoxley@cohnekinghorn.com

September 28, 2018

VIA E-MAIL ONLY
The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

VIA E-MAIL ONLY
The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of Brett M. Kavanaugh to be Associate Justice of the Supreme Court of the United States

Dear Chairman Grassley and Ranking Member Feinstein:

The correspondence by Robert Carlson, President of the American Bar Association, of September 27, 2018, was not received by the American Bar Association's Standing Committee on the Federal Judiciary prior to its issuance. The Standing Committee on the Federal Judiciary acts independently of ABA leadership.

The Committee conducts non-partisan, non-ideological, and confidential peer review of federal judicial nominees. The ABA's rating for Judge Kavanaugh is not affected by Mr. Carlson's letter.

Sincerely,

Paul T. Moxley

cc: Mike Davis, Chief Counsel for Nominations, United States Senate Committee on the Judiciary (via e-mail only)
Lola A. Kingo, Chief Nominations Counsel, Office of Legal Policy, U.S. Department of Justice (via e-mail only)
ABA Standing Committee on the Federal Judiciary (via e-mail only)
Denise A. Cardman, ABA Standing Committee on the Federal Judiciary, Staff Counsel (via e-mail only)

ACLJ
American Center
for Law & Justice

August 31, 2018

The Honorable Chuck Grassley
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building, Washington, D.C. 20150

The Honorable Dianne Feinstein
Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building, Washington, D.C. 20150

Re: Nomination of Brett Kavanaugh to the United States Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein:

By way of introduction, the American Center for Law & Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties as secured by law. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in a number of significant cases involving the freedoms of speech and religion. The ACLJ and its international affiliates are committed to defending human rights and religious liberty around the world.

We write today for the purpose of sharing our petition to confirm Judge Brett Kavanaugh to serve as an Associate Justice of the Supreme Court of the United States. This petition has been circulated among our members and has been signed by more than 105,000 people. We believe that Judge Kavanaugh is supremely qualified by every standard to serve on our nation's highest court.

We are confident the testimony you will hear next week will further affirm the conclusion that he is highly capable to serve on the Supreme Court. We look forward to following the confirmation proceedings and appreciate your careful consideration.

Sincerely,

Jordan Sekulow
Executive Director

201 Maryland Avenue, N.E.
Washington, DC 20002
202-546-8890

October 1, 2018

Re: On the Kavanaugh Nomination: You Must Demand a Full, Independent FBI Investigation, and Also Demand Your Right as a Senator to Read the Full, Unredacted FBI Report

Dear Senator:

As the Senate and the entire country start a new week of considering the nomination of Brett Kavanaugh to the Supreme Court and the grave allegations of sexual abuse made against him, the American Civil Liberties Union strongly urges you to take the following two steps this week:

1) demand that the Federal Bureau of Investigation be able to follow the facts and law wherever they may lead, without political interference; and
2) demand your right as a senator to read the full, unredacted FBI report--and then actually read the FBI report and the committee hearing record on Judge Kavanaugh before voting.

AMERICAN CIVIL LIBERTIES UNION

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Susan Herman
President

Anthony Romero
Executive Director

Faiz Shakir
National Political Director

Both of these steps are necessary for senators to fulfill the constitutional obligation to provide "advice and consent" on this nomination for a lifetime position as an Associate Justice on the Supreme Court.

On Friday, the National Board of the ACLU took the extraordinary step of opposing the confirmation of Judge Kavanaugh, stating:

The ACLU opposes the confirmation of Judge Brett Kavanaugh to the Supreme Court. There are credible allegations that Judge Kavanaugh has engaged in serious misconduct that have not been adequately investigated by the Senate. Dr. Christine Blasey Ford's credible testimony, subsequent allegations of sexual misconduct, the inadequate investigation, and Judge Kavanaugh's testimony at the hearing lead us to doubt Judge Kavanaugh's fitness to serve as an Associate Justice of the Supreme Court.

This is not a decision taken lightly. We cannot remain silent under these extraordinary circumstances about a lifetime appointment to the highest court of the land. The standard for such an appointment should be high, and the burden is on the nominee. That burden is not met as long as there are unresolved questions regarding the credible allegations of sexual assault.

After Dr. Ford's courageous and credible testimony inspired survivors of sexual assault across the country to share their own experiences with senators and Senate staff, the Senate Judiciary Committee, at the urging of Senator Jeff Flake, paused the proceedings for a week to provide the FBI with time to investigate the multiple allegations against Judge Kavanaugh.

To be clear, to date, Judge Kavanaugh has failed to meet his burden of showing that he has met the high standard of demonstrating fitness to serve on the Supreme Court. The ACLU has argued in front of the Supreme Court more than any other private organization over our nearly 100-year history—and we do not take this position lightly. After hearing from both Judge Kavanaugh and Dr. Ford, it is strikingly clear that Judge Kavanaugh is not someone who can sit on the highest court for life and make decisions about civil rights and civil liberties for generations to come.

You Must Demand a Full FBI Investigation With No Political Interference

The ACLU strongly urges you to demand that the FBI be able to conduct its investigation, and write its report, without political interference. The FBI must be able to investigate the significant allegations of sexual misconduct, including the alleged attempted rape of Dr. Ford, and follow the facts and law wherever they may lead. Multiple media outlets reported over the weekend about strict limitations being placed on the scope and breadth of the FBI investigation, with the limitations being imposed by the White House, perhaps in collaboration with the majority staff of the Senate Judiciary Committee.

White House or Judiciary Committee political interference in the FBI investigation, including by sharply circumscribing the scope of the investigation or by requiring White House piecemeal approval of each interview or other investigatory activity, will hobble the FBI investigation and undermine the confidence of all Americans in the integrity of the confirmation process---and ultimately undermine the confidence of all Americans in the integrity of the Supreme Court and the judicial branch.

We strongly urge you to make a public statement of support for a full FBI investigation, in which the FBI can comply with the law and its own guidelines in following up with allegations and leads, rather than be constrained by the White House and the Judiciary Committee. We also urge you to make clear to the White House and the leadership of the Judiciary Committee that a report that is the result of political interference will have little to no value, and will further erode confidence in all three constitutional branches of government.

You Cannot Meet Your Constitutional Duty Unless You Demand Your Right as a Senator to Read the Full, Unredacted FBI Report—and Then Read It

You and all 100 senators must assert your right and constitutional duty to have access to the full, unredacted FBI report.

After an entire confirmation process built around hiding Judge Kavanaugh's record not only from the American public, but also from you and your colleagues in the Senate, we fully expect that the White House and some members of the Judiciary Committee will try to block senators from being able to read the full, unredacted FBI report. There is no reason that you or any other senator should accept reading anything less than the full, unredacted FBI report. The stakes are too high for the nation, and the allegations far too serious, for you or any other senator to accept anything other than the right to read the full, unredacted report yourself.

The Appointments Clause of the Constitution, in Article II, Section 2, Clause 2, provides for the "Advice and Consent of the Senate" for "Judges of the Supreme Court." In our constitutional system of checks and balances, this power of "advice and consent" by the Senate is a core check by the Legislative Branch on the other two branches of government.

No senator can meet his or her constitutional obligation of "advice and consent" on the nomination of Judge Kavanaugh without reading every word of both the full, unredacted FBI report at the end of this week, as well as the full hearing record. The ACLU strongly urges you to set aside the time to read both documents, and to be ready to determine whether Judge Kavanaugh met his burden of proving himself fit to serve on the Supreme Court.

After reading these two documents, you must decide whether Judge Kavanaugh has met his burden of demonstrating that he is fit to serve as an Associate Justice on the Supreme Court. To be clear, the burden is high—and the burden belongs to the nominee, not to Dr. Ford or anyone else alleging abuse or other misconduct.

You must not accept any substitute for reading the full FBI report yourself. Specifically, you must not accept a summary of the full FBI report, even if the summary is provided by the FBI itself, and you certainly should not accept reading a redacted report. While there may be a need, consistent with the Privacy Act, for limited redactions before an FBI report is made available to the American public, you as a United States Senator should not accept reading anything other than the full, unredacted FBI report when it is complete. The allegations against Judge Kavanaugh, including alleged attempted rape, are far too serious for you to rely on anyone else's characterization of the results of an investigation.

Thank you for your attention to this matter, and please do not hesitate to call us if you have any questions regarding this issue.

Sincerely,

Faiz Shakir
National Political Director
National Political Advocacy Department

Christopher Anders
Deputy Director
Washington Legislative Office

AFL-CIO

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September 10, 2018

Dear Senator:

I am writing on behalf of the AFL-CIO to express our strong opposition to the confirmation of Judge Brett Kavanaugh to the United States Supreme Court. Make no mistake about it: Judge Kavanaugh's confirmation to our high court will have disastrous consequences for the rights and well-being of working Americans for decades to come.

Our current Supreme Court is one of the most pro-business in decades, siding with the privileged and powerful over working people whenever given the chance. For the 2017-2018 Court term, the corporate community had a stunning 90 percent victory rate, its best record in six years. Working Americans thus deserve a nominee with a balanced record—and Judge Kavanaugh is far from that nominee.

Judge Kavanaugh's twelve-year record on the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) reveals his values, priorities, and vision for our country. The White House has reason to be promoting this nomination to the business community—his record is marked by pro-business rulings, as well as consistent deference to the wealthy and powerful.

Based on his record, he is likely to jeopardize an entire body of worker rights and protections by overturning well-established precedent. In one dissent, he attacked not only the Consumer Financial Protection Bureau specifically, but also all independent federal agencies. He strongly dissented when the D.C. Circuit upheld an Occupational Safety and Health Review Commission's (OSHA) safety citation against SeaWorld following the third death of an animal trainer who had been working with a killer whale; he characterized the government's role in protecting such workers as "paternalistic."

Judge Kavanaugh regularly has overturned agency decisions that promote and protect worker rights. He reversed a National Labor Relations Board (NLRB) decision to allow workers to display pro-union signs in their cars while at work. He reversed other NLRB decisions that would have prohibited an employer from calling the police to issue criminal citations for legal union demonstrations and from discriminating against union members when hiring. He also dissented from a decision that ordered a company to bargain with a union because some of the workers were undocumented.

Judge Kavanaugh demonstrates extraordinary deference to executive governmental authority. In one opinion, he allowed the Department of Defense to eliminate collective bargaining rights. In dissent in another case, he said that the State Department should be exempt from the Age Discrimination in Employment Act; in another case, contrary to the majority, he would have disallowed Congressional employees from pursuing employment discrimination claims. He even suggested in his dissent from a decision upholding the Affordable Care Act (ACA): "Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional."

The public has not been able to learn much about Judge Kavanaugh's work before he joined the D.C. Circuit because so much information has been withheld. Press reports revealed for example, that Brett Kavanaugh sought to limit the compensation victims of the horrific 9/11 terrorists attack could receive from the federal government to $500,000. Other documents just released confirmed that during his 2004 and 2006 D.C. Circuit confirmation hearings Judge Kavanaugh gave less than honest answers about his work at the highest levels of the George W. Bush administration.

Based on what we know of his record, and the evasive and contradictory answers he provided during his confirmation hearing, we are compelled to oppose Judge Kavanaugh's nomination to be an Associate justice of the Supreme Court. Working families deserve a Supreme Court that recognizes and respects our established legal rights. I urge you to oppose Judge Kavanaugh's nomination.

Sincerely,

Richard L. Trumka
President

RLT/WS/aeb

AFSCME
We Make America Happen

August 28, 2018

Lee Saunders
President

Elissa McBride
Secretary-Treasurer

Vice Presidents

Jody Barr
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Chicago, IL

Henry Nicholas
Philadelphia, PA

Debbie Parks
Hamilton, NJ

Randy Perreira
Honolulu, HI

Steven Quick Sr.
Indianapolis, IN

Lawrence A. Roehrig
Lansing, MI

Joseph F. Rugola
Columbus, OH

Alan F. Shanahan
Los Angeles, CA

Paul Spink
Milwaukee, WI

Mary E. Sullivan
Albany, NY

Braulio Torres
San Juan, PR

Anthony Wells
New York, NY

John P. Westmoreland
South St. Paul, MN

e370-18

United States Senate
Washington, D.C. 20510

Dear Senator:

On behalf of the 1.6 million members of the American Federation of State, County and Municipal Employees (AFSCME), I am writing in opposition to the confirmation of Judge Brett Kavanaugh to the Supreme Court. Brett Kavanaugh has a consistent record of favoring the interests of the rich and powerful over average working Americans. His confirmation would move the entire court and the laws of this country in a direction that would further prioritize corporate interests over individual interests, and in our view would exacerbate growing divisions within our nation when there is a critical need instead to promote unity and equality.

Judge Kavanaugh's nomination reflects a disturbing and deeply flawed trend in which nominees are pre-approved by extremely conservative special interest groups who favor judges with firm positions that favor corporate interests over the freedoms, rights and liberties of working families and individuals. A Supreme Court justice should never be selected with promises to overturn specific crucial areas of law. Our founding fathers envisioned a court that will serve independently, even if that requires it to rule against the policy preferences of the President who nominated them.

Justice Neil Gorsuch was nominated from just such a list. He also promised to respect established law and precedent and to be an independent check on the President. Yet in his first term, he cast a deciding political vote to overturn decades of longstanding precedent to rule against working people and unions in *Janus v. AFSCME Council 31*. If Judge Kavanaugh is confirmed, we expect more of the same.

As a jurist on the D.C. Circuit Court, Judge Kavanaugh authored opinions undermining worker rights, protections providing relief from discrimination in the workplace, employer-provided healthcare and voting rights. He wrote the majority opinion in *AFGE v. Gates*, reversing the lower court's partial blocking of Department of Defense regulations, which it found to "entirely eviscerate collective bargaining rights." In *Sea World of Fla, LLC v. Perez*, he also sided with an employer whose negligence resulted in an employee's violent death, dismissing the role of the Occupational Safety and Health Administration (OSHA) as "paternalistic." He also ruled in *Miller v. Clinton* that the State Department could fire an employee working overseas simply for turning 65 years old, despite a clear violation of the Age Discrimination in Employment Act.

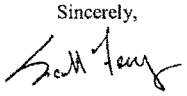
Kavanaugh has also been critical of provisions and protections in the Affordable Care Act (ACA). He dissented in *Seven-Sky v. Holder*, signaling a view in

his dissent that the ACA, which provides essential protections for millions of individuals with pre-existing conditions, is not constitutional. His critiques of equal access include a problematic record on voting rights. He authored an opinion upholding a South Carolina voter ID law which was intended to block access and reduce turnout in elections of people of color.

Despite assurances he respects established law, there is no doubt his decisions and public remarks expose a willingness to overturn well-established U.S. Supreme Court precedent. There should also be no ambiguity that his interpretation of the Constitution gives the President immense and unchecked powers. We know he expressed support to reverse the opinion in *Chevron USA, Inc. v. NRDC, Inc.* which held that unelected judges must defer to executive agencies' construction of a statute when Congress has given an agency primary responsibility for interpreting its mandates, including executive agencies such as Equal Employment Opportunity Commission, the Occupational Safety and Health Commission, and the National Labor Relations Board. Overturning *Chevron*, like *Janus*, would be devastating to workers, their basic rights and their health and safety on the job.

All Americans, especially at this particular time in history, should be alarmed by the nomination of Brett Kavanaugh. Americans demand and deserve an independent and impartial arbiter of the facts and the law. Supreme Court justices' decisions impact the fundamental rights and freedoms of all Americans. Yet, Judge Kavanaugh's views seem detached from the day to day struggles of working men and women. We urge you to oppose his nomination.

Sincerely,



Scott Frey
Director of Federal Government Affairs

SF:KLS:mc

ALEC ACTION

Open Letter to the Senate:

Confirm Judge Brett Kavanaugh

Dear Senators,

We the undersigned legislators, in partnership with the American Legislative Exchange Council, the largest voluntary membership organization of state legislators who support limited government, free markets and federalism, urge the swift confirmation of Brett Kavanaugh to the Supreme Court of the United States. State legislators dedicated to small government and freedom believe Judge Kavanaugh is the single most qualified person in the country to serve on the Supreme Court.

Judge Kavanaugh has a proven track record of strict constitutionalism. He applies the law as written. He is a judge who will enforce the text, structure and original understanding of the Constitution. Judge Kavanaugh believes "the judge's job is to interpret the law, not to make the law or make policy." Rather, he reads statutes as written—mindful of history and tradition.

In a time of political division, Judge Kavanaugh is a consensus builder who works with all stakeholders to assess cases based on the law rather than personal preference. Consensus building—grounded in America's founding principles—is a hallmark of ALEC Action and of constitutionally-minded state legislators in states across the nation.

Judge Kavanaugh's skilled consensus building has been recognized by Democrats and Republicans alike. Not only was Judge Kavanaugh confirmed to the Washington, D.C. Circuit Court with bipartisan support, his 100 most cited cases have been cited by more than 200 judges in states across the nation, and more than 50 circuit court opinions discuss or cite his opinions. Judges believe Judge Kavanaugh's interpretation of the law is both sound and just.

Judge Kavanaugh's dedication to public service is rooted in his patriotism, community spirit, training and education. After graduating with honors from Yale College in 1987, Judge Kavanaugh graduated from Yale Law School in 1990, where he was a Notes Editor on the Yale Law Journal. He clerked for Justice Anthony Kennedy of the Supreme Court, Ninth Circuit Judge Alex Kozinski, and Third Circuit Judge Walter Stapleton.

Citizen legislators in the states believe in and support leaders and decision-makers who devote their lives to public service as they have also done. State legislators give of themselves daily to bolster and support their fellow citizens and create the opportunity for a better life for all. Judge Kavanaugh's commitment to his community, to mentorship and statesmanship, is unrivaled among American jurists. There is no attribute of Judge Kavanaugh's character, intellect or life of public service that should preclude his immediate installment to the Supreme Court of the United States.

Open Letter to the Senate:

Confirm Judge Brett Kavanaugh

Alabama
Senator Cam Ward
Representative David Faulkner
Representative Mike Holmes
Representative Nathaniel Ledbetter
Representative Phillip Pettus

Alaska
Senator John Coghill
Senator Cathy Giessel
Senator Shelley Hughes
Representative Chuck Kopp
Representative Lora Reinbold

Arizona
Senator Nancy Barto
Senator Gail Griffin
Senator John Kavanagh
Representative Noel Campbell
Representative Regina Cobb
Representative Drew John
Representative Anthony Kern
Representative Jay Lawrence
Representative Jill Norgaard
Representative Tony Rivero
Representative David Stringer
Councilman Levi Tappan

Arkansas
Senator Trent Garner
Senator Missy Irvin
Representative Mary Bentley
Representative Jim Dotson
Representative David Meeks
Representative C. Brandt Smith, Jr

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Senator Joel Anderson
Supervisor Kirk Uhler

Colorado
Senate President Kevin Grantham
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Senator Vicki Marble
Senator Jerry Sonnenberg
Senator Jack Tate
Representative Kim Ransom
Representative Lois Landgraf
Representative Lori Saine
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Commissioner Libby Szabo

Delaware
Senator Ruth Briggs King
Representative Rich Collins

Florida
Representative Jason Fischer
Representative Paul Renner
Representative Benjamin Toma

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Representative Josh Bonner
Representative John Corbett
Representative Matt Dollar
Representative Bill Werkheiser
Representative Bruce Williamson
Councilwoman Leslie McPherson

Hawaii
Representative Gene Ward

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Senator Mary Souza
Senator Steve Vick
Representative Vito Barbieri
Representative Judy Boyle
Representative Sage Dixon
Representative Terry Gestrin
Representative Eric Redman
Councilman Bruce Skaug

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Representative Terri Bryant
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Representative David Reis
Representative Dan Swanson
Representative David Weltner

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Senator John Crane
Senator Michael Crider
Senator Blake Doriot
Senator Dennis Kruse
Senator Jean Leising
Senator Jim Tomes
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Representative David Wolkins
Representative Denny Zent
Mayor Tim Neese

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Representative David Sieck
Representative Rob Taylor

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Senator Andre Cushing
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Delegate Susan Krebs

Massachusetts
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Senator Dave Hildenbrand
Senator Rick Jones
Representative Hank Vaupel
Representative Michael Webber

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Senator Jerry Relph
Representative Matt Grossell
Representative Kathy Lohmer
Representative Tim Miller
Representative Roz Peterson
Representative Peggy Scott
Representative Abigail Whelan
Representative Mark Uglem
Representative Nick Zerwas

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Senator Eugene Clarke
Senator Josh Harkins
Senator Chris Massey
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Representative Fred Shanks
Mayor Billy Hewes

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Senator Dan Hegeman
Senator Doug Libla
Senator Brian Munzlinger
Senator Bob Onder
Senator Caleb Rowden
Senator Wayne Wallingford
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Representative Kurt Bahr
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Representative Bruce DeGroot
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Representative Travis Fitzwater
Representative Lyndall Fraker
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Representative Mike Henderson
Representative Justin Hill
Representative Mike Kelley
Representative Donna Lichtenegger
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Senator Cary Smith
Senator Fred Thomas
Senator Roger Webb
Representative Fred Anderson
Representative Jim Hansen
Representative Barry Usher
Representative Peggy Webb

Nebraska
Senator Lou Ann Linehan

Nevada
Senator Don Gustavson
House Minority Leader Jim Wheeler
Assemblywoman Lisa Krasner

New Hampshire
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Representative Gary Daniels
Representative Jody McNally
Representative Kimberly Rice
Representative Jordan Ulery
Representative Michael Vose

(New Jersey)

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Representative Dennis Roch
Representative Yvette Herrell
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New York
Assemblyman Karl Brabenec

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Senator Jay Hottinger
Senator Lou Terhar
Representative Andrew Brenner
Representative Ron Hood
Representative Wes Retherford
Representative Bill Seitz
Representative Andy Thompson

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Senator Gary Stanislawski
Senator Anthony Sykes
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Representative Bill Post
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Senator John Eichelberger
Representative Cris Dush
Representative Brian Ellis
Representative Seth Grove
Representative Kate Klunk
Representative Eric Nelson
Representative Tedd Nesbit
Representative Donna Oberlander
Representative Jeff Pyle
House Majority Chairman Stan Saylor
Councilman Samuel DeMarco, III

Rhode Island
Senator Elaine Morgan
Representative Anthony Giarrusso

South Carolina
Senator Rex Rice
Representative Carl Anderson
Representative John M. McCravy, III
Representative Garry Smith

South Dakota
Senator Jim Stalzer
Representative Lynne DiSanto
Representative Leslie Heinemann

Tennessee
Senator Brian Kelsey
Representative Bruce Dale Carr
Representative Martin Daniel
Representative Pat Marsh

Texas
Representative Charles Anderson
Representative Tony Dale
Representative Jason Isaac
Representative Dennis Paul
Representative Ed Thompson
Councilwoman Ellen Troxclair
Judge Keith Self

Utah
Senate Pres. Wayne Niederhauser
Senator Howard Stephenson
Representative Kay Christofferson
Representative Ken Ivory

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Delegate Riley Ingram
Delegate John McGuire
Delegate Roxann Robinson
Councilman Jon Russell
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Supervisor Ruth Anderson

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Senator Mike Padden
Senator Mark Schoesler
Representative Luanne Van Werven

West Virginia
Senator Mike Azinger
Senator Mark Maynard
Senator Patricia Rucker
Delegate Gary Howell
Delegate Charlotte Lane
Delegate Joe Statler

Wisconsin
Speaker Pro Tempore Tyler August
Representative Jesse Kramer
Representative Mike Kuglitsch
Representative Kenneth Skowronski

Wyoming
Speaker Pro Tempore Don Burkhart
Representative Dan Laursen
Councilman Jesse Morgan

August 3, 2018

The Honorable Charles E. Grassley, Chairman
The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the American Network of Community Options and Resources (ANCOR), we would like to address the nomination of Judge Kavanaugh for the U.S. Supreme Court. ANCOR is the national trade association for providers of disability services that support individuals with intellectual and developmental disabilities (I/DD) to live and thrive in the community. ANCOR represents over 1,400 private providers of community services and 55 state provider associations serving over one million individuals with intellectual and developmental disabilities.

We look forward to the Senate discussion on the nomination of Judge Kavanaugh and would like to respectfully request that the *Doe ex rel Tarlow v. D.C.* 489 F.3d 376 (2007) decision receive a fair amount of discourse during the nomination hearing. As a trade association that focuses on the independence and self-determination of individuals with disabilities, we are concerned about this specific decision and hope that Judge Kavanaugh can further explain his legal reasoning in this case. This specific case dealt with plaintiffs who were individuals with intellectual and developmental disabilities who filed suit against the District of Columbia and Mental Retardation and Developmental Disabilities Administration based on a 2003 policy that allowed the government to make determinations about elective surgeries on behalf of the individuals without establishing the patient's consent.

In finding for the District, Judge Kavanaugh wrote "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… **Consideration of the wishes of patients who are not and have never been competent is therefore not required by the Supreme Court's procedural due process cases.**" Judge Kavanaugh expressed that people with I/DD by the nature of their disability "by definition lack 'sufficient mental capacity to appreciate the nature and implications' of the preference expressed."

ANCOR members support over one million individuals with I/DD who express their preferences every day with evidence-based safeguards in place to ensure their true preferences and consent are fully informed and independent of coercion. Americans with I/DD, like any American,

should not be deprived of due process or the equal rights of our fellow citizens. ANCOR strongly endorses supported decision-making principles to ensure that people with I/DD and even those with significant communication challenges can still express their free will.

The reality of an American's equality must not waiver based on the circumstances of that person's birth. While Judge Kavanaugh has a thorough record and respectable history in our nation's courts, we believe the decision in this case was misinformed and is problematic for an individual who is preparing to serve in the highest court of our land. For this reason, ANCOR respectfully requests that the Judiciary Committee enter this letter into the record and reflect our concern during the course of the hearing, providing Judge Kavanaugh an opportunity to address it and hopefully explain that his legal positioning has now evolved to ensure that all people with disabilities have full access to their constitutional rights.

Sincerely,

Esmé Grant Grewal, Esq.
Vice President of Government Relations
ANCOR
202-579-7789
egrant@ancor.org

Sarah Meek
Director of Legislative Affairs
ANCOR
202-258-4462
smeek@ancor.org

CC: Members, Senate Judiciary Committee

AMERICAN PUBLIC HEALTH ASSOCIATION
For science. For action. For health.

July 26, 2018

The Honorable Charles Grassley
Chairman
U.S. Senate
Committee on the Judiciary
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate
Committee on the Judiciary
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of the American Public Health Association, a diverse community of public health professionals that champions the health of all people and communities, I write to express our opposition to the pending confirmation of Judge Brett Kavanaugh to the U.S. Supreme Court. The attached background document highlights several of Judge Kavanaugh's key public health-related decisions and positions and we urge you and your colleagues to carefully review his record in these areas as you consider his pending confirmation.

The next appointed justice to the Supreme Court will likely play a pivotal role in the outcome of important decisions related to critical public health issues that come before the court, and as such their judicial record should be rigorously examined. We are deeply concerned by many of Judge Kavanaugh's views and previous decisions related to public health.

This document outlines Judge Kavanaugh's positions and rulings on key public health issues including those that threaten the Affordable Care Act, Clean Air Act protections, access to contraceptive coverage and other reproductive health care and efforts to prevent and reduce gun violence. As you meet with him both individually and during any Judiciary Committee meetings related to his pending confirmation, we urge you to question him about his record and views on these critical issues.

Thank you in advance for your attention to the important public health issues that are at stake as the Senate considers Judge Kavanaugh's pending confirmation. If you have any questions regarding our position on his pending confirmation, past decisions and views, please do not hesitate to contact me.

Sincerely,

Georges C. Benjamin, MD
Executive Director

cc: Members of the U.S. Senate Committee on the Judiciary
Senate Majority Leader Mitch McConnell
Senate Minority Leader Charles Schumer

AMERICAN PUBLIC HEALTH ASSOCIATION
For science. For action. For health.

September 28, 2018

U.S. Senate
Washington, DC 20510

Dear Senator:

On behalf of the American Public Health Association, a diverse community of public health professionals that champions the health of all people and communities, I write to express our strong opposition to the pending confirmation of Judge Brett Kavanaugh to the U.S. Supreme Court.

After a detailed examination of Judge Kavanaugh's previous opinions and his other publically stated views on key public health issues, we wrote to the members of the Senate Judiciary Committee urging them to question Judge Kavanaugh about his record on public health issues. We continue to have serious concerns about his record and views on a number of critical issues, including attempts to weaken the Affordable Care Act, roll backs of Clean Air Act protections, efforts to reduce access to the full range of reproductive health services including contraception and abortion, and undermining measures designed to prevent and reduce gun violence.

Unfortunately, neither during his responses to questions at the confirmation hearing nor in his subsequent written responses for the record did Judge Kavanaugh demonstrate that he would act in the interest of the public's health as a Supreme Court justice. Throughout the hearing, Judge Kavanaugh failed to adequately clarify his position on the aforementioned issues. Therefore, we maintain our opposition to Judge Kavanaugh's confirmation, which we believe would lead to decisions that threaten pivotal laws and regulations that safeguard and advance public health.

The lifetime appointment of the next Supreme Court justice will affect the health of all Americans for generations to come. It is vital to the nation's future that our courts uphold strong public health protections, and this priority should be reflected in the values and opinions of the nominee. Our nation deserves a Supreme Court justice who recognizes the role of a judicial system in protecting the public's health. Judge Kavanaugh's record does not reflect these values, and for these reasons, I urge you to oppose his confirmation.

Thank you for your attention to the important public health issues that are at stake as the Senate considers Judge Kavanaugh's confirmation. Do not hesitate to contact me directly if you have any questions regarding our position.

Sincerely,

Georges C. Benjamin, MD
Executive Director

800 I Street, NW • Washington, DC 20001–3710
202-777-2742 • www.apha.org

AFR Americans for Financial Reform

Sept 3, 2018

Honorable Members
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senators,

On behalf of Americans for Financial Reform, we strongly urge you to oppose the nomination of Brett Kavanaugh to serve as an Associate Justice of the Supreme Court.

Judge Kavanaugh consistently sides with corporations to the detriment of consumers, workers, ordinary Americans and the public interest. His pro-corporate jurisprudence is often far afield from that of his colleagues on the DC Circuit. He notably has the most dissents per year of service on the bench. His views are so extreme that in some instances his conservative colleagues have declined to adopt them.

As an organization focused on consumer financial protection and on the need to properly regulate the financial sector to prevent grave harms to individuals, families, communities, and economic stability, we are deeply concerned about his hostility to consumer protection and to independent agencies. Although the constitutionality of independent federal agencies has long been upheld by the Supreme Court, in 2016, Judge Kavanaugh found that the Consumer Financial Protection Bureau (CFPB) was unconstitutional because its director is removable by the President only for cause, and not simply because the President desires to remove them. The Supreme Court has long recognized that an independent structure is of tremendous importance in allowing regulators to carry out the law and protect the public without undue influence from political or industry pressures. This independence, for example, has helped the CFPB to be successful in carrying out its consumer protection mandate, which includes returning nearly $12 billion to harmed consumers.

But Judge Kavanaugh showed no respect for this Supreme Court precedent, or for Congressional will - supported by Supreme Court precedent - in establishing an effective and independent agency for consumer protection. His decision in this case was ultimately overruled by a majority of the DC Circuit sitting *en banc* in a strongly

worded opinion, but if he is confirmed as a Supreme Court justice, it could prevail. Both his original decision and his dissent display a radical choice that would leave Americans much more vulnerable to harm by corporate wrongdoers.

This case was not the first time Judge Kavanaugh expressed his disdain towards independent agencies, and only one of many times that he sided with powerful corporate interests against key public protections. In an earlier case regarding the constitutionality of the removal provisions for the Public Company Accounting Oversight Board, he criticized the long standing Supreme Court precedent upholding them. In other dissenting opinions, he expressed hostility towards Chevron deference, another well established Supreme Court precedent that gives deference to agency decisions when the statute is ambiguous. Chevron deference has played a crucial role in upholding the ability of federal agencies to enact and enforce regulatory protections to safeguard the American people.

Judge Kavanaugh's confirmation to the Supreme Court would give him ample opportunity to weaken all independent agencies working within their Congressional mandate to protect the public, and thereby leave us all much more vulnerable to predatory practices as well as to actions that put the stability of the entire financial system at risk.

We urge you to oppose his nomination.

Sincerely,

Americans for Financial Reform

AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

1310 L Street NW,
Suite 200
Washington, DC 20005

www.au.org
(202) 466-3234

September 10, 2018

Senator Chuck Grassley
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Dianne Feinstein
Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

Americans United writes to express our opposition to the nomination of Judge Brett Kavanaugh to be the next Supreme Court justice. Judge Kavanaugh's record indicates that he is hostile to the principle of the separation of church and state and could upend decades of settled law in this area. The rejection of this fundamental American value would have a profound impact on our nation, undermining religious freedom for all and particularly harming those of minority faiths and the nonreligious, women, and LGBTQ people.

The wall of separation between church and state is the linchpin of religious freedom. Judge Kavanaugh, however, has made clear that he believes the "wall of separation" metaphor, long used to explain the protections guaranteed to us by the First Amendment to the U.S. Constitution, "was wrong as a matter of law and history."[1] This view, if adopted by the Court, could cause real harm to real people. Below are just three examples of what is at stake.

First, the separation of church and state is what ensures that students of all religions and beliefs can attend public schools without fear of being evangelized by teachers or forced to pray according to someone else's faith tradition. But Judge Kavanaugh's record indicates he may reject five decades of Supreme Court cases that uphold the constitutional bar on public school-sponsored prayer and religious activities. In an amicus brief he submitted to the Supreme Court, for example, he argued in support of school-sponsored prayers at football games.[2] His brief asserted that public schools can—and sometimes must—sponsor prayers, even though they make students and their families who follow a faith that is different from a majority of their community or are nonreligious feel like outsiders in their own school.

Second, the separation of church and state ensures the government cannot carve out religious exemptions if they cause harm to others. Judge Kavanaugh's record, however, shows he supports religious exemptions even if they undermine nondiscrimination laws or obstruct women's access to healthcare. When he was a White House counsel, he was point

[1] Brett M. Kavanaugh, From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist (Sept. 18, 2017), at 12-13.
[2] Brief of Amici Curiae Congressman Steve Largent & Congressman J.C. Watts in Supp. Pet'r, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), No. 99-62, 1999 WL 1272963, at *4-5.

person on President George W. Bush's "faith-based initiative,"[3] which allowed faith-based organizations that accept government grants to discriminate in hiring with taxpayer dollars.[4] Under the Bush initiative, a homeless shelter could get a government grant and then deny someone a job because she's the "wrong" religion. And in a dissenting opinion in *Priests for Life v. U.S. Department of Health and Human Services*, Judge Kavanaugh sided with a religious organization that argued that filling out a form to request a religious exemption burdened its religious exercise.[5] Thus, he allowed employers to cite religious beliefs to obstruct their employees' access to contraception. Judge Kavanaugh's nomination threatens to turn the balance of the court so that religion can be used to undermine people's rights, especially for women, LGBTQ people, and religious minorities.

Third, the separation of church and state ensures that taxpayer dollars cannot be used to pay for religious activities, schools, and institutions. Yet, in amicus briefs he wrote in two different Supreme Court cases, Judge Kavanaugh made clear he believes that religious institutions should be equally entitled to taxpayer funds that are available to nonreligious institutions—even if the funding goes to religious activities.[6] And in a pro bono case, *Bush v. Holmes*, he argued that a Florida private school voucher program that funded religious schools did not violate the state constitution's bar on funding religious institutions.[7] These arguments could jeopardize 38 state constitutional provision, ushering in private school voucher programs across the country. Each person should have the right to decide whether and how to donate money to our houses of worship, religious schools, faith-based social service providers, and other religious institutions, and the government cannot force anyone to pay for someone else's religion. Judge Kavanaugh would turn his back on this vital constitutional protection for freedom of conscience.

The separation of church and state ensures religious freedom for all. Accordingly, we urge you to oppose Judge Kavanaugh's nomination.

Sincerely,

Maggie Garrett
Legislative Director

---

[3] Email from Bradford A. Berenson to Jay P. Lefkowitz (July 11, 2001, 5:06:36 p.m.) (REV_00017302-0017305); email from Brett M. Kavanaugh to Elizabeth N. Camp (July 12, 2001, 7:42:13 a.m.) (REV_00128692).

[4] *E.g.*, White House Faith-Based and Community Initiatives, "Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations," available at https://bit.ly/2007n8q.

[5] 808 F.3d 1, 14-26 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[6] Brief of Amicus Curiae Sally Campbell in Supp. Pet'rs, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), No. 99-2036, 2000 WL 1784193, at *6, *20; Brief of Amici Curiae in *Santa Fe Indep. Sch. Dist. v. Doe*, at *28 n.7.

[7] Reply Brief of Appellants, *Bush v. Holmes*, 767 So.2d 668 (Fla. Dist. Ct. App. 2000), No. 1D00-1121/1D00-1150, at 14 n.8 (*aff'd on other grounds*, 919 So.2d 392 (Fla. 2006) (holding private school vouchers violate another provision of state constitution)).

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ADL
FIGHTING HATE FOR GOOD

August 30, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

ADL (the Anti-Defamation League) was founded in 1913 with a simple but timeless mission: to stop the defamation of the Jewish people and to secure justice and fair treatment to all. To strive towards these goals, ADL has maintained a core set of principles for more than 100 years—fighting anti-Semitism and all forms of bias and hate, as well as eliminating discriminatory barriers that deny equal opportunities to individuals based on their race, religion, gender, national origin, sexual orientation or other immutable characteristics. We have also worked to ensure the preservation of individual rights, including the Constitution's guarantees of freedom of religion and expression and other rights that must be protected to maintain a pluralistic and democratic nation.

We write to you in anticipation of the upcoming hearings on the nomination of Judge Brett Kavanaugh to serve as an Associate Justice of the United States Supreme Court. By all accounts, he is a person who has demonstrated integrity and care for his community and the country. Judge Kavanaugh's academic pedigree, work in the legal counsel's office at the White House, and twelve years as a federal appellate court judge have earned him the respect due to someone who has a long track record of public service at the highest levels.

While we appreciate Judge Kavanaugh's qualifications and deeply respect his service, it is critical for the Judiciary Committee (the "Committee") to examine his judicial philosophy and views on a wide range of topics. The American people need to know his views on the Supreme Court's role in interpreting the United States Constitution and laws that protect fundamental civil rights and liberties. This can be accomplished without asking for commentary on any pending cases.

The Supreme Court has spoken clearly and emphatically on some issues core to ADL's agenda, for example, by unanimously affirming the constitutionality of hate crimes laws 25 years ago. However, there are several areas relevant to our core equities regarding the promotion of equality and the elimination of discrimination that are likely to come before the Court in the coming years. We believe these areas deserve the Committee's special attention and would urge you and your colleagues to probe them in the upcoming hearings. In this context, topics of particular interest to us that Judge Kavanaugh should be invited to address include: (1) First Amendment religion clauses, (2) civil rights, (3) immigration, and (4) his judicial philosophy.

Consistent with recommendations that ADL has made to this Committee for the past three decades, here we present a series of potential questions to help the Committee to ascertain Judge Kavanaugh's views on these critical topics:

1. First Amendment Religion Clauses

The two religion clauses of the First Amendment—the Establishment Clause and Free Exercise Clause—are vital to the preservation and protection of religious freedom in this country. The interpretation of both clauses, however, continues to generate considerable controversy. We think it is of the utmost importance for the Committee to gain clarity regarding Judge Kavanaugh's perspective on both clauses.

a. The Establishment Clause

ADL has long believed that strict separation of church and state is necessary to protect the religious rights of all. We are concerned about various aspects of Establishment Clause jurisprudence, including the judicial standard employed when interpreting the First Amendment, the extent to which religious symbols can be displayed on public lands, the appropriateness of prayer in a government setting, and public funding of religious institutions or activity.

Judge Kavanaugh's record in demonstrating appreciation for the unique First Amendment promise that government will not promote or support religion gives rise to concerns. In a lecture he gave on the jurisprudence of Chief Justice William Rehnquist, Judge Kavanaugh commended the former Chief Justice for "persuasively criticiz[ing]" the metaphor of "a strict wall of separation between church and state" and disparaged the metaphor as being "based on bad history," "useless as a guide to judging," and "wrong as a matter of law and history."[1]

During his time in private practice, Judge Kavanaugh advocated before the courts for positions that we believe disregard necessary protections of the Establishment Clause. For example, in *Good News Club v. Milford Central School* (2001), Judge Kavanaugh filed an *amicus* brief in support of allowing a religious group that proselytizes elementary school children to organize and participate in meetings on public school grounds. He also filed an *amicus* brief in *Santa Fe Independent School District v. Doe* (2000), on behalf of two members of Congress, defending a school policy authorizing and sanctioning student-led prayers before a captive audience at school football games. The brief contended that these religious practices were constitutional because they are "deeply rooted in our history and tradition," even if they "favor or promote religion over non-religion." Judge Kavanaugh carried his misguided interpretation of the Establishment Clause to his service on the District of Columbia Circuit. In *Newdow v. Roberts* (2010), he wrote a concurring opinion affirming the constitutionality of sectarian prayers at the presidential

[1] Brett Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, THE WALTER BERNS CONSTITUTION DAY LECTURE SERIES, http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf (last visited Jul 19, 2018).

inauguration, stating that "stripping government ceremonies of any references to God or religious expression . . . would, in effect, 'establish' atheism."

It is appropriate to ask Judge Kavanaugh about his position on organized prayer in a public setting. Whether it be a non-denominational religious prayer at graduation, an invocation at the start of school board meetings, prayer circles with sports coaches before or after team events, or a cheerleader's banner containing religious symbols, ADL strongly believes these activities demonstrate unconstitutional government advancement, endorsement, and coercion of religion. Church-state matters in school settings raise particularly serious issues, because students are inherently vulnerable to coercion by school officials.

Senators should ask Judge Kavanaugh:

- ***What do you believe constitutes religious coercion under the Constitution?***
- ***To what extent is it appropriate for a religious display to be located on public grounds?***
- ***What is your view on the inclusion of prayer at an official public event?***
- ***What is your view on the inclusion of prayer at an official event involving students in a public school?***
- ***When, if at all, is it appropriate for a religious group to use public school facilities?***
- ***When is it acceptable for tax-payer funding to benefit religious organizations?***
- ***Do you think when a majority seeks to impose its religious views on contraception, adoption, marriage equality or abortion, it constitutes impermissible coercion under the Establishment Clause?***

b. The Free Exercise Clause

It is equally important for the Committee to explore Judge Kavanaugh's view of the Court's role in preserving and protecting religious liberty and religious free exercise. It is ADL's firm belief that the right to free exercise must be supported only to the extent that such practice does not interfere with the rights of others. Today, we see many examples of those who seek to convert the shield of religious freedom into a sword to discriminate against LGBTQ communities, women, and religious minorities. Notably, both longstanding Supreme Court precedent and growing public consensus have increasingly and properly rejected the idea that religion can be used as a justification for discrimination in the marketplace.

Again, in this regard, Judge Kavanaugh's record gives cause for concern. In his dissent in *Priests for Life v. U.S. Department of Health and Human Services* (2015), Judge Kavanaugh would have upheld a Religious Freedom Restoration Act ("RFRA") challenge to the process by

which the Affordable Care Act ("ACA") grants religious exemptions to its contraceptive mandate. He argued that requiring agencies to notify their insurance companies of their decision to voluntarily opt out (a right explicitly provided to them) placed a substantial burden on religious employers' beliefs. With this argument, Judge Kavanaugh suggests that he would permit the government to grant religious exemptions in future cases even if they result in discrimination against innocent third parties. That suggestion has implications for all employees—not just women. It could, for example, make it difficult for employees to obtain needed blood transfusions or vaccinations that are contrary to an employer's religious beliefs. ADL firmly believes that the free exercise of religion in America is a foundational civil right and one of our nation's greatest strengths. Free exercise of religion, however, should not infringe on the rights of others: it must be balanced with equality, fairness, and other civil rights.

Senators should ask Judge Kavanaugh:

- ***What is the intent of RFRA and what are its limitations?***
- ***Under what circumstances can a person refuse to follow a law that violates their religious beliefs?***
- ***When must an individual follow the law, even if they believe it compromises their religious beliefs?***
- ***What is the legal balance between the religious liberty rights of one party and the right to be free from discrimination for another? Should free exercise rights always prevail, even if such practice violates the rights of others?***
- ***How does the decision in Burwell v. Hobby Lobby (2014) affect the rights of Jews and other religious minorities?***

2. Civil Rights

Civil rights issues continue to come before the Court on a regular basis. ADL has long sought to eradicate discrimination in employment, education, and housing, as well as in other areas of American life. ADL supports a broad interpretation of the Constitution's equal protection guarantees, and its prohibition against discrimination on the basis of race, ethnicity, religion, national origin, gender, sexual orientation, and gender identity.

a. Voting Rights

Judge Kavanaugh's record presents concerns about his positions on voting restrictions and a lack of sensitivity to the disproportionate and discriminatory impact of such restrictions on Black and Latino voters. Voting rights are the cornerstone of our democracy and ADL considers the Voting Rights Act of 1965 ("VRA") one of the most important and effective pieces of civil rights legislation ever enacted.

The VRA helped to secure the right to vote for millions of Americans. In its June 2013 *Shelby County v. Holder* decision, the United States Supreme Court struck down part of the VRA, essentially gutting the heart of the law. In so doing, the Court substituted its views for Congress's own conclusions after very extensive hearings and findings conducted in 2006, where Congress voted almost unanimously to reauthorize the VRA for another 25 years. Since this Court ruling, voters have been faced with increasing restrictions, from laws requiring them to show identification at the voting booth—which threaten to disproportionately disenfranchise African Americans, the elderly, students, and Latino voters—to restricting early voting and imposing onerous requirements for voter registration.

Before *Shelby County v. Holder*, Judge Kavanagh wrote the opinion in *State of South Carolina v. The United States of America* (2012), approving South Carolina's voter ID law for future elections despite Department of Justice's ("DOJ") strong objections that the law was based in part on evidence of discriminatory intent. At the time, more than 80,000 minority-registered voters in South Carolina lacked DMV-issued identification. African Americans were 20 percent more likely than white residents to lack such ID. Judge Kavanaugh wrote that the law "does not have a discriminatory retrogressive effect" and "was not enacted for a discriminatory purpose." ADL has opposed these restrictive laws, which constrain our most core privilege as Americans, as discriminatory in intent and effect.

Senators should ask Judge Kavanaugh:

- ***What is the role of Congress and the Judiciary in interpreting the relevancy of the Voting Rights Act?***
- ***Was the Court correct in its 2013 Shelby County v. Holder ruling, to substitute its views for Congress's regarding the Voting Rights Act?***
- ***What is the role of the states in considering limitations on voting that could disenfranchise minority voters?***

b. Race-Based Decision-Making

Recent United States Supreme Court decisions have held that racial diversity is a compelling interest in public education. In *Fisher v. University of Texas* (2016), the United States Supreme Court upheld the admissions policy of the University of Texas at Austin, finding that the use of race as one element in a holistic undergraduate admissions process was constitutional. ADL agreed with the Court that such a policy does not impose quotas, assign people to categories based on their race, or use race as a determinative factor in making admissions decisions. Rather, we agreed with the Court that the consideration of race as one factor in a holistic review of each application is a proper means for a public university to achieve a diverse student body.

Judge Kavanaugh has not decided any cases regarding the use of race in college admissions. Relatedly, however, before becoming a judge, he co-authored an *amicus* brief in *Rice v. Cayetano* (2000), where he argued that it was illegal for the state of Hawaii to consider the race

of voters in determining their eligibility to participate in the election of the trustees of the agency that administered benefits. Judge Kavanaugh's participation in co-authoring this brief, which includes statements that conflict with *Fisher v. University of Texas*, adds concern that his view of our Constitution ignores historic racial inequities and the benefits of diversity in education.

Senators should ask Judge Kavanaugh:

- ***What is your understanding of race-based decision-making in college admissions?***
- ***Do you agree that public universities have a compelling interest to seek and maintain racially diverse student bodies?***

c. Employment Discrimination

Our nation's employment laws protect against policies or practices that discriminate against employees or potential employees on the basis of age, race, religion, gender, and national origin. These laws are critically important, because each time an employer engages in discrimination, it not only violates the rights of the individual victim but establishes an unwelcoming and hostile environment in both the workplace and adjacent social communities. ADL has identified a number of employment discrimination cases that have come before Judge Kavanaugh that raise concerns and merit further inquiry. In *Miller v. Clinton* (2012), for example, Judge Kavanaugh dissented from the majority's decision to allow a sixty-five-year-old State Department employee who was fired because of his age to seek redress. The nominee argued that the Age Discrimination in Employment Act ("ADEA") does not apply to the State Department abroad. Judge Kavanaugh likewise dissented in *Howard v. Office of the Chief Admin. Officer of the United States House of Representatives* (2013), where he would have prohibited a congressional employee from bringing a racial discrimination claim under the Speech and Debate Clause of the Constitution—an argument that the majority deemed irrelevant because the circumstances of the employee's termination did not implicate legislative matters. Because the aforementioned cases raise questions about Judge Kavanaugh's views on the breadth of employee workplace protections, it is appropriate to ask about his commitment to justice and fair treatment for all in the employment context.

Senators should ask Judge Kavanaugh:

- ***Can discrimination on the basis of age, race, religion, gender, or national origin ever be constitutional or otherwise legally permissible?***
- ***Should federal employees be protected by employment discrimination laws?***
- ***What should an employee have to demonstrate to succeed on a discrimination claim?***

d. Gender Equality

It has been the long-standing position of ADL that individuals should be permitted to make decisions regarding their personal health, including reproductive choices, in accordance with their own conscience and their own faith, and without governmental interference. This principle is core to religious freedom and liberty, and to the right to be free from sex discrimination. Since the seminal case *Roe v. Wade* (1973) set forth the fundamental right to privacy in this area, there have been numerous legal battles analyzing how closely government laws can creep towards regulating that fundamental right without violating it. In *Planned Parenthood v. Casey* (1992), a case that could have dismantled the fundamental right to privacy in reproductive healthcare, Justice Kennedy proved to be the decisive vote to uphold and support gender equality in this area.

With Justice Kennedy's retirement, many have expressed significant concern about the potential for the Supreme Court to undermine gender equality in healthcare. In his 2006 confirmation hearing for his nomination to the District of Columbia Circuit, Judge Kavanaugh declined to provide his own opinion on the merits of *Roe v. Wade*, stating he would follow it as binding United States Supreme Court precedent. As a nominee for the United States Supreme Court, Judge Kavanaugh should now be pressed to address whether he recognizes the constitutional right to an abortion.

In *Garza v. Hargan* (2017), when the federal government prevented an undocumented immigrant teen from obtaining an abortion, Judge Kavanaugh wrote a panel decision upholding the government's course of action. An *en banc* majority of the District of Columbia Circuit reversed Judge Kavanaugh's decision on the grounds that the government's actions constituted an undue burden on the abortion procedure. Judge Kavanaugh disagreed, writing a fiery dissent asserting that the decision was "based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand."

Judge Kavanaugh's record provides a clear basis for a skeptical evaluation of whether he is committed to gender equality and the principles set forth in *Roe v. Wade*.

Senators should ask Judge Kavanaugh:

- ***What is your general view on the issue of a constitutional right to privacy?***
- ***What are the limitations on governmental regulation of individuals' decisions?***

e. LGBTQ Rights

Across the nation, same-sex couples found profound hope in the words of Justice Anthony Kennedy: "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family. In forming a marital union, two people become something greater than once they were . . . The Constitution grants them that right." These words

come from Justice Kennedy's opinion for the Supreme Court in the landmark civil rights victory *Obergefell v. Hodges* (2015), which held that the Constitution grants the right to marriage irrespective of sexual orientation. ADL applauded the decision as one historic step on the journey towards justice and fair treatment for all. ADL also welcomed EEOC findings and judicial decisions protecting LGBTQ workers under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the workplace on the basis of sex, race, color, national origin, and religion. Further, ADL supported the Departments of Justice and Education when, in 2016, it made clear to school districts that transgender students are covered by Title IX, a most important federal civil rights law that protects students from discrimination based on sex. We were, of course, deeply disappointed when the current Administration rescinded that guidance. ADL decried that decision as "cruel, tinged with prejudice and unnecessary."

It is particularly important that the Committee probe Judge Kavanaugh's approach to cases implicating LGBTQ rights. As recently as last term, the Supreme Court heard *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2017), a case in which a Colorado baker refused to bake a wedding cake for a gay couple. The Supreme Court issued a narrow ruling, failing to address the underlying question of whether religious beliefs could be used as a justification for blatant discrimination against the LGBTQ community. Thus, the next Justice appointed to the Court could be called upon to address this very issue and would likely cast the deciding vote.

Judge Kavanaugh has not directly ruled on issues specific to the LGBTQ community. However, the Family Research Council, which strongly and actively opposes equal rights for LGBTQ individuals, enthusiastically supported his nomination to the District of Columbia Circuit. As a result of this connection, Judge Kavanaugh's dissent in *Priest for Life v. U.S. Department of Health and Human Services* (2015) should be examined closely for insight on how he approaches conflicts between religious liberty rights and the right to be free from discrimination. That dissent highlights his deference to a business that sought to discriminate against women by raising a religious objection to a non-intrusive insurance notification. In light of this dissent, it is important to thoroughly probe whether Judge Kavanaugh would allow store owners, public officials, or employers to use claims of religious freedom as a sword to discriminate against members of the LGBTQ community.

Senators should ask Judge Kavanaugh:

- ***Do you agree with the decision in Obergefell v. Hodges that the right to marry is a fundamental liberty? Do you believe it is settled law?***
- ***Is it your view that the Constitution protects against discrimination based on sexual orientation and gender identity?***
- ***What is your interpretation of Title VII, as it relates to discrimination based on sexual orientation and gender identity?***

- ***What is your interpretation of Title IX, as it relates to discrimination based on sexual orientation and gender identity?***
- ***Does RFRA or the Free Exercise Clause permit those with religious objections to refuse to sell goods and services to or fire or refuse to hire members from the LGBTQ communities?***
- ***Do you think being transgender should be a "pre-existing condition" under the ACA?***
- ***How do the decisions in Burwell v. Hobby Lobby and Masterpiece Cakeshop v. Colorado Civil Rights Commission affect the rights of the LGBTQ community?***

3. Immigration

ADL has advocated for fair and humane immigration policies since the organization's founding. For years, we have exposed the same anti-immigrant hate that has been a fixture of the recent immigration debate and have always called for responsible policies that honor America's history as a nation welcoming of immigrants and refugees.

ADL has been deeply troubled by the Administration's anti-immigrant executive actions and policies, including the odious and impactful Muslim Travel Ban, family separations at the border, reported abuse at immigration detention facilities, efforts to end Deferred Action for Childhood Arrivals ("DACA"), punishment of so-called "sanctuary" cities, and increased immigration arrests in "sensitive locations," such as courthouses and schools. Detention and deportations have been increasingly targeting immigrants with no criminal history. Consequently, ADL is concerned about a number of related cases gradually making their way through the federal court system.

a. DACA

On September 5, 2017, President Trump rescinded the DACA program, ignoring the impact his action would have on the health of the economy and on DACA recipients' investments resulting from their reliance on the government's commitments. This decision left the lives of 800,000 young immigrants and their families in limbo, causing multiple federal courts to step in and hold that rescinding DACA was unnecessary, arbitrary, and unlawful.

b. Immigration Enforcement

ADL is also troubled by recent executive actions that condition the receipt of federal public safety grants on local immigration enforcement. As an organization that has worked closely with local law enforcement on a variety of issues, including fighting hate and extremism, ADL strongly opposes these actions. We believe these steps compromise the entire community's safety by driving a wedge between local law enforcement agencies and the communities they serve, where individuals often fear the police, fail to report crimes, and are unwilling to come

forward as witnesses. ADL supports so-called "sanctuary" states and cities in their recent efforts to challenge this executive action.

Likewise, ADL fervently opposes the DOJ and Department of Homeland Security's "zero-tolerance immigration policy" for migrant families seeking to cross the border. Such policy has resulted in the criminal prosecution of undocumented immigrants seeking to cross the border, and the subsequent separation of thousands of migrant children from their parents. The Administration's "zero tolerance" policy resulted in a humanitarian crisis at the border. Hundreds of children are still separated from their parents—even after a federal court-ordered deadline—as a direct result of this policy.

Also, deeply concerning to ADL are attempts by DOJ to use its broad authority over the immigration court system to decide that domestic violence and gang violence are no longer grounds for asylum in most cases. DOJ's actions have resulted in additional barriers for vulnerable asylum-seekers fleeing profound violence, making it extremely difficult for these victims to gain refugee status in the United States. Recently, President Trump went so far as to suggest that undocumented immigrants should be deported without a court hearing. It is ADL's view that our basic democratic ideals need not be sacrificed to ensure our nation's physical security.

ADL strongly believes that one branch of government should not be able to make unilateral decisions about human rights policies. Checks and balances are a fundamental principle of our government's policymaking process and were put in place for the primary purposes of protecting against any abuses. The next Associate Justice of the United States Supreme Court must protect the rights of all people and must be willing to intervene when the fundamental rights of individuals, including immigrants, are compromised.

Senators should ask Judge Kavanaugh:

- ***What is your view on a state's capacity to enact laws related to the citizenship and/or immigration status of persons within its jurisdiction?***
- ***What is your view on the due process rights for undocumented persons under the Constitution?***
- ***Is there an appropriate role for states to play in enforcing federal immigration laws?***

c. Muslim Travel Ban

ADL is deeply concerned by the recent Supreme Court decision *Trump v. Hawaii* (2018), which upheld the President's executive order barring travel to the United States for individuals from some majority Muslim nations. While campaigning, now-President Trump proposed a "total and complete shutdown of Muslims" entering the country. In his first week in office, his Administration caused chaos in airports across the country, and in many parts of the world, by issuing an Executive Order temporarily banning immigrants from several Muslim-majority

countries. That original Order was initially enjoined by multiple courts and subsequently found unlawful on multiple counts. The original Order was ultimately revoked and replaced with another Order that, among other things, temporarily blocked visitors from certain countries from entering the United States.

ADL filed an *amicus* brief in support of the state of Hawaii's challenge to the Order, because we vehemently opposed both Orders' purposes, as discriminatory in intent and antithetical to the immigrant-rich history of our nation. It is in this moment that we are reminded of other grave historical injustices stemming from the exclusion of groups of people from our shores, including the Chinese Exclusion Act, the forced relocation and incarceration of Japanese-Americans in World War II, and the tragedy of the USS St. Louis, in which Jews fleeing Nazi Germany were denied entry to the United States and sent back to Europe.

For these reasons, ADL believes Judge Kavanaugh's judicial record on immigration must be strictly scrutinized. In his dissent in *Agri Processor Co. v. National Labor Relations Board* (2008), Judge Kavanaugh made it clear that he believes undocumented immigrant workers do not qualify as "employees" under the National Labor Relations Act and should not be allowed to vote in union elections. In *International Internship Program v. Napolitano* (2013), Judge Kavanaugh essentially invalidated unpaid internship opportunities by requiring organizations that sponsor cultural exchange visas to pay "wages" to foreign citizens obtaining visas. Further, Judge Kavanaugh dissented against granting special knowledge visas to Brazilian chefs to cook Brazilian food in *Fogo De Chao (Holdings) Inc. v. Department of Homeland Security* (2014).

Senators should ask Judge Kavanaugh:

- ***Can an exclusion of immigrants based on religion ever be constitutional or otherwise legally permissible?***
- ***Do you believe that Trump v. Hawaii was correctly decided?***
- ***To what extent is it appropriate to consider senior government officials' statements related to Administrative policy when determining the constitutionality of an Administrative action?***
- ***In your view, what is the scope of the Executive's authority in the immigration realm?***
- ***What is your view of the respective roles of the Executive, the Legislature, and the Judiciary in dealing with issues of national security?***

4. <u>Judicial Philosophy</u>

ADL respectfully requests that the Committee explore Judge Kavanaugh's judicial philosophy. It is well known that Judge Kavanaugh adheres to the philosophies of both textualism and originalism for statutory and constitutional interpretation. This is demonstrated in his law review

article, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, where Judge Kavanaugh wrote, "Contemporary standards of what's good or decent or efficient do not control; the precise text of the Constitution controls."[2] Judge Kavanaugh's adherence to textualism and originalism is also demonstrated throughout his judicial record. For example, in his dissent in *Miller v. Clinton* (2012), Judge Kavanaugh relied on textualist principles from Justice Antonin Scalia's book *Reading Law: The Interpretation of Legal Texts* to justify the denial of redress to an employee who had been fired because of his age.

The judicial philosophies of originalism and textualism can present significant consequences in civil rights jurisprudence. A United States Supreme Court Justice's very role is to interpret the Constitution and its Amendments, documents that were intended not only to establish our government, but also to safeguard individual liberty and protect the rights of the minority from the tyranny of the majority. As our country grows and becomes more diverse, and as we strive to embody the ideals of a more perfect version of the vision upon which our nation was founded, new issues of civil rights and liberties emerge. An originalist approach—looking backward rather than forward—will often run counter to protecting civil rights as we think of them today.

Past statements by Judge Kavanaugh reveal that, guided by a philosophy of textualism, he believes the role of judges in our government are defined and limited. In 2006, during his confirmation hearing to become a judge for the District of Columbia Circuit, Judge Kavanaugh stated: "I believe very much in interpreting text as it is written and not seeking to impose one's own personal policy preferences into the text of the document. I believe very much in judicial restraint, recognizing the primary policymaking role of the legislative branch in our constitutional democracy." However, his past statements and decisions on issues such as workers' rights and civil rights suggest otherwise. A July 2018 independent report on Judge Kavanaugh's judicial record concluded that he is "an uncommonly partisan judge," even compared to other federal appeals court judges.[3] Importantly, the judicial branch must weigh in when the legislative and/or executive branches are abusing their power. This concept is explicitly set out in the Constitution and solidified by the Bill of Rights.

Senators should ask Judge Kavanaugh:

- ***In the past, you have shown a commitment to both the originalist and textualist canons of construction when interpreting the Constitution. Does this accurately reflect your current thinking? What do those judicial philosophies mean to you?***

[2] 89 NOTRE DAME L. REV. 1907, 1926 (2014).
[3] Ash, Elliott, and Daniel L. Chen. "Research Note: Trump's Supreme Court Picks." Washington Post-Google Slides, 10 July 2018, docs.google.com/document/d/13f3K_K_fHqgB1p-S9wZCAMjFDUcEuOWoeTG9uw_Uw4I/edit.

- ***What is your philosophy regarding stare decisis? Would you read precedent narrowly or broadly, and under what circumstances would you vote to overturn precedent with which you disagree?***

- ***How do you define "judicial activism?"***

Conclusion

We hope this submission, highlighting issues of concern to ADL, will be of assistance to the Committee as it undertakes its evaluation of Judge Brett Kavanaugh. Again, we have considerable admiration for Judge Kavanaugh's service in the Executive and Judicial branches and his dedication to his country. However, these facts do not diminish from the questions that must be probed in order to ascertain his views that relate to a series of core issues likely to come before the Court during his tenure, issues of concern to ADL and to communities across the country.

In ADL's view, the Senate's role in the nomination process is equally as important as the President's responsibility to nominate. At a time when immigrants, religious minorities, and other targets of discrimination in our country are feeling particularly vulnerable, the role of the Court in protecting their rights is critical. We believe it is vitally important that Committee members determine whether Judge Kavanaugh will respect basic principles of equality, independence, church-state separation, and civil rights, as outlined above.

Sincerely,

Marvin D. Nathan
National Chair

Jonathan A. Greenblatt
CEO and National Director

September 3, 2018

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The Honorable Chuck Grassley
Chairman, U.S. Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member, U.S. Senate Judiciary Committee
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the Asbestos Disease Awareness Organization (ADAO), the largest U.S. independent organization dedicated to preventing asbestos-caused diseases, we oppose President Trump's Supreme Court nominee, Judge Brett Kavanaugh.

Kavanaugh's anti-environment record is cause for alarm.

In 2014, Kavanaugh argued against setting standards for mercury – despite it being linked to heart attacks, premature deaths and childhood asthma. Instead, he said we should consider the costs to polluters. Similarly, he overturned a rule to limit air pollution amounts that cross-state lines, argued in favor of dumping coal mining waste into streams, and ruled that it's okay for factory farms to pollute the air of their neighbors.

His confirmation to the Supreme Court will be a direct assault on our environment. We will never have clean air, soil, or water. Each year, nearly 40,000 Americans die from asbestos-related illnesses -- and as long as the deadly carcinogen is legal, that number will only increase.

In addition, the Trump administration's decision to withhold over 100,000 pages of records during Kavanaugh's tenure in the White House as Staff Secretary and White House Counsel proves a lack of transparency that raises a red flag to the suitability of Judge Kavanaugh to impartially serve on the Supreme Court.

With an unbalanced Supreme Court, public health and environmental laws will be challenged, especially the Clean Air Act, Clean Water Act, and the Toxic Substances Control Act -- putting Americans at risk forever.

ADAO urges the Senate to delay a vote on Brett Kavanaugh. Without access to the aforementioned documents, we believe it is impossible to comprehensively vet and evaluate a nominee for a lifetime position with power that can drastically reverse much of our country's progress.

Kavanaugh's anti-environment history is largely concerning. ADAO would like to remind the Senate that this appointment would be a lifetime one, and deserves significant consideration, a full, transparent evaluation, and a complete hearing.

ADAO agrees with Sen. Tom Carper (D-DE), ranking member on the Senate Environment and Public Works Committee's statement that Kavanaugh "has demonstrated that he will put the interests of polluters ahead of the right of the public to breathe clean [air] and drink clean water."

We urge the Judiciary Committee to vote no on President Trump's Supreme Court nominee, Judge Brett Kavanaugh, and to delay the Senate floor vote until he is fully vetted, as his industry bias makes him unfit to serve Americans today and in our future.
Sincerely,

Linda Reinstein, CEO/Co-Founder, Asbestos Disease Awareness Organization (ADAO)

August 10, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We are proud parents of current or former members of the girls' 4th and 5th/6th grade basketball teams at the Shrine of the Most Blessed Sacrament parish in Washington, D.C. Our girls were fortunate enough to be coached by Judge Brett Kavanaugh in the Washington area Catholic Youth Organization (CYO) basketball league.

The Kavanaugh family is a fixture in the Blessed Sacrament parish community. Brett's two daughters, Margaret and Liza, are students at Blessed Sacrament School, and Judge Kavanaugh routinely serves as a reader at weekly mass. Brett Kavanaugh is best known, however, as the coach of the girls' 4th and 5th/6th grade basketball teams which he has led for the past several years.

CYO sports are an important part of the Catholic school tradition, and participation is open to all members of the parish. Parents look to the basketball program at Blessed Sacrament as a vehicle for their children to not only have fun, but also to learn about teamwork, honesty, integrity, humility, respect, discipline, hard work and competitiveness. With this in mind, no one is more important to a successful youth basketball program than the coach.

Brett Kavanaugh has been a devoted coach and mentor to our daughters. A former high school player and true "student of the game," Judge Kavanaugh stressed to his players the importance of playing not as individuals on the court, but as a team. On the sidelines during games, he led by example. He was composed and respectful. His players were expected to follow suit. He encouraged his players in a positive way to be as competitive as they could be. Most importantly, though, his players had fun, and they all came away from the experience with great memories of their time playing for "Coach K."

Brett Kavanaugh's dedication and commitment as a volunteer youth basketball coach is a great illustration of his character. He took the role, and his responsibility to each of his players (and their parents), seriously. It would not be uncommon for parents to receive a note from Brett about something great their daughter did in practice that night. And even after his former players

had moved on to play in high school, Brett Kavanaugh would follow their development and success with pride.

Coach K's dedication and commitment over these past several years paid off this past season when his 5th/6th grade Blessed Sacrament Bulldogs team won the City Championship.

In addition to his long list of professional and academic accomplishments, we hope that the Committee will also consider Brett Kavanaugh's contributions as a volunteer youth basketball coach – and the service, selflessness, dedication, and commitment his coaching exhibits – to our community.

Sincerely,

Stephanie and Tom Conaghan	Patricia and Brendan Burke
Jennifer Langston	The Flax Family
Eden and Kevin Keating	Ceane and Bryan Corbett
Monica and John Mastal	John J. DiMartino
Wendy and Michael O'Neil	Brian Maloney
John Murray	Kate and Bill Schulz
Barbara Ann and Greg Myers	Julie F. O'Brien
Felice and Don Goodwin	Lynn and Chris Maloney
Andrea and Clark Bottner	Susie and John Lively
Christina and Steve Grimberg	Molly and Michael Bruno
Cynthia and Matt Dowd	Annie Bennett

August 28, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

Judge Brett Kavanaugh would be an extraordinary Associate Justice of the Supreme Court of the United States. I urge the Senate to confirm him with bipartisan support.

I first crossed paths with Brett in the mid-1990s, when we found ourselves lined up on opposite sides of the decade's biggest legal battle. At the time, I was serving as President Clinton's personal lawyer in the Paula Jones case. Brett had just joined the Office of Independent Counsel under Ken Starr, then investigating the President.

That hardly seems like the winning recipe for a close friendship. Much like politics, litigation often brings out people's worst tribal instincts, and the temptation to view your opponent as a villain can be especially overwhelming when the stakes are high. Despite being on opposite sides of the Starr investigation, however, Brett and I managed to avoid falling prey to that trap. Credit goes in large part to Brett, who, as far back as I can remember, has had an innate sense of fairness and civility that has governed his relationships with allies and adversaries equally.

Brett's integrity quickly won me over, and we became close friends despite our differences (and the differences between the Presidents we served). After getting to know him well over many years, I have learned that his outstanding reputation from the Starr years onwards is, if anything, understated: Brett is an all-star in both his professional and his personal life.

As a Washington attorney, I can attest to the high esteem in which the bar holds Brett. Lawyers love arguing before him because they know he will approach every case with an open mind. To him, it does not matter whether you are bringing a "conservative" case or a "liberal" case; what matters is whether you can support your case with solid arguments grounded in the law. That leads him to be an unusually balanced questioner, one who will rigorously test the case brought by each side rather than concentrating his fire on only one advocate. On the bench, Brett is not trying to score points so much as tally them.

Unsurprisingly, his even-handedness during oral argument translates into a steady stream of balanced and thoughtful opinions. Brett is widely respected by liberals and conservatives alike as independent, smart, experienced, and nuanced. When he writes an opinion, people pay attention. They know that Brett is a "judge's judge," someone doing his absolute best to follow the law rather than his policy preferences. And even when Brett rules against parties, they know he gave them a fair hearing and thoughtful explanation for his position.

Brett is as unfailingly decent off the bench as he is on it. His family is the center of his world. It is nearly impossible to walk away from a conversation with Brett without realizing the depth of his love for his wife, Ashley, and their two daughters, Margaret and Liza. I still remember Brett bringing Margaret and Liza to our house when they were younger for Halloween trick-or-treating. These days, he proudly recounts their scholastic and athletic accomplishments to anyone who will listen. (The public got a small taste of that at his White House nomination, when Brett couldn't help but mention that Margaret's basketball team had "just won the city championship.") Even more important, Brett often talks about their strong character and commitment to serving others, values that he and Ashley have taught powerfully through their words and their examples.

Brett is the most qualified person any Republican President could possibly have nominated. Were the Senate to fail to confirm Brett, it would not only mean passing up the opportunity to confirm a great jurist, but it would also undermine civility in politics twice over: first in playing politics with such an obviously qualified nominee, and then again in losing the opportunity to put such a strong advocate for decency and civility on our Nation's highest court.

Socrates contended that a judge must do four things: listen courteously, answer wisely, consider soberly, and decide impartially. He must have been thinking of Brett Kavanaugh. I hope that the Senate can follow Brett's example, put aside politics, and confirm such a qualified nominee to the Supreme Court.

Sincerely,

Robert S. Bennett

BLACK FARMERS AND AGRICULTURALISTS ASSOCIATION, INC.

Thomas Burrell
President

Bishop David Allen Hall, Sr.
Ecumenical Support Advisor

August 15, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The Black Farmers and Agriculturalists Association represents seventeen thousand African American farmers across America. Since 1968, when the late Dr. Martin Luther King Jr. planned the Poor People's Campaign, we have been fighting to preserve and advance Black agriculture. We are happy to advise you that our members will be informing the Committee that Judge Brett Kavanaugh would make an excellent Associate Justice of the Supreme Court of the United States.

In October of 2017 Judge Kavanaugh rendered a decision in favor of Black farmers on the merits of the evidence. We know all too well the challenges and inequalities that Black farmers and 1890 Land-Grant Universities (HBCUs) still face today. Black Farmers are entrepreneurs and we, like other Black owned businesses, still face a lack of access to capital and markets.

During Judge Kavanaugh's tenure he was prepared, attentive and had command of the facts. If confirmed, these are the traits that Judge Brett Kavanaugh would bring to the bench as an Associate Justice.

Sincerely,

Thomas Burrell
President, BFAA, Inc.

Bishop David Allen Hall
Ecumenical Advisor

To whom it may concern,

As members of Christine Blasey Ford's family, we wish to express our full support for our sister-in-law, daughter-in-law, aunt and dear friend. She is married to our brother, son and uncle Russell Ford, and is a loyal, reliable, involved family member of the most impeccable character. Chrissy has tremendous compassion for others, goes out of her way to support and encourage the young ones in our family, and does so with great warmth and generosity.

She listens to others with full attention, interested in their ideas and their concerns, and spends time with young family members, giving surf lessons, attending soccer matches and school plays, and brainstorming about college planning with nieces and nephews. We especially admire the way she is raising her children to be genuinely good people who are considerate of others.

Chrissy is also a very highly respected professional in the field of Psychology. She is devoted to helping researchers get at the truth through detailed statistical analysis and research. She shows great devotion to her work and to her community of colleagues and students. When discussing her work, she recognizes the team effort at work, never speaking of "I" but always of "we," and is diligent about research findings, always careful not to exaggerate results.

As a family member, Chrissy can be counted on in any kind of difficulty. Her honesty is above reproach and her behavior is highly ethical and respectful of everyone's point of view. We believe that Chrissy has acted bravely by voicing her experiences from the past, and we know how difficult this is for her. Chrissy is not someone who chooses to be in the spotlight. We ask that her decision to share a private and difficult recollection be treated seriously and respectfully, and we ask that you please make every effort to respect Chrissy's and our family's privacy as this issue is investigated.

Sincerely yours,

Russell Ford
Deborah Ford Peters, PhD
Sandra Ford Mendler, AIA
Charles Mendler
Rev. Jackie Clement
John Ford
Ruth Ford Guthery
John Guthery
Katie Thurman
Bridgit Mendler
Nicholas Mendler
Haley Peters

B'NAI B'RITH INTERNATIONAL

Celebrating 175 Years

September 4, 2018

The Honorable Chuck Grassley, Chairman
The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senators Grassley and Feinstein:

On behalf of B'nai B'rith International's more than 100,000 members and supporters, we write to ask that the Supreme Court confirmation hearings of Judge Brett Kavanaugh carefully examine the nominee's judicial philosophy with regard to issues of great concern to our organization. Founded in 1843, B'nai B'rith is America's oldest and best-known Jewish advocacy and social service organization, with a wide range of domestic and international public policy priorities. Included in our agenda are several issues that we would like to ask the Judiciary Committee to raise with Judge Kavanaugh:

1) **Church-State Relations.** We hope the Committee will ask Judge Kavanaugh which judicial test should be applied to determine whether a particular government action violates the First Amendment's Establishment Clause. It would be helpful to know if the nominee feels that public funds and public property may be used for religious displays, or whether taxpayers should enjoy special standing to bring Establishment Clause lawsuits. With respect to the Free Exercise Clause, we would be interested to learn whether Judge Kavanaugh believes that constitutional protections differ when cases involve institutions rather than individuals. We also would like to know his view of Congress' authority to regulate state action to safeguard Equal Protection rights where religious liberty is concerned.

2) **Asylum.** B'nai B'rith hopes the Committee will ask the nominee what standard should be applied to asylum claims by individuals facing persecution in their homelands. We would be interested to know what threshold of harm, or risk of harm, a person fleeing a repressive society must demonstrate before receiving asylum in the United States.

3) **Employment and Housing Discrimination.** B'nai B'rith would like to hear Judge Kavanaugh's views on the standard that should be applied to cases of age, disability, religious, racial, or sexual discrimination in employment and housing practices. It would be useful to know the nominee's position on the burden of proof an older worker must meet to demonstrate that he or she has been passed over for promotion, denied accommodation, or unfairly rejected as a job applicant because of his or her age or disability.

Thank you for your attention and consideration. B'nai B'rith looks forward to remaining in communication with you about this and other matters of mutual interest in the near future.

Respectfully,

Gary P. Saltzman
President

Daniel S. Mariaschin
Executive Vice President and CEO

Heidi S. Bond

September 22, 2018

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

Dear Chairman Grassley,

I am writing to you as a woman who experienced sexual harassment at the hands of Judge Alex Kozinski, who went public with my story in December, and who had a mostly positive public reception to my story. It was incredibly meaningful to me that the judiciary convened a working group to address harassment, and that the Senate Judiciary committee held a hearing to hold the judiciary accountable for what it felt was an inadequate response.

It meant everything to me that in your opening statement, you read my words on the Senate floor about how it felt for me to experience sexual harassment. You were the first person to ask the Judiciary's representative if they had apologized to those of us who had come forward; the words I heard that day were the first time anyone from the judicial branch had ever expressed regret.

Coming forward about harassment was one of the hardest things I ever did. I pride myself on being a strong and independent woman; publicly exposing the fact that I had been vulnerable in the past was something I did not for myself, but because I hoped that doing so would pave the road to a better future, one where women did not need to stay silent about harassment.

Today I write to you to beg you to treat Dr. Christine Blasey Ford with the same respect that you treated me. I do not know her. I cannot know if her story is true. But I do know that her story mirrors mine. I also waited a decade before coming forward. The corroboration that the Washington Post listed for my story was an email with a friend, reminding me that I had told her about being sexually harassed and shown porn in his office.

Every attack that is being leveled at Dr. Blasey could be applied to me as well, and in that regard, it feels personal for me, and I suspect for many victims of harassment and assault. Whether she is telling the truth or not, the open disrespect that is being shown to her hurts many women.

When I went public with my story in December, many on the right wing decided that Kozinski was a liberal because he was on the Ninth Circuit; many on the left decided that Kozinski was a conservative because he was appointed by Reagan. I escaped much of the censure that Dr. Blasey has endured simply because it was not politically expedient for anyone to defend Kozinski. But issues of sexual assault and harassment should not be a matter of partisan politics.

For that reason, I implore you to collaborate with your colleagues on the Judiciary Committee so that you can establish a timetable to have an impartial investigation into Dr. Blasey's claims, while still leaving time for a vote on Kavanaugh's nomination before the midterm elections.

The precedent that is being set by your current actions actually creates an incentive for false claims. If claimants know that no investigation will result from a claim, they can sow doubt and distrust about any nominee simply by making a false claim. Nothing could be more conducive to establishing truth than a rule that claims of harassment will be vigorously investigated—and thoroughly debunked if untrue.

I also beg you, when this is over, to come together with your colleagues on the Judiciary Committee and to establish neutral rules for responding to these sorts of claims in the future, for all nominees, whether Democrat or Republican.

I know that your time is valuable, particularly at this moment. I thank you once again for listening to me in December, when I came out about sexual harassment, and in June, when the Senate held its hearings on harassment in the judiciary. I hope you are able to listen to me today as well.

With sincerest regard,

Heidi Sacha Bond

Heidi Sacha Bond

August 29, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We are women who served with Brett Kavanaugh in White House staff positions during President George W. Bush's Administration. We are united in our admiration for Judge Kavanaugh as a public servant and as a person. He would be an exceptional Associate Justice of the Supreme Court. We strongly urge the Senate to confirm him promptly.

The West Wing is a small place. The hours are long, and the pressure is intense. You get to know your colleagues well in those conditions. And in Brett Kavanaugh, we got to know a brilliant lawyer, a thoughtful friend, and a man of the highest integrity. In the Counsel's Office, Brett was a trusted voice on difficult legal questions. Lawyers and non-lawyers alike counted on him to give clear and considered answers. His analysis reflected his deep knowledge, extraordinary care, and obvious reverence for the law. As Staff Secretary, Brett was an honest broker who faithfully conveyed information to the President from his advisors. Policy debates in the White House are passionate and high stakes, but Brett always took care to ensure that the process was fair and that every voice was heard.

Consistently, Brett was the definition of a thoughtful colleague, always willing to listen to all sides. And no one worked harder. His green Jeep Cherokee was a fixture on West Executive Drive at all hours of the day or night. No matter how many hours he worked or how much stress he must have felt, Brett maintained his focus, discipline, decency, calm, and good humor. His skills as a staffer were matched only by his strengths as a person.

Brett's personal and professional qualities have served him well as a judge on the D.C. Circuit for the past 12 years. His judicial record is unsurpassed, with the Supreme Court regularly vindicating his opinions in many different areas of law. We have full confidence that, if confirmed, Brett would continue to approach each case fairly and with an open mind and that he would faithfully interpret the Constitution according to text, history and precedent.

As former colleagues of Brett's, we know his commitment to equal treatment of women in the workplace and are especially proud of his efforts to encourage and support women

lawyers. More than half of Brett's law clerks have been women, and he has worked tirelessly to support them in their legal careers. His leadership on these issues is vitally important, and we have no doubt that it would continue at the Supreme Court.

No one captured our thoughts on Brett's nomination better than our former boss, President Bush, who said the following: "President Trump has made an outstanding decision in nominating Judge Brett Kavanaugh to the Supreme Court. Brett is a brilliant jurist who has faithfully applied the Constitution and laws throughout his 12 years on the D.C. Circuit. He is a fine husband, father, and friend – and a man of the highest integrity. He will make a superb Justice of the Supreme Court of the United States."

We strongly agree, and we urge the Senate to confirm him promptly.

Sincerely,

Jackie Arends
Christal West Atkinson
Brenda Becker
Melissa Bennett
Elizabeth Bingold
Rachel Brand
Therese Burch
Christine Burgeson
Kirsten Chadwick
Emily Willeford Christy
Christine Ciccone
Marlene Colucci
Amy Jensen Cunniffe
Melissa Danforth
Ashley Davis
Sarah Day
Suzy DeFrancis
Liz Dougherty
Alicia Downs
Anne Campbell Dudro
Jennifer Millerwise Dyck
Libby Camp Elliott
Ruth Elliott
Courtney Elwood
Sara Fagen
Deb Fiddelke
Kara Figg LiCalsi
Angela Flood
Leslie Fahrenkopf Foley
Linda Gambatesa
Ashley Snee Giovannettone
Georgia Godfrey
BJ Goergen
Ann Patzke Gray

Wendy Grubbs
Terrell Halaska
Megan Hauck
Erin Healy
Ashley Holbrook
La Rhonda M. Houston
Karen Hughes
Alison Jones
Karen Keller
Rhonda Keenum
Karen Knutson
Anne Womack Kolton
Holly Kuzmich
Heather Larrison
Colleen Litkenhaus
Ginger Loper
Ann Loughlin
Anita McBride
Jenny McIntyre
Jeanie Mamo
Cathie Martin
Taylor Hughes Mason
Emily Kropp Michel
Harriet Miers
Carol Thompson O'Connell
Claire Buchan Parker
Lindsey Paola
Susan Ralston
Allison Riepenhoff Ratajczak
Nina Rees
Kristen Silverberg
Heidi Marquez Smith
Margaret Spellings
Carolyn Nelson Spurlock
Julie Nichols Steindler
Pam Stevens
Veronica Vargas Stidvent
Caroline Swann
Meredith Terpeluk
Marguerite Murer Tortorello
Fran Townsend
Helgi Walker
Charity Wallace
Camille Wellborn
Heather Wingate
Candi Wolff
Julie Myers Wood
Liza Wright
Katherine C. Yarger
Tracy Young

CENTER for BIOLOGICAL DIVERSITY Because life is good.

September 1, 2018

The Honorable Dianne Feinstein
Ranking Member, Senate Judiciary Committee
United States Senate

Re: Opposition to Brett Kavanaugh Nomination to the U.S. Supreme Court

Dear Senator Feinstein:

On behalf of the Center for Biological Diversity, and our over 63,000 members and 1,600,000 activists, we write to strongly oppose the nomination of Brett Kavanaugh to be an associate justice on the United Supreme Court. He is potentially the most ill-suited Justice this nation has seen in generations. Based on our assessment of his past record, he would be a disaster for biological diversity.

There exist many reasons to oppose this nomination, both procedural and substantive. The common critical theme is Mr. Kavanaugh's pre-determined bias on the many important issues facing Americans in today's rapidly changing world. In particular, Mr. Kavanaugh has displayed a bizarre hostility toward environmental protection, regularly ruling against actions that would address climate change, conserve wildlife habitat, and reduce exposure to dangerous toxics.

Attached, for example, is a Center for Biological Diversity report on Judge Kavanaugh's wildlife law record at the U.S. Court of Appeals for the D.C. Circuit, where we found he ruled against species 96% of the time, a rate far higher than his other colleagues, even those considered "conservative." This report is especially alarming given that the Supreme Court is scheduled to hear *Weyerhaeuser Company v. U.S. Fish and Wildlife Service*, an Endangered Species Act (ESA) critical habitat case, on the first day of the Court's upcoming session. If the Majority Leader has his way, Judge Kavanaugh would likely be the deciding vote against the ability of our country's best scientists to protect crucial habitat necessary for imperiled species' recovery, here the dusky gopher frog.

Mr. Kavanaugh also was the author of woefully bad and illogical D.C. Circuit decision on the Clean Air Act and cross-state pollution, which was later overturned 6-2

Alaska . Arizona . California . Florida . Minnesota . Nevada . New Mexico . New York . Oregon . Vermont . Washington, DC
P.O. Box 710 . Tucson, AZ 85702-0710 tel: (520) 623.5252 fax: (520) 623.9797 www.BiologicalDiversity.org

by the Supreme Court. *EPA v. EME Homer City Generation*, 572 U.S. ____ (2014). This Kavanaugh decision literally cost human lives through the air pollution caused by the regulatory delay effectuated by his wrong fully issued order. Another similar example of Kavanaugh judicial activism, *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017), which would allow foreign manufacturers of highly harmful air pollutants to avoid regulation under the Clean Air Act, is currently on appeal before the Supreme Court.

But perhaps the most disturbing aspect of Mr. Kavanaugh's record is the devotion to his political party's agenda, no matter the circumstance. Whether it's his changing and hypocritical theories on executive privilege, or his own clandestine records during his time in the White House, Mr. Kavanaugh always rules for the powerful economic interests, for his political buddies, and for those seeking to avoid public protections. With twelve years on the federal appellate bench by which to evaluate him, there is no indication that Mr. Kavanaugh would be an independent Justice and considerable evidence that he would be an apparatchik.

Mr. Kavanaugh is anti-environment, anti-wildlife, anti-civil rights, anti-women's rights, anti-choice, anti-campaign finance reform, anti-worker's rights, anti-health care rights, anti-net neutrality, just to name a few. He does not deserve a seat on the highest court of our country. We can and must do much better. Mere opposition to this nomination is not enough. We ask you and like-minded Senators to, at the very least, delay a vote on this nomination until the new Congress, a practice that has become common in recent years.

Ultimately, we ask you to lead the votes against this nomination to defeat it. We stand ready to help you in any way. The future of our country is at stake. Thank you.

Respectfully,

/s/ WJ Snape III

William J. Snape, III
Senior Counsel
Center for Biological Diversity

Attachment: Wildlife Species Cases Decided by Judge Brett Kavanaugh: Almost a Perfect Record of Ruling Against Mother Nature (American University, Washington College of Law, Center for Biological Diversity, August 2018).

CLASP
Policy solutions that work for low-income people

August 31, 2018

VIA ELECTRONIC TRANSMISSION

Senator Chuck Grassley
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Senator Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: APPOINTMENT OF JUDGE KAVANAUGH

Dear Senator Feinstein:

On behalf of the Center for Law and Social Policy (CLASP), I am writing to express our strong opposition to the appointment of Judge Kavanaugh to the Supreme Court of the United States. His appointment will have a devastating impact on people with all levels of income, but particularly for children, women, and families across the country who are low-income. For this reason and those expanded on below, we urge you to oppose his nomination, and encourage others to do so.

CLASP advocates for public policies that reduce poverty, improve the lives of people living in poverty, and create ladders to economic security for all, regardless of race, gender, or geography. We target large-scale opportunities to reform federal and state programs, funding, and service systems, then work on the ground for effective implementation. Our research, analysis, and advocacy foster new ideas and position governments and advocates to better serve low-income people. We also work at the state and local levels, providing technical assistance regarding the implementation of federal policies and programs.

We believe that quality, affordable healthcare is critical for everyone, but for many women, children, and families, particularly women and families of color and those who are low-income, medical care often remains inaccessible. If Kavanaugh were to be appointed, based on his previous record and dissenting opinions, there is cause to be concerned that he would vote to overturn current health protections. He suggested that a President could choose not to enforce the individual mandate of the Affordable Care Act if he "...concludes that enforcing it would be unconstitutional." This would have potentially devastating effects on ensuring health coverage for those with pre-existing conditions, thereby increasing the possibility that millions would be without access to affordable and reliable health care.

Additionally, as state Medicaid waivers are being deliberated on, there exists the possibility that provisions in some of these harmful waivers could rise to the level of the Supreme Court. CLASP has submitted several comments against work requirements and other proposed rescissions to key protections,[1] all of which may be in jeopardy if the Supreme Court votes to uphold waivers with

CLASP
Policy solutions that work for low-income people

provisions that would harm low-income people, or cut back on federal oversight of state Medicaid programs. CLASP has shown our support through letters expressing this opinion.[i,ii,iii]

Additionally, Judge Kavanaugh has consistently ruled against workers and their families. He has demonstrated an undue deference to large employers over working people. His hostility towards workers fighting discrimination and mistreatment on the job threatens workers' ability to exercise their statutory rights, including the right to privacy, to organize, to be protected from discrimination, and to a safe workplace. His past judicial opinions and dissents raise concerns about his hostility towards immigrant workers, his willingness to exclude groups of workers from basic labor standards, and his lack of respect for precedent. If confirmed, he will likely undermine protections for the most vulnerable workers, including women, immigrants, and undocumented workers.

We believe that Judge Kavanaugh's appointment would widen the gap in care for needed services for low-income populations in the U.S., strip basic rights for workers, and create further strain on communities of color and immigrant communities. To address these and other concerns, CLASP urges you to reject Kavanaugh's appointment, and encourage other Senators to do so.

If you have any questions, please contact Alexandra Costello, Director of Legislative Affairs, at [redacted].

Sincerely,

Hannah Matthews
Deputy Executive Director for Policy

---

[i] CLASP. Medicaid Waivers. https://www.clasp.org/tags/medicaid-waivers
[ii] National Partnership for Women and Families. www.nationalpartnership.org/research-library/budget-economy/supreme-court/judicial-nominations/national-partnership-letter-to-congress-on-kavanaugh.pdf
[iii] Families USA. https://familiesusa.org/sites/default/files/Sign-On%20-%20SCOTUS%20Health%20Care%20Cases%20Letter.pdf

THE CENTER FOR POPULAR DEMOCRACY

449 Troutman Street
Brooklyn, NY 11237

1730 M Street NW, Suite 1115
Washington, DC 20036

populardemocracy.org
T 347-985-2220

September 4, 2018

Dear U.S. Senators:

On behalf of the Center for Popular Democracy, a national network of grassroots community organizations, we write to register our strong opposition to President Trump's nomination of Brett Kavanaugh to become an Associate Justice of the Supreme Court.

In the last year and a half, our country has crossed dangerous thresholds that have led to a crisis of our democracy and challenged our hopes for a tolerant, safe, and pluralistic society. Whether it be the kidnapping of children at the U.S.-Mexico border, the banning of Muslim returning residents and travelers, ending due process in immigration proceedings, or reversing DACA -- to just name a few -- the Trump administration has advanced hostile and dangerous policies that run afoul of the Constitution and other laws and norms. These disastrous and unlawful acts come on the heels of an increasingly threatening climate of hate and bigotry fueled by this administration, and a raft of decisions by the Supreme Court over the last few decades that have solidified power for corporations, special interests and the wealthy, while stripping basic rights away from workers, immigrants, and communities of color.

Brett Kavanaugh's elevation to the highest Court would spell disaster for communities nationwide.

A review of his publicly-available judicial opinions, speeches, memoranda, and partisan advocacy demonstrate that Kavanaugh's confirmation would further threaten women's reproductive rights, harm LGBTQ communities, restrict access to healthcare, deepen voter disenfranchisement, exacerbate racial inequities, erode our climate, and lead to unprecedented levels of government deregulation. The impact of this Supreme Court appointment will undoubtedly affect the lived realities for communities for a generation, if not more.

That Trump is now an unindicted co-conspirator to federal crimes committed to influence the outcome of the 2016 presidential election calls into question the very legitimacy of his nomination of Mr. Kavanaugh to the Supreme Court. Moreover, given the strong likelihood that legal matters related to the Special Counsel's investigation into Trump's troubling -- and likely criminal -- behavior will be heard by the Supreme Court in the next term, there is a substantial chance that his pick of Mr. Kavanaugh represents an effort to further obstruct justice and impede the Mueller probe.

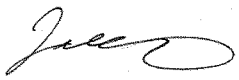
The Center for Popular Democracy network, which consists of 50 grassroots organizations in 126 cities and 34 states, works day in and day out to demand that our institutions and governments be more democratic and responsive to the needs of people, in particular to the lives of marginalized communities. This nomination represents a disturbing watershed moment because of the radical shift that Kavanaugh joining the Court would represent. Whether it be for

demanding access to healthcare, voting rights, holding government actors accountable for state violence or corruption, or protecting workers' rights to organize, the future of our country may well rest on the Senate's decision to confirm Brett Kavanaugh.

We endorse the recent reports and statements opposing the Kavanaugh nomination because of how his potential confirmation threatens civil rights and democratic norms, as put forth by, among many leading organizations, the Leadership Conference on Civil and Human Rights, the NAACP, the Lawyer's Committee for Civil Rights Under the Law, Demos, and the NAACP Legal Defense Fund.

We implore the Senate to reject the nomination of Brett Kavanaugh.

Respectfully,



Jennifer Epps-Addison
Network President & co-Executive Director
Center for Popular Democracy & CPD Action

CENTER FOR REPRODUCTIVE RIGHTS

August 31, 2018

The Honorable Charles Grassley
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Judge Brett Kavanaugh
Associate Justice of the Supreme Court Hearing

Dear Chairman Grassley, Ranking Member Feinstein, and Members of the Senate Committee on the Judiciary,

The Center for Reproductive Rights writes today to oppose the nomination of Judge Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States. The American people want a Supreme Court nominee who will respect the basic liberties guaranteed to all of us under the Constitution. Based on his record, Judge Brett Kavanaugh is not that nominee.

The Center for Reproductive Rights uses the power of law to advance reproductive rights as fundamental human rights around the world. For over 25 years, our game-changing litigation and advocacy work—combined with our unparalleled expertise in the use of constitutional, international, and comparative human rights law—has transformed how reproductive rights are understood by courts, governments, and human rights bodies.

In the United States, we litigate extensively in federal and state courts to ensure reproductive health services are available across the country. Since our founding, we have been involved in every major Supreme Court case on abortion rights. In 2016, we won the landmark Supreme Court case, *Whole Woman's Health v. Hellerstedt*, which was the most significant ruling on abortion in more than two decades. The decision reaffirmed a woman's constitutional right to access abortion.

As recognized in decades of Supreme Court rulings, the right to make decisions about whether and when to have children is protected by the U.S. Constitution. These important decisions sit within the realm of personal liberty which the government may not enter. They are vital to the health, dignity, and equality of women in the United States, and this nomination puts them at risk.

CENTER FOR REPRODUCTIVE RIGHTS

This is the first time since our founding in 1992 that we are opposing the confirmation of a Supreme Court nominee. We do not make this decision lightly. The Center for Reproductive Rights wins cases before a wide range of federal judges, who have been appointed by both Republican and Democratic presidents. As an organization which litigates cases in federal courts, including in the U.S. Supreme Court, we are rigorous about factual accuracy and careful legal analysis. We are a non-partisan organization that does not support or oppose political parties or candidates.

However, after a thorough review of Judge Kavanaugh's judicial opinions, speeches, and writings, we have grave concerns about how he will rule on reproductive rights cases. We conclude that his judicial philosophy is fundamentally hostile to the protection of reproductive rights under the U.S. Constitution.

As an appellate judge, Judge Kavanaugh misapplied Supreme Court precedent to allow the government to continue blocking an undocumented minor from getting an abortion. He has praised and applied a narrow, backward-looking approach to defining the scope of individual liberty under the Constitution at odds with the Supreme Court's jurisprudence protecting the right to abortion. In speeches, he has praised then-Justice William Rehnquist's dissent in *Roe v. Wade* (1973) and Justice Antonin Scalia's dissent in *Planned Parenthood v. Casey* (1992), where each justice rejected the constitutional right to abortion. He has given a high degree of deference to religiously-affiliated employers who wish to avoid "complicity" in women's use of contraception. Finally, Judge Kavanaugh has criticized the Supreme Court's decisions upholding the Affordable Care Act, which has provided critical maternal and reproductive health care access to millions of women.

The stakes of this nomination are extraordinarily high. There are dozens of cases making their way through the lower courts whose outcomes could guarantee or deny access to reproductive health care for millions of women across the United States.

We urge members of the U.S. Senate Committee on the Judiciary to reject the confirmation of Judge Kavanaugh to serve as the next Associate Justice.

Sincerely,

Nancy Northup
President and CEO, the Center of Reproductive Rights

CENTER FOR REPRODUCTIVE RIGHTS

Report of the Center for Reproductive Rights on the Nomination of Judge Brett Kavanaugh to be Associate Justice of the United States Supreme Court

August 31, 2018

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EXECUTIVE SUMMARY

The Center for Reproductive Rights uses the power of law to advance reproductive rights as fundamental human rights around the world. For over 25 years, our game-changing litigation and advocacy work—combined with our unparalleled expertise in the use of constitutional, international, and comparative human rights law—has transformed how reproductive rights are understood by courts, governments, and human rights bodies. Through our work on five continents, we have played a key role in securing legal victories before national courts, United Nations Committees, and regional human rights bodies on reproductive rights issues including access to life-saving obstetrics care, contraception, maternal health and safe abortion services, as well as the prevention of forced sterilization and child marriage.

In the United States, we litigate extensively in federal and state courts to ensure reproductive health services are available across the country. Since our founding, we have been involved in every major Supreme Court case on abortion rights. In 2016, we won the landmark Supreme Court case, *Whole Woman's Health v. Hellerstedt*, which was the most significant ruling on abortion in more than two decades. The decision reaffirmed a woman's constitutional right to access abortion.

On July 9, 2018, President Trump nominated Judge Brett Kavanaugh as Associate Justice to the U.S. Supreme Court to fill the vacancy created by Justice Anthony Kennedy's retirement. For the past 26 years, Justice Kennedy has been a critical vote on abortion rights. As recognized in decades of Supreme Court rulings, the right to make decisions about whether and when to have children is guaranteed by the U.S. Constitution. These important decisions are within the realm of personal liberty which the government may not enter. They are vital to the health, dignity, and equality of women in the United States, and they are at risk with this nomination.

For the first time since our founding in 1992, the Center for Reproductive Rights is opposing the confirmation of a Supreme Court nominee. Based on our in-depth analysis of Judge Kavanaugh's record, we urge members of the United States Senate to reject his nomination to serve as the next Associate Justice on the Supreme Court.

We do not make this decision lightly. The Center for Reproductive Rights wins cases before a wide range of federal judges, who have been appointed by both Republican and Democratic presidents. As an organization that litigates cases in federal courts, including in the Supreme Court, we are rigorous about factual accuracy and careful legal analysis. We are a nonpartisan, nonprofit organization that does not support or oppose political parties or candidates.

After a thorough review of Judge Kavanaugh's record, we have grave concerns about how he will rule on reproductive rights cases. We conclude that his judicial philosophy is fundamentally hostile to the protection of reproductive rights under the U.S. Constitution.

This report provides an analysis of Judge Kavanaugh's record on reproductive rights. To prepare this report, we conducted an extensive review of Judge Kavanaugh's judicial opinions, speeches, and writings as they impact issues such as access to abortion, contraception, and maternal health care. Not available for our review are voluminous records from Judge Kavanaugh's tenure in the White House from 2001 through 2006, as his confirmation hearing is scheduled to go forward on September 4, 2018 without the vast majority of these documents being made available to the Senate or public.[1]

As an appellate judge, Judge Kavanaugh misapplied Supreme Court precedent to allow the government to continue blocking an undocumented minor from accessing an abortion. He has praised and applied a narrow, backward-looking approach to defining the scope of individual liberty under the Constitution at odds with the Supreme Court's jurisprudence protecting the right to abortion. In speeches, he has praised then-Justice William Rehnquist's dissent in *Roe v. Wade* (1973) and Justice Antonin Scalia's dissent in *Planned Parenthood v. Casey* (1992), where each justice rejected the constitutional right to abortion. He has given a high degree of deference to religiously-affiliated employers who wish to avoid "complicity" in women's use of contraception. Finally, Judge Kavanaugh has criticized the Supreme Court's decisions upholding the Affordable Care Act, which has provided critical maternal and reproductive health care access to millions of women. The Center for Reproductive Rights therefore opposes the confirmation of Judge Kavanaugh to the Supreme Court.

With the release of this report, we remind the Senate that the stakes of this nomination are extraordinarily high. There are dozens of cases making their way through the lower courts whose outcomes could guarantee or deny access to reproductive health care for millions of women across the United States.

[1] Judge Kavanaugh spent six years serving in the White House under President George W. Bush. Senate Judiciary Committee Chairman Charles Grassley has requested only documents from the years 2001 through 2003 when Kavanaugh served as associate White House counsel. The Chairman has requested no documents from Kavanaugh's tenure as staff secretary from 2003 through 2006 – a period that Kavanaugh himself has described as "among the most instructive" for him as a judge. Because the National Archives indicated that it cannot disclose even Sen. Grassley's limited document request until October, the Chairman has instead sought to obtain the documents from President George W. Bush's presidential library—a process that is being overseen by a personal attorney of President Bush who once served as Kavanaugh's deputy in the White House. To date, the vast majority of Kavanaugh's total White House records have not been released to the Judiciary Committee. This limited document request and production has prevented the Senate and the public from learning about Judge Kavanaugh's potential involvement in key reproductive rights issues that arose while he served as White House staff secretary, such as the 2003 federal abortion method ban and the appointment of federal judges who are hostile to reproductive rights. *See* Editorial Board, *Why Are Republicans Covering Up Brett Kavanaugh's Past?*, N.Y. TIMES (Aug. 17, 2018), https://www.nytimes.com/2018/08/17/opinion/republicans-brett-kavanaugh-senate.html

I. BACKGROUND

A. Nomination

President Donald Trump took office in January 2017 after a campaign in which he promised to nominate judges who would overturn *Roe v. Wade*. "That'll happen automatically, in my opinion, because I am putting pro-life justices on the court," he said at the final presidential debate.[2] To bolster his *Roe*-reversal promise, Trump released during the campaign a list of judges from which he pledged to pick his Supreme Court nominees. For advice on assembling the list of potential Supreme Court nominees, the president relied on the Federalist Society and the Heritage Foundation.[3]

Judge Kavanaugh was not on the original list released during the campaign. He was added to an updated list released by the White House in November 2017, only a month after he ruled against an unaccompanied, undocumented immigrant minor seeking an abortion in a dissenting opinion in *Garza v. Hargan* (discussed below).[4] White House Counsel Don McGahn announced the additional five judges at a Federalist Society convention, saying all "have a demonstrated commitment to originalism and textualism." And adding, "They all have paper trails. They all are sitting judges. There's nothing unknown about them. What you see is what you get."[5]

B. Biography

Judge Kavanaugh is 53 years old and currently sits on the United States Court of Appeals for the District of Columbia Circuit. He was first nominated to that court by President George W. Bush in 2003 and confirmed by the Senate in 2006.

Judge Kavanaugh graduated from Yale College in 1987 and Yale Law School in 1990. He clerked for Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit in 1990-1991.[6] He then served as a clerk for Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit in 1991-1992, and finally for Justice Kennedy on the Supreme Court in 1993-

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[2] Irin Carmon, *2016 Debate: On Abortion, Trump and Clinton Give Passionate Answers*, NBC NEWS (Oct. 20, 2016), https://www.nbcnews.com/storyline/2016-presidential-debates/abortion-trump-clinton-let-it-all-hang-outn669586.

[3] Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html.

[4] Nolan D. McCaskill, *Trump releases updated short list of potential Supreme Court nominees*, POLITICO (Nov. 11, 2017), https://www.politico.com/story/2017/11/17/trump-supreme-court-nominees-247441.

[5] *Id.*

[6] During this term, Judge Stapleton wrote the Third Circuit's panel decision in *Casey*, upholding each of the challenged restrictions except a provision requiring women to notify their spouses before having an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992). Kavanaugh's level of involvement in *Casey* is not known.

1994, a position he held at the same time as now-Justice Neil Gorsuch. From 1992 to 1993, Kavanaugh worked as an attorney in the Office of the Solicitor General of the United States.[7]

Prior to his nomination to the D.C. Circuit, Judge Kavanaugh served as an associate counsel in Ken Starr's Office of Independent Counsel in the investigation of President Bill Clinton. There, Kavanaugh was responsible for the office's inquiry into the death of Deputy White House Counsel Vince Foster and helped prepare the 1998 report to Congress detailing the possible grounds for impeaching President Clinton. He worked with the Bush-Cheney presidential campaign in 2000 and later assisted with the Florida ballot recount. From 2001 to 2006, Kavanaugh was associate counsel and later staff secretary to President George W. Bush, where one of his responsibilities was helping the Office of White House Counsel select and vet the administration's nominees to the federal judiciary. He also worked in private practice at Kirkland & Ellis in Washington, D.C., from 1994 to 1998, and 1999 to 2001.[8]

II. JUDGE KAVANAUGH'S REPRODUCTIVE RIGHTS RECORD

A. Abortion

A woman's right to end a pregnancy has been recognized and reaffirmed by the Supreme Court from *Roe* in 1973 through *Whole Woman's Health* in 2016. These cases stand for the fundamental principle that a woman's control over her own reproductive decisions is essential to her individual health, liberty, dignity, and autonomy. The decision about if, when, and how to have a family is critical to ensuring that women can fully realize their economic, employment, and educational opportunities.

In the United States, one in four women will have an abortion by age 45,[9] and fifty-nine percent of women who obtain abortions have had at least one previous birth.[10] Women cite a range of reasons for seeking abortion care, including responsibility to their families and existing children, finances, and education and work goals.[11] Some women also seek abortion due to concerns about their own health or the health of the fetus.[12] Abortion care is extremely safe, as confirmed by a comprehensive 2018 report issued by the National Academies of Science,

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[7] *Brett M. Kavanaugh: Professional Biography*, United States Court of Appeals for the District of Columbia Circuit, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+BMK.
[8] *Id.*; Edith Roberts, *Potential nominee profile: Brett Kavanaugh*, SCOTUSBLOG (June 28, 2018), http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/.
[9] Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*. 107 AMER. J. PUB. HEALTH 1904 (2017).
[10] Guttmacher Inst., *Induced Abortion in the United States* (Jan. 2018), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states.
[11] *See, e.g.*, Antonia M. Biggs, et al., *Understanding Why Women Seek Abortions in the U.S.* 13 BMC WOMEN'S HEALTH 1 (2013); Lawrence Finer, et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110 (2005).
[12] *See* Biggs, *supra* note 11; Finer, *supra* note 11; Brian L. Shaffer, et al., *Variation in the Decision to Terminate Pregnancy in the Setting of Fetal Aneuploidy*, 26 PRENATAL DIAGNOSIS 667 (2006).

Engineering, and Medicine.[13] In fact, the risk of death associated with childbirth is approximately fourteen times higher than that associated with abortion, and every pregnancy-related complication is more common among women having live births than among those having abortions.[14] The negative impact of being turned away from a wanted abortion has also been rigorously documented in recent years.[15] Women who are denied access to a wanted abortion and give birth instead have almost four times greater odds of living below the federal poverty line and are more likely to report an inability to cover their basic cost of living.[16] Over the past several years, state legislatures have made it more difficult—and for some women impossible—to access abortion, enacting over 400 restrictions on abortion access between 2011 and 2017.[17]

1. *Garza v. Hargan* (2017)

Judge Kavanaugh directly addressed abortion access in *Garza v. Hargan*,[18] in which he would have permitted the federal government to continue preventing a minor (known in court as "Jane Doe") from accessing abortion because it did not want to "facilitate" such access. Kavanaugh twice determined that allowing the government to continue blocking Jane's access to abortion did not impose an undue burden on her right to decide whether to end her pregnancy.

Garza involved an undocumented immigrant minor—Jane Doe—who entered the United States from Central America without her parents. Jane was detained and placed in a federally-funded shelter in Texas, where she discovered she was pregnant. Jane requested an abortion, but the shelter refused under direction from the Office of Refugee Resettlement, which in 2017 prohibited shelters from taking "any action that facilitates" abortion for unaccompanied minors. This policy amounts to a ban.[19]

Jane had obtained an order from a state court judge deeming her able to consent to the abortion for herself. Texas state law requires minors to complete a judicial process to obtain an abortion without notification and consent of a parent or guardian. As part of that process, Jane filed an application under oath, then appeared at an in-person hearing where the judge was legally obligated to consider her experience, perspective, and judgment in finding that she could

[13] National Academies of Sciences, Engineering, and Medicine, *The Safety and Quality of Abortion Care in the United States* (Mar. 2016), http://nationalacademies.org/hmd/reports/2018/the-safety-and-quality-of-abortion-care-in-the-united-states.aspx.
[14] Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTET. & GYNECOL. 215 (2012).
[15] Advancing New Standards in Reproductive Health, *Introduction to the Turnaway Study* (May 2018), https://www.ansirh.org/sites/default/files/publications/files/turnaway-intro_5-23-2018.pdf.
[16] Diana Greene Foster, et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the United States*, 108 AMER. J. PUB. HEALTH 407 (2018).
[17] Elizabeth Nash & Rachel Benson Gold et al., *Policy Trends in the States, 2017*, GUTTMACHER INST. (Jan. 2, 2018), https://www.guttmacher.org/article/2018/01/policy-trends-states-2017.
[18] *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc).
[19] Plaintiff's Memorandum in Support of Her Application for a Temporary Restraining Order and Motion for a Preliminary Injunction at 3-8, *Garza*, No. 17-cv-02122 (D.D.C. Oct. 13, 2017), https://www.aclu.org/legal-document/garza-v-hargan-plaintiffs-memorandum-support-her-application-temporary-restraining.

consent for herself. The judge appointed a guardian ad litem, charged by law with representing Jane's best interests in the judicial hearing; and an attorney ad litem to help her navigate the legal process. Moreover, with the assistance of her guardian and attorney ad litems, Jane had arranged for her own transportation to her doctor's appointments and a private source of payment. The government would play no role in "facilitating" the abortion but would simply need to let her leave with her guardian to visit to a clinic.[20]

Nevertheless, the government continued blocking her from obtaining an abortion, and took several adverse actions against Jane, including:

- forcing her to cancel multiple doctor's appointments to prepare for and obtain an abortion.
- forcing her to attend "counseling" with a religiously-affiliated anti-abortion crisis pregnancy center, where she was forced to view a sonogram.
- overriding Jane's wishes and contacting her mother to inform her of Jane's pregnancy.[21]

Jane's court-appointed guardian ad litem, represented by the ACLU, filed suit, claiming government officials violated Jane's constitutional rights. A district court granted a temporary restraining order on October 18, 2017, prohibiting the government from preventing her abortion.[22] But before Jane could obtain the abortion, the government appealed the order and sought an emergency stay before a three-judge panel that included Judge Kavanaugh.

a. Three-Judge Panel Decision

The panel heard the case when Jane was more than fifteen weeks pregnant and had already been blocked from obtaining an abortion for almost four weeks. On October 20, 2017, the panel vacated the federal district court order which would have allowed Jane to obtain an abortion.[23] The unsigned order was issued by Judge Kavanaugh and Judge Karen Henderson. Judge Henderson also wrote separately in concurrence. The third judge, Judge Patricia Millett, dissented.

The order by Judge Kavanaugh returned the case to the district court, asserting that the government's conduct toward Jane would not constitute an undue burden on her right to abortion if it could find a sponsor who would remove her from custody and allow the abortion "expeditiously"—even though the government had already failed to find Jane a sponsor for six weeks.[24]

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[20] *Id.*
[21] *Id.*
[22] Temporary Restraining Order, *Garza*, No. 17-cv-02122 (D.D.C. Oct. 18, 2017), https://www.aclu.org/legal-document/garza-v-hargan-order.
[23] Order, *Garza*, No. 17-5236 (D.C. Cir. Oct. 20, 2017), https://www.aclu.org/legal-document/garza-v-hargan-order-0.
[24] *Id.*

Judge Kavanaugh's order directed the district court to allow the government an additional eleven days to find such a sponsor. After eleven days, the district court could re-enter a temporary restraining order, which the circuit court order noted either party could immediately appeal.[25] This would have delayed Jane's abortion at least until she was nearly seventeen weeks pregnant—and potentially indefinitely—approaching the point at which Texas bans abortion.[26]

In a dissent issued three days later, Judge Millett criticized the order for "[f]orcing [Jane] to continue an unwanted pregnancy just in the hopes of finding a sponsor that has not been found in the past six weeks," which she said "sacrifices [Jane's] constitutional liberty, autonomy, and personal dignity for no justifiable governmental reason. The flat barrier that the government has interposed to her knowing and informed decision to end the pregnancy defies controlling Supreme Court precedent;"[27] and that "[s]etting up substantial barriers to the woman's choice violates the Constitution. That is settled, binding Supreme Court precedent."[28]

b. En Banc Decision

Jane filed an emergency petition asking the full D.C. Circuit Court of Appeals to rehear the case en banc. She argued that the delay ordered by the panel imposed an undue burden on her ability to obtain an abortion.[29] On October 24, 2017, the full D.C. Circuit granted Jane's petition for rehearing, vacated the three-judge panel order issued by Judge Kavanaugh, and remanded the case to the district court to issue an amended temporary restraining order instructing the government to cease interfering with Jane's abortion.[30] In the en banc order, the court said that it was acting "substantially for the reasons [in the] . . . dissenting statement of Circuit Judge Millett [from the three-judge panel]."[31]

Judge Kavanaugh dissented from the en banc court's decision, defending the panel order blocking Jane's abortion access. Claiming to interpret precedent, he wrote: "the Supreme Court's many precedents hold[] that the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion."[32]

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[25] *Id.* at 2.
[26] Texas bans abortions after 22 weeks as measured by last menstrual period. Tex. Health & Safety Code § 171.044.
[27] Order at 2, *Garza*, 874 F.3d 735 (No. 17-5236) (attaching Judge Millett's dissent), https://www.aclu.org/legal-document/garza-v-hargan-dissent.
[28] *Id.* at 3.
[29] Emergency Petition for Rehearing, *Garza*, 874 F.3d 735 (No. 17-5236), https://www.aclu.org/legal-document/garza-v-hargan-emergency-petition-rehearing-en-banc.
[30] *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc). The Supreme Court later granted the government's petition for certiorari, and on June 4, 2018, vacated the en banc decision with instructions to the court of appeals to direct the district court to dismiss the individual claim for injunctive relief as moot, as Jane had already had the abortion. *Azar v. Garza*, 138 S. Ct. 1790 (2018).
[31] *Garza*, 874 F.3d at 736.
[32] *Garza*, 874 F.3d at 752 (Kavanaugh, J., dissenting).

However, Judge Kavanaugh's recitation of the governing case law was incomplete and one-sided, failing to address the Supreme Court precedent making clear that the government must respect a woman's constitutional right to make the ultimate decision about whether to continue or end a pregnancy. Judge Kavanaugh acknowledged that "all parties to this case recognize that *Roe v. Wade* and *Planned Parenthood v. Casey* are precedents we must follow."[33] Yet he failed to respect that precedent: his opinion does not explain how the government's repeated attempts to veto Jane's choice to have an abortion were consistent with *Casey*'s holding that abortion regulations must "inform the woman's free choice, not hinder it."[34]

Judge Kavanaugh rejected the majority's conclusion that the government had imposed an undue burden on Jane's rights, calling it "ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision."[35] He cited no authority for the ability of the government to veto a woman's decision for six weeks, as it did to Jane.[36] Indeed, Judge Kavanaugh insisted the delay was eleven days—ignoring the full period of time Jane had been delayed in accessing abortion.[37] Moreover, "abortion on demand" is a phrase commonly used by abortion rights opponents, and by Justice Scalia in his *Casey* dissent.[38] Kavanaugh used that phrase three separate times in his dissent.[39]

Judge Kavanaugh did not join an opinion by Judge Henderson asserting that as an undocumented, detained immigrant, Jane had no constitutional right to an abortion.[40] Rather than affirmatively state that Jane has a right to abortion, Judge Kavanaugh instead wrote only that the government had "assumed" that she had a right to abortion. At no point did Judge Kavanaugh state that, for example, if the government failed to find Jane a sponsor after eleven more days, the government must stop blocking her access to abortion. Instead, Judge Kavanaugh left the door open to delaying Jane's abortion even further, noting that the government might make additional arguments to resist allowing access at that time, and the court could "immediately consider [them]."[41] Whether or not "existing precedent" would then permit Jane to access abortion would "depend[] on what arguments the Government can make at that point," he

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[33] *Id.* at 753.
[34] *Casey*, 505 U.S. at 877.
[35] *Garza*, 874 F.3d at 752 (Kavanaugh, J., dissenting).
[36] Kavanaugh did include a footnote, stating: "To be clear, under Supreme Court precedent, the Government cannot use the transfer process as some kind of ruse to unreasonably delay the abortion past the point where a safe abortion could occur." *Id.* at 753 n.3.
[37] *Id.* (urging that the delay was only "7 days from now").
[38] *See Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part).
[39] *Garza*, 874 F.3d at 752, 755, 756 (Kavanaugh, J., dissenting).
[40] Judge Henderson's opinion faulted the government for failing to press forward this argument (although it was presented in amicus brief filed by Texas and other states). While Judge Kavanaugh did not sign her opinion, neither did he disavow that position in his opinion (whereas Judge Millett did so in ringing terms). Instead, Judge Kavanaugh said several times that the government had "assumed" that Jane Doe possessed the constitutional right, so the only inquiry before the court was whether blocking her access was an undue burden.
[41] *Garza*, 874 F.3d at 754 (Kavanaugh, J., dissenting).

wrote.[42] In practice, Judge Kavanaugh was inviting additional, potentially indefinite delay, even while Jane's pregnancy progressed toward the state's legal limit for abortion.

Judge Kavanaugh wrote that the government had good reason to put Jane "in a better place when deciding whether to have an abortion," and to deny her abortion access until finding a sponsor because she lacks a "support network of friends and family" for support "through the decision and its aftermath."[43] He asserted, without citation to any authority, that it was "irrelevant" that Jane had already gone through the state-mandated bypass process and been deemed by a court to be able to make the decision herself.[44]

In her en banc concurrence, Judge Millett noted that Judge Kavanaugh's view is inconsistent with controlling Supreme Court precedent. "[Jane], like other minors in the United States who satisfy state-approved procedures, is entitled under binding Supreme Court precedent to choose to terminate her pregnancy. *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622 (1979)," wrote Judge Millett.[45] "The [en banc] opinion gives effect to that concession; it does not create a 'radical' 'new right' . . . by doing so," she wrote, explicitly rebutting Judge Kavanaugh's dissenting opinion.[46] Judge Millett further noted that Kavanaugh's view that the "sufficiency of someone's 'network'" is constitutionally relevant—"even after compliance with all state-mandated procedures"—would "require a troubling and dramatic rewriting of Supreme Court precedent."[47]

Judge Kavanaugh did not acknowledge or distinguish *Bellotti* in his dissent—and he ignored or refused to apply several other existing Supreme Court precedents. In particular, he ignored *Bellotti*'s holding that minors must be able to complete a confidential judicial bypass with "sufficient expedition to provide an effective opportunity for an abortion to be obtained."[48] He did not explain how the "flat prohibition" (as Judge Millett called it) imposed by the government wholly preventing Jane from accessing abortion failed to constitute an undue burden on her right to terminate a pregnancy under *Casey*.[49] Nowhere in his opinion did Judge Kavanaugh allow that the decision of whether to carry a pregnancy to term must ultimately be made by the pregnant woman herself, as required by *Casey*.[50] He did not weigh the potential harms to Jane stemming from a further delay against the purported benefits of the delay asserted

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[42] *Id.*
[43] *Id.* at 755.
[44] *Id.*
[45] *Garza*, 874 F.3d at 737 (Millett, J., concurring).
[46] *Id.*
[47] *Id.* at 740.
[48] *Bellotti*, 443 U.S. at 644.
[49] *Garza*, 874 F.3d at 739 (Millett, J., concurring); *see also Casey*, 505 U.S. at 877 (articulating the undue burden standard).
[50] *Casey*, 505 U.S. at 877.

by the government, as required by *Whole Woman's Health*.[51] In fact, he did not cite *Whole Woman's Health* at all, even though it is the Supreme Court's most recent pronouncement on how courts should evaluate government-imposed restrictions on the right to abortion.

The day after the D.C. Circuit's en banc decision, Jane was able to have an abortion.[52] Less than a month after issuing his opinion that would have forced Jane to continue her pregnancy, Judge Kavanaugh was added to President Trump's public list of candidates to fill the next vacancy on the Supreme Court.[53]

2. Writings and Speeches

Roe and the right to abortion rest on a foundation of individual liberty guaranteed by the Constitution.[54] The Supreme Court has applied the constitutional principle of liberty to fit the context of modern society, yielding greater protection for individual dignity and self-autonomy from government intrusion. This approach builds on and updates the principle of liberty that the Framers embedded in our Constitution and does not chain its meaning to the eighteenth and nineteenth centuries.

Beyond the right to abortion, this approach has produced landmark decisions protecting a sphere of personal and intimate decision-making, such as the right of parents to direct the education and upbringing of their children,[55] the right to use contraception,[56] and the right of same-sex couples to marry.[57] Modeling this approach, Justice Anthony Kennedy wrote for the Court in *Obergefell v. Hodges* recognizing a constitutional right to marriage equality. He rejected a history-bound method for identifying liberty rights, asserting that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries," because "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[58]

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[51] 136 S. Ct. at 2309 ("The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."); *see also id.* at 2318 (noting that the effects of Texas's regulations of abortion providers could harm women's health).

[52] Press Release, *After A Month of Obstruction by the Trump Administration, Jane Doe Gets Her Abortion*, ACLU (Oct. 25, 2017), https://www.aclu.org/news/after-month-obstruction-trump-administration-jane-doe-gets-her-abortion.

[53] Nolan D. McCaskill, *Trump Releases Updated Short List of Potential Supreme Court Nominees*, POLITICO (Nov. 11, 2017), https://www.politico.com/story/2017/11/17/trump-supreme-court-nominees-247441.

[54] *See* Amy Myrick, *Roe and Intersectional Liberty Doctrine*, CTR. FOR REPROD. RIGHTS (2018), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Liberty-Roe-Timeline-spread-for-web.pdf.

[55] *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

[56] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[57] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[58] *Id.* at 2598, 2602.

However, some jurists and legal thinkers have argued against broadening the scope of individual liberty, advocating for limiting constitutionally-protected liberties to only those "deeply rooted in the Nation's history and tradition."[59] This narrower approach has been used to reject a right to a dignified death[60] and to reject a right to sexual intimacy for LGBT people[61] (a decision later overturned by the 2003 case *Lawrence v. Texas*[62]).

The narrow "history and tradition" approach to liberty has often been invoked by Supreme Court justices who disagreed with the Court's rulings upholding the right to abortion. For instance, in his dissenting opinion in *Roe*, then-Justice William Rehnquist wrote, "the asserted right to an abortion is not so rooted in the traditions and conscience of our people as to be ranked as fundamental."[63] When the Court reaffirmed *Roe*'s core holding nearly two decades later in *Casey*, Rehnquist again dissented, maintaining that "it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as 'fundamental.'"[64] Also in *Casey*, Justice Antonin Scalia argued in dissent that there is no right to "abortion on demand" because "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."[65]

On the question of how to evaluate the scope of liberty, Judge Kavanaugh has made it clear where he stands. Rather than continue the tradition of a robust and evolving liberty espoused by Justice Kennedy and others, Judge Kavanaugh, in both word and deed, has instead firmly sided with the cramped view of liberty endorsed by Chief Justice Rehnquist and Justice Scalia. In fact, he has repeatedly praised both of these justices for tying liberty to only those rights "deeply rooted in this Nation's history and tradition"—singling out their dissenting opinions in *Roe* and *Casey* for particular acclaim.

In public speeches, Judge Kavanaugh has embraced an analytical method that looks to "history and tradition" to narrowly define liberty rights, specifically reproductive rights. In a speech he delivered at the American Enterprise Institute in September 2017,[66] Judge Kavanaugh praised then-Justice Rehnquist's dissenting opinion in *Roe*, in which Rehnquist wrote that the Constitution does not protect abortion as a fundamental right. Calling Chief Justice Rehnquist his "first judicial hero,"[67] Judge Kavanaugh recounted Rehnquist's view that "any such unenumerated right had to be rooted in the traditions and conscience of our people," saying that

[59] *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).
[60] *Id.* at 720.
[61] *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).
[62] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[63] *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).
[64] *Casey*, 505 U.S. at 952-53 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
[65] *Id.* at 979-80 (Scalia, J., concurring in the judgment in part and dissenting in part).
[66] *From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist* at the American Enterprise Institute (Sept. 18, 2017), http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.
[67] *Id.* at 6, 21.

while Rehnquist could not convince the other justices that he was correct in *Roe* or later cases such as *Casey*, "he was successful in stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition."[68] Kavanaugh strongly implied his agreement with Chief Justice Rehnquist, saying that Rehnquist "righted the ship of constitutional jurisprudence."[69]

In a speech that he delivered at the University of Notre Dame in 2017, Judge Kavanaugh similarly recalled Justice Scalia's advice: "don't make up new constitutional rights that are not in the text of the Constitution."[70] In particular, Judge Kavanaugh remarked that Justice Scalia rejected "balancing tests" to decide constitutional cases, instead favoring an approach that looked to "history and tradition."[71] Judge Kavanaugh noted that Justice Stephen Breyer had applied a balancing test to decide whether the abortion restrictions in *Whole Woman's Health* imposed an undue burden. Judge Kavanaugh said that Justice Scalia's call for "judges to focus on history and tradition" might better guide their decision-making on constitutional rights. Kavanaugh said that "balancing tests . . . could be used by judges to make it up as they go along," calling the rejection of those tests a defining feature of Justice Scalia's jurisprudence.[72]

In a speech delivered at George Mason University School of Law in 2016, Judge Kavanaugh analyzed Justice Scalia's legacy.[73] Kavanaugh described Justice Scalia's refusal to recognize "new" constitutional rights, which Scalia thought was outside the proper role of the courts, and not permitted by the Constitution. [74]

Judge Kavanaugh picked two examples to illustrate that approach: Justice Scalia's dissents in *Casey* and *Obergefell*.[75] Judge Kavanaugh noted that "courts have no legitimate role, Justice Scalia would say, in creating new rights not spelled out in the Constitution. . . . For Justice Scalia, it was not the Court's job to improve on or update the Constitution to create new rights."[76] Judge Kavanaugh said that Justice Scalia recognized that the determination of whether to recognize an individual liberty right depended on the "text and history of the constitutional . . . provision in question."[77] Judge Kavanaugh signaled his agreement with Justice Scalia's dissents in *Casey* and *Obergefell*, saying that Scalia deferred to legislatures (by refusing to recognize new

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[68] *Id.* at 16.
[69] *Id.* at 6. Kavanaugh also said of Rehnquist's 1976 law review article "*The Notion of a Living Constitution*"—which criticized the so-called judicial activism of the federal judiciary—"it's impossible to overstate its significance to me and how I first came to understand the role of a judge in our constitutional system." *Id.* at 9.
[70] Brett Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1909 (2017).
[71] *Id.* at 1916.
[72] *Id.* at 1909.
[73] *Keynote Address: Justice Scalia and Deference*, VIMEO (June 2, 2106), https://vimeo.com/169758593.
[74] *Id.*
[75] 135 S. Ct. 2584 (2015) (recognizing marriage equality as a constitutional right).
[76] *Keynote Address: Justice Scalia and Deference*, *supra*, note 73.
[77] *Id.*

constitutional rights) "*when the Constitution . . . called for deference*," based on its "text and history."[78]

In addition to praising the narrow "history and tradition" approach to individual liberty, Judge Kavanaugh applied that approach in a 2007 case (*Doe ex rel. Tarlow v. District of Columbia*) involving the extent to which people with intellectual disabilities have a liberty right to have their wishes considered about their own health care.[79]

Judge Kavanaugh authored the D.C. Circuit panel opinion reversing the district court and upholding the District of Columbia's policy under which it did not need to "consider the health wishes of intellectually disabled patients" who had not been competent to consent to health care.[80] Judge Kavanaugh said that such individuals' liberty to inform decision-making about their own medical care was "not . . . deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty."[81] He held that the plaintiffs' liberty claims were therefore "meritless"[82]—a conclusion deeply at odds with modern notions of human dignity and self-autonomy. As the Bazelon Center for Mental Health Law has explained, Judge Kavanaugh's decision runs contrary to the basic principle that "[l]ike 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."[83]

Judge Kavanaugh's praise and application of the limited approach to individual liberty grounded in "history and tradition" suggests that he is hostile to the foundations of the right to abortion and other essential liberty rights. By siding with the dissenters' approach in *Roe* and *Casey*, Judge Kavanaugh has strongly signaled that he disagrees with the judicial philosophy surrounding liberty underpinning those landmark cases.

B. Contraception

The Supreme Court first addressed the constitutional right to contraception in a series of cases stretching back over fifty years ago.[84] As the Court has stated: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[85] The Centers for Disease Control ("CDC") named

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[78] *Id.* (emphasis added).
[79] 489 F.3d 376 (D.C. Cir. 2007).
[80] 489 F.3d at 380.
[81] *Id.* at 383.
[82] *Id.* at 384.
[83] *Self-Determination: Review of Disability-Related Cases Involving Judge Brett Kavanaugh*, BAZELON CTR. FOR MENTAL HEALTH, http://www.bazelon.org/wp-content/uploads/2018/08/Self-Determination-Bazelon-One-Pager.pdf
[84] *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[85] *Casey*, 505 U.S. at 856. The American College of Obstetricians and Gynecologists ("ACOG") further recognizes the wide range of benefits including "female engagement in the work force, and economic self-sufficiency for women." *See* Amer. Coll. of Obstet. & Gynecol., Committee Opinion 615, Access to Contraception, 125 Obstet. &

contraception one of the ten great public health achievements of the twentieth century.[86] Women in the United States spend an average of thirty years trying to prevent pregnancy and ninety-nine percent of women who have ever had sexual intercourse have used some form of contraception, including women from every ethnic, racial, religious, and geographic background.[87] The Affordable Care Act ("ACA") was a significant advance in women's health. It requires most employers to provide insurance coverage for women's preventive health services, including contraception, at no cost. The ACA has helped guarantee no-cost contraceptive access for more than 60 million women.[88]

***Priests for Life v. Health & Human Services* (2015)**

Judge Kavanaugh has addressed issues of contraceptive access in the ACA context. In *Priests for Life v. Health & Human Services*,[89] Judge Kavanaugh would have invalidated the ACA's contraception coverage accommodation that preserved coverage for employees at religiously-affiliated organizations. He believed that the accommodation substantially burdened the religious exercise of employers, taking a sweeping view of what it means for an employer to be "complicit" in women's use of contraception.

Priests for Life involved challenges brought by several religiously-affiliated employers to the ACA accommodation. Under the accommodation, religiously-affiliated nonprofit organizations can opt out of covering contraception by filing a simple two-page form with their insurer. Their insurer then provides coverage directly, preserving seamless access for employees without involving their employers.

The plaintiffs in *Priests for Life* argued that filing the required form to opt out of providing contraception coverage violated their rights under the Religious Freedom Restoration Act ("RFRA").[90] D.C. District Court judges ruled against the employers on almost all of their claims. After the employers appealed, the D.C. Circuit Court of Appeals affirmed the district

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Gynecol. 250 (2015); Amer. Coll. Of Obstet. & Gynecol., Committee Opinion No. 516, Health Care Systems for Underserved Women (2012).

[86] Ctrs. For Disease Control & Prevention, Ten Great Public Health Achievements – United States, 1990-1999 (Apr. 2, 1999), https://www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm.

[87] Kimberly Daniels, et al., *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, 62 NAT'L HEALTH STATISTICS REPORTS 1 (Feb. 14 2013), https://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf; JO JONES ET AL., *Current Contraceptive Use in the United States, 2006–2010, and Changes in Patterns of Use Since 1995*, 60 NAT'L HEALTH STATISTICS REPORTS 1 (Oct. 18, 2012); Rachel K. Jones & Joerg Dreweke, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use*, GUTTMACHER INST. (Apr. 2011), https://www.guttmacher.org/sites/default/files/report_pdf/religion-and-contraceptive-use.pdf.

[88] *New Data Estimates 62.4 Million Women Have Coverage of Birth Control Without Out-of-Pocket Costs*, NAT'L WOMEN'S LAW CTR. (Sept. 25, 2017), https://nwlc.org/resources/new-data-estimate-62-4-million-women-have-coverage-of-birth-control-without-out-of-pocket-costs/.

[89] 808 F.3d 1 (D.C. Cir. 2015) (en banc).

[90] Plaintiffs also claimed that the accommodation violated their First Amendment rights.

court decisions, partly on the grounds that filing the form imposed only a de minimis burden on religion.[91] The plaintiffs sought rehearing from an en banc panel, which the appeals court denied.

Judge Kavanaugh authored a lengthy dissent from the denial of rehearing.[92] He would have held that the accommodation burdened the employers' free exercise of religion in violation of RFRA. First, he significantly expanded the Supreme Court's decision in *Burwell v. Hobby Lobby*,[93] finding that the accommodation substantially burdened religion. In *Hobby Lobby*, however, employers were required to provide contraception coverage and did not have the option of accepting an accommodation, unlike the employers in *Priests for Life*.[94] Nonetheless, Judge Kavanaugh gave a high degree of deference to the religious employers, writing that "if the Government requires someone (under threat of incurring monetary sanctions or punishment, or of having a benefit denied) to act or to refrain from acting in violation of his or her sincere religious beliefs, that constitutes a substantial burden on the exercise of religion."[95] He asserted that courts could not question the "correctness or reasonableness" of a religious belief, only its sincerity.[96] The consequence of Judge Kavanaugh's substantial burden analysis was to privilege the interests of religiously-affiliated employers over the interests of employees seeking contraception access.

Validating the plaintiffs' claim that the accommodation infringed upon their religious exercise, Judge Kavanaugh equated the filing of the two-page form with other types of religious burdens, including: a Muslim prisoner being forced to shave his beard; Amish parents being forced to send their children to high school; and Seventh-Day Adventists being forced to work on the Sabbath.[97] In these examples, however, individuals were required to directly violate their religious practices. There is no direct violation of religious practice from filing a two-page form.

In a concurrence to the court's decision denying rehearing that responded to Judge Kavanaugh's dissent, Judge Nina Pillard declined to defer to the employers' argument that by providing notice to their insurer, they were forced to trigger contraceptive coverage for their employees. She noted that they simply mischaracterized the accommodation process. "[T]he dissenters," Judge Pillard wrote, "perceive in *Hobby Lobby* a potentially sweeping, new RFRA prerogative for religious adherents to make substantial-burden claims based on sincere but erroneous assertions about how federal law works."[98]

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[91] *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 249 (D.C. Cir. 2014).
[92] *Priests for Life*, 808 F.3d 14 (Kavanaugh, J., dissenting).
[93] 134 S. Ct. 2751 (2014) (invalidating the requirement that closely-held, for-profit businesses with religious objections to contraception nonetheless must buy health-insurance coverage for their employees that pays for contraception, or else face taxes or penalties).
[94] *Id.*
[95] *Priests for Life*, 808 F.3d at 16 (Kavanaugh, J., dissenting)
[96] *Id.* at 17.
[97] *Id.* at 20.
[98] *Id.* at 2 (majority opinion).

Indeed, Judge Kavanaugh acknowledged that under the Supreme Court's opinions in *Hobby Lobby*, the government had a compelling interest in ensuring broad access to contraception, writing, "It is not difficult to comprehend why a majority of the Justices in *Hobby Lobby* . . . would suggest that the Government has a compelling interest in facilitating women's access to contraception."[99] Identifying the "numerous benefits that would follow from reducing the number of unintended pregnancies" by expanding access to contraception, he wrote: "It is commonly accepted that reducing the number of unintended pregnancies would further women's health, advance women's personal and professional opportunities, reduce the number of abortions, and help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant unintentionally at a young age."[100]

But, having already found that filing out a two-page form imposed a substantial burden, and acknowledging a compelling interest in ensuring access to contraception, Judge Kavanaugh insisted that the government find less restrictive means to ensure that employees did not lose their contraceptive coverage. He wrote that the government had a different notice available that employers could file indicating that they would not cover contraception, which would allow the government to then independently identify their insurers to arrange for alternative coverage.[101] Judge Kavanaugh wrote that plaintiffs had stated that the alternative notice would "lessen[] the religious organizations' degree of complicity[.]"[102]

Judge Kavanaugh put weight on the fact that this alternative notice would not harm employees. "[A]ccommodating the religious organizations by allowing them to use the [alternative] notice would not . . . 'unduly restrict' third parties," he wrote.[103] He cited a law review article that interpreted Supreme Court precedent on the ACA's contraception benefit as "'appear[ing] to tie accommodation to the fact that the government has other ways of providing for the statute's intended beneficiaries so that no third-party harm would result from the accommodation.'"[104]

The Supreme Court ultimately heard *Priests for Life* and other consolidated cases in the 2016 case *Zubik v. Burwell*. An eight-member Court did not reach the merits, instead remanding

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[99] *Id.* at 22 (Kavanaugh, J., dissenting).
[100] *Id.* at 22-23. However, in a footnote, Judge Kavanaugh qualified this holding, noting that Justice Kennedy's *Hobby Lobby* opinion addressing the government's compelling interest "did not expressly discuss" whether that interest "in ensuring general coverage for contraceptives encompasses ensuring coverage for those specific drugs and services that, some believe, operate as abortifacients and result in the destruction of embryos." *Id.* at 23 n.10.
[101] Judge Kavanaugh relied on the Supreme Court's orders in non-merits rulings in *Little Sisters of the Poor v. Sebelius*, 571 U.S. 1171 (2014) and *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), writing that the Court had previously identified a process in which religious employers could submit a less restrictive notification (not an opt-out form) about their religious status directly to the government.
[102] *Priests for Life*, 808 F.3d. at 24 (Kavanaugh, J., dissenting).
[103] *Id.* at 25.
[104] *Id.* (quoting Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2532 (2015)).

the cases to the courts of appeals for the parties to try to reach a compromise solution.[105] No compromise was reached, and the Trump administration later issued interim final rules creating broad exemptions from contraceptive coverage for employers and universities with religious or moral objections.

These rules are currently enjoined, and litigation challenging them (including a suit brought by the Center) could reach the Supreme Court.[106] These cases and others could be affected by Judge Kavanaugh's expansive deference to religious employers that object to being made "complicit" in conduct they oppose. On the Supreme Court, Judge Kavanaugh could also confront litigation raising similar issues around other regulations issued by the current administration that grant broad religious exemptions.[107]

C. Maternal Health

The ACA was also critical to expanding access to maternal health care. Previously, many individual health plans did not cover maternity care. In addition, many insurance companies treated pregnancy or past pregnancy-related procedures like C-sections as pre-existing conditions, which could be grounds for denying maternity coverage.[108] The ACA eliminated coverage denials based on pre-existing conditions and included maternity care as an essential health benefit that must be part of any health insurance plan.[109] Overall, the ACA has extended health care coverage, including for reproductive health care, to nearly 20 million people.[110] The ACA has been a frequent subject of litigation, with challenges repeatedly arising before the Supreme Court, which has largely sustained the law.[111]

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[105] 136 S. Ct. 1557 (2016).

[106] *California et al. v. Health & Human Servs. et al.*, 281 F. Supp. 3d 806 (N.D. Cal. Dec. 21, 2017), *appeal filed*, No. 18-15255 (9th Cir. Feb. 16, 2018); *Pennsylvania v. Trump et al.*, 281 F. Supp. 3d 553 (E.D. Pa. Dec. 15, 2017), *appeal filed*, No. 18-1253 (3d Cir. Feb. 15, 2018); *see also Irish 4 Reproductive Health et al. v. Health & Human Servs.*, No. 3:18-cv-00491 (N.D. Ind. filed June 26, 2018).

[107] *See, e.g.*, Juliet Eilperin & Ariana Eunjung Cha, *New HHS Civil Rights Division to Shield Health Workers with Moral or Religious Objections*, WASH. POST (Jan. 17, 2018), https://www.washingtonpost.com/national/health-science/trump-administration-creating-civil-rights-division-to-shield-health-workers-with-moral-or-religious-objections/2018/01/17/5663d1c0-fbe2-11e7-8f66-2df0b94bb98a_story.html?utm_term=.41fbbcc66529.

[108] *See* Danielle Garrett, Turning to Fairness, NAT'L WOMEN'S LAW CTR. (2012), https://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf.

[109] *See* 42 U.S.C. § 18022(b)(1)(D). Research shows that uninsured pregnant women receive fewer prenatal care services, and are more likely to experience pregnancy related complications and adverse birth outcomes whereas increased access to care and services improves outcomes for both mothers and their children. *See, e.g.*, Amer. Coll. of Obstet. & Gynecol., Committee Opinion No. 552: *Benefits to Women of Medicaid Expansion Through the Affordable Care Act*, 121 OBSTET. & GYNECOL. 223 (2013).

[110] Nicholas Bakalar, *Nearly 20 Million Have Gained Health Insurance Since 2010*, N.Y. TIMES (May 22, 2017), https://www.nytimes.com/2017/05/22/health/obamacare-health-insurance-numbers-nchs.html.

[111] *See NFIB v. Sebelius*, 567 U.S. 519 (2012) (holding that the law's requirement that individuals purchase health insurance or pay a tax was a valid exercise of Congress's taxing power); *King v. Burwell*, 135 S. Ct. 435 (2015) (rejecting a challenge to the law's tax credit subsidies for individuals purchasing health insurance). The ACA also expanded eligibility for Medicaid. However, as a result of the Supreme Court's decision in *NFIB*, which effectively made the Medicaid expansion optional for states, 567 U.S. at 580-88, many states with the worst health disparities have refused to expand Medicaid, resulting in coverage gaps that impact health care overall, including before,

1. *Seven-Sky v. Holder* (2011)

In 2011, Judge Kavanaugh was part of a three-judge panel that heard a challenge to the ACA's requirement that individuals purchase health insurance (the "individual mandate"). The outcome of the case had the potential to roll back the ACA's coverage expansion, jeopardizing reproductive health care, including maternal health care, for millions of women. While Judge Kavanaugh did not address the substantive merits of the ACA in his *Seven-Sky* opinion, his analysis largely disregarded the substantial practical impact that undermining the law would have for millions of people.

The panel majority held that the mandate was constitutional pursuant to Congress's commerce clause authority.[112] Judge Kavanaugh dissented from the panel decision.[113] He would have held that the court lacked jurisdiction to reach the merits because the individual mandate's tax penalty had not yet taken effect.[114] Though he withheld judgment on the ACA's ultimate constitutionality, Judge Kavanaugh characterized the law as a significant expansion of federal power, calling it "unprecedented on the federal level in American history"[115]—a comment that was not necessary to his disposition of the case.

2. Writings

In a 2014 law review article, Judge Kavanaugh discussed the Supreme Court's recent health care cases. He criticized Chief Justice Roberts's decision upholding the ACA's individual mandate in *NFIB v. Sebelius*.[116] Judge Kavanaugh noted that Chief Justice Roberts "*agreed* with the four dissenters (Justices Scalia, Kennedy, Thomas, and Alito) on all of the key constitutional and statutory issues raised about the individual mandate."[117] However, Chief Justice Roberts held that the Court should find a way to avoid invalidating the mandate. Roberts did so by construing the individual mandate as an allowable exercise of Congress's taxing power (after determining that it exceeded Congress's authority to regulate interstate commerce).[118] In response to Chief Justice Roberts's opinion, Judge Kavanaugh argued that the method of statutory construction that Roberts used to save the ACA should be "jettisoned."[119] Nowhere in his article does Judge Kavanaugh discuss the fact that had that interpretive tool not been available to Chief Justice Roberts, millions of Americans stood to lose access to health care coverage.

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during, and after pregnancy. *See* Rachel Garfield, et al., *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAMILY FOUND. (2018), https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/.

[112] *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

[113] Judge Kavanaugh would have ruled that the court lacked jurisdictional grounds to reach the merits.

[114] *Id.* at 45-46.

[115] *Id.* at 51.

[116] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016).

[117] *Id.* at 2147 (i.e., about limits on the scope of the Commerce, Necessary and Proper, and Taxing Clauses, and that the provision was best read to impose a mandate rather than a tax).

[118] *Id.*

[119] *Id.* at 2148.

In the same article, Judge Kavanaugh discussed *King v. Burwell*,[120] where the Supreme Court held that individuals who purchase health insurance policies on the federal health exchange are entitled to tax credit subsidies under the ACA. He criticized the decision in *King* for allegedly stretching the text of the ACA such "that the words in question did not *mean* what they *said*."[121] Under Judge Kavanaugh's strict reading of the law, more than 6 million people in 34 states would be cut off from financial assistance in paying for health insurance.[122]

With ongoing litigation against the ACA, there is reason to expect the Court to continue to shape the legal foundations of health reform over the coming years.[123]

CONCLUSION

After a thorough review of Judge Kavanaugh's judicial opinions, speeches, and writings, we have grave concerns about how he will rule on reproductive rights cases. His judicial philosophy is fundamentally hostile to the protection of reproductive rights under the U.S. Constitution. **Therefore, the Center for Reproductive Rights strongly recommends that the Senate reject the nomination of Judge Brett Kavanaugh to the Supreme Court.**

[120] 135 S. Ct. 2480 (2015).
[121] Kavanaugh, *supra* note 116, at 2159 (emphasis in original).
[122] *State-by-State Effects of a Ruling for the Challengers in King v. Burwell*, KAISER FAMILY FOUND. (June 2, 2015), https://www.kff.org/interactive/king-v-burwell-effects/.
[123] For example, in *Texas v. United States*, No. 4:18-cv-00167 (N.D. Tex. filed Feb. 2018), the Department of Justice has declined to defend the ACA against challenges that it is unconstitutional.

Chicago Council
of Lawyers

The public interest bar association

U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Honorable Members of the U.S. Senate Committee on the Judiciary,

Founded in 1969, for the past five decades the Chicago Council of Lawyers, a non-partisan public interest bar association, has advocated for the fair and impartial administration of justice and has engaged in the evaluation of judicial appointments at all levels of the judiciary in pursuit of a judicial system that is fair, open and accessible to the marginalized and the powerful alike. It is in that spirit that we offer our comments on the nomination of Judge Kavanaugh to the Supreme Court in the attached report, wherein the Council recommends that the Senate not confirm Judge Kavanaugh to the Supreme Court.

For further information, please contact:

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Sincerely,

The Chicago Council of Lawyers

Kari Chin, LCSW
[redacted]

September 10, 2018

Dear Senate Judiciary Committee,

My name is Kari Chin and I was just a Nobody in the crowd on Day 1 of the Senate Judiciary Committee hearing for Judge Kavanaugh on September 4th. I want to thank Senator Feinstein for including me as a guest to this historic event.

I paid close attention to nearly every frustrating word and to every brilliant word that day. I took copious amounts of notes at the hearing and I have a few questions for the committee and for Judge Kavanaugh. This letter may not be limited to ten minutes.

Before my questions, I would like to introduce myself along with three specific areas of concern relating to discrimination against the LGBT community.

First, I would like you to understand that I am a woman who is fully dedicated to my wife of 17 years and to our three young children, ages five, three, and two. We have claimed our marriage for what it is—"*marriage*"—since 2001, even though my constitutional right to be married was not granted by Florida and by the Supreme Court until 2015. I gave birth to our middle son in 2015 and Florida did not treat me equally to other opposite-sex couples and refused to list my wife's name on the birth certificate, as would have been done for any opposite-sex married couple, *even* in cases where the wife conceived via artificial insemination through donor sperm. It took the state nearly two years to settle this case and to come to the conclusion not to discriminate against us. States all around the nation took up this issue. In Arkansas, same-sex married couples faced even more resistance on this issue. Their case went to the Supreme Court, who ruled in the couples' favor. Judge Gorsuch dissented to the decision. I urge you to read this dissent for yourself after you dive into the case and see if it makes common sense.

My second concern: Florida falls within the 11th Circuit Court of Appeals. And in the 11th Circuit Court of Appeals, a three-judge panel decided that Title VII of the Civil Rights Act does not protect LGBT employees from being fired for being LGBT in the case Evans vs. Georgia Regional Hospital. In other words, I can be fired for being gay. Sexual orientation is not a form of sex discrimination under the 11th Circuit. And again, in real words, I can be fired for being gay. The full panel failed to review the ruling. The Supreme Court declined to hear the case. This ruling differs from similar cases on the same issue in the 7th Circuit and the 2nd Circuit. The 8th Circuit will have a ruling on a similar case soon. So, to summarize, one can be fired for being gay in Florida, Georgia and Alabama. But in Illinois, Indiana, and Wisconsin (the 7th Circuit) and in Connecticut, New York and Vermont (the 2nd Circuit), one is protected from being fired for being gay. And again, in common, everyday language: I can be fired for being gay.

Finally, did you know that there are a host of complications to couples relating to the date of their legal marriage? I am a social worker eligible for the Florida State Retirement System

("FRS"). Within the FRS, employees can elect between participation in the Pension Plan or the Investment Plan. It is common knowledge that the Pension Plan is more beneficial for an employee who intends to spend their career working for the State, particularly those with lower salaries who cannot afford substantial contributions to the Investment Plan. However, under the Pension Plan your beneficiary had to be your spouse. In 2010, I could not designate my wife as my beneficiary under the Pension Plan because Florida did not recognize my marriage as legal. After Florida finally recognized my marriage as legal, I decided to switch from the Investment Plan to the Pension Plan. The State of Florida told me that it would cost $34,459. The total amount in my Investment Plan account was approximately $22,826, meaning that my family of five had to come out of pocket $11,633.16, just because my wife was not considered my "spouse" by Florida in 2010.

Because this is unfair, I asked the State of Florida to waive the $11,633.16 that I had to come out of pocket (the "buy-in fee"). I have spent two years fighting for this issue to be resolved in administrative hearings within the agency. Instead of reimbursing me $11,633.16, the State of Florida retained a private law firm to combat my request. It easily spent triple the amount I was asking to be reimbursed on attorney's fees. The State first argued that I was not entitled to any relief, and then it argued that I was not entitled to any relief because I did not have a marriage license in 2010 (even though it was impossible for me to get a marriage license in Florida in 2010). The Hearing Officer assigned to my case ruled I was entitled to be reimbursed for a significant amount of money. But, the State of Florida and the Agency handling the case disagreed, so I was forced to file an appeal of the ruling to the Second District Court of Appeals.

This is just *one* example of the need to have common sense decisions to rectify wrongs that relate to same-sex couples' marriage dates not accurately reflecting what they should be if they could have been recognized prior to the end of discrimination of no access to marriage. Please see Peter Nicolas's "Backdating Marriage" in the California Law Review for an in-depth look at this topic and numerous other similar situations relating to Social Security, survivor benefits, military benefits, alimony, birth certificate complications and more. I would also venture to say, that though this sum of money is significant to me, more is being spent on defending this position than the amount of the buy-in fee itself.

Suffice it to say, these are just three examples, *and only three examples*, relating to LGBT rights alone. In other words, marriage equality was not the end of discrimination against the LGBT community as many may think. Other cases will come before the court. Even the Supreme Court. Sadly, they must.

My questions:

- Considering that a recently confirmed nominee of President Trump, Justice Gorsuch, dissented in the Arkansas birth certificate case for same-sex couples, why should I have faith in a more recent nominee to come to a different conclusion when facing a similar situation?

- Considering that my marriage was put to a vote by the Supreme Court, and found valid with a narrow margin of a 5-4 vote, why should I be confident with the court moving toward a majority of conservative justices?
- Judge Kavanaugh, what do you think of the 11th Circuit's decision in Evans vs. Georgia? Do you think I should be able to be fired for being gay? What if my employer cites religious grounds?
- How can anyone be confident in the answers that any Supreme Court justice nominee provides?
- If the documents that have not been released yet are so irrelevant and there is nothing in them, why doesn't Judge Kavanaugh just release them to shut up the Democrats and take away their reasoning?

So, because I am a *human being*, not because I am a Democrat, I *do* see this as a rushed process. Release everything, give some time, and shut up the Democrats about the documents. This is a *lifetime* nomination. It affects *so* many people. Apparently even a Nobody like me.

I truly wanted to yell out that day in the hearing room. At times, it was so frustrating to hear. Also, numerous times I was intrigued and impressed by our Senators.

I'm sorry to say, Senator Sasse, that things are not as they should be the way you mentioned. And I live in the world I live in now. A country that decided my marriage with a 5 to 4 vote. A 5 to 4 vote! Listen to that again: *a 5 to 4 vote*. A political vote if you want to call it that. I never asked for my marriage to be political. I never asked for anything that opposite-sex couples didn't have. I never asked for special rights. I never wanted my rights to have to be litigated in court. But they were. They are. They will be. Senator Sasse, I did not yell out. And if I would have, it would not have been to be on TV. I am just a Nobody with real concerns. I truly like Senator Sasse's solution, but we are not there. The courts are political. My marriage was made out to be a political issue. Only a court resolved that. By a 5 to 4 vote. And even with this ruling, discrimination against my LGBT community still occurs. I'll take my civil rights on whatever platter they come on, the executive branch, the legislative branch, or the judicial branch.

Regarding the discussion on temperament and character, I am not concerned about someone's temperament and character only. I have well-meaning people in my family, whom I love dearly and they are good people who do not believe I have the right to be married to my wife. They are wonderful, family-minded people. I am not one of those people who sees others as all good or all evil. I need to know how someone is going to handle these issues that impact the protections of myself and my family, along with other critical issues. These rulings affect people *regardless* of how good of a person the justice is.

In my heart I want to believe that Judge Kavanaugh is a wonderful man the way he was discussed. I had a historic seat at a historic hearing. I sat two rows behind your family, Judge. I saw the genuine love on their faces. I witnessed your mother tear up from love, pride and joy when you spoke about her. It tears up my heart to know that being a good person is not enough when it comes to a Supreme Court justice. Critical, yes. But not enough.

You must understand that I am just a Nobody. Just a Nobody who the National Center for Lesbian Rights represented in the Florida birth certificate case when the state of Florida denied us benefits that go along with marriage for nearly two years. For nearly TWO YEARS they left off my wife's name from the birth certificate. The NCLR did this not only because they are good people, and they are. They fought to end discrimination on behalf of the vulnerable, taking on the case at no charge to me. Florida, on the other hand, spent tens of thousands of dollars or more, defending their position right up until Judge Hinkle referenced our case in another document he released about the final marriage equality ruling. At that point and only at that point, the state did the common-sense thing.

So here is the situation I am in. I am not a lawyer. I do not have time to review millions of pages of documents. I am also not a Senator. However, I have the NCLR opposing your nomination, along with countless other organizations, including some who NEVER or almost never oppose a nominee. And frankly, I don't have time to learn more or to learn the full truth, if that were possible. I am a busy, working mother. Just a Nobody. However, I have seen no evidence of my family being protected by conservative judges or justices. Think of the cases I just referenced, including my own! So, yes, I am skeptical. I would love to have real evidence. Instead, I have a flawed political system and a flawed legal system where people literally fight, throughout history, for civil rights. Maybe judges shouldn't be "political," whatever that means. But this is the way it is.

- Where is the evidence that Judge Kavanaugh values my equal rights?
- Where is the evidence that a conservative majority on the Supreme Court does not present a threat to me and my family? And as a threat on a number of other concerns raised?

I am a Nobody. Not trying to "distract and delay the process" as was discussed about other Senators yesterday. Not being histrionic. I am not slandering the judge in the media. (I actually heard no slander yesterday, in spite of Trump's tweet.)

These are not normal times, as some Senators stated. Do we need to expand on that more? Let me summarize in one short thought: Trump was right when he stated that he could shoot someone on 5th Avenue and not lose a voter. I'll leave it at that.

And again, LGBT rights is just one topic of concern. It is one of many. And I only raised three specifics within the LGBT realm. I cannot imagine how many more concerns there are; people out there, Nobodies like me, have legitimate fear in filling a Supreme Court seat. Justice Kennedy was known as the Swing Vote for a reason! How someone cannot understand legitimate concern over this *lifetime* appointment is beyond me.

To learn more about the Senators making these critical decisions, I did some research on the Senators on the committee and their statements about my civil rights. This is by no means an exhaustive list of opinions. I apologize in advance if I left off critical quotes or votes from Senators. I know that I did. I know that many Senators worked very hard on bills. I also know it could depress me further to look up every vote on the Respect for Marriage Act or the ENDA, for example. This is what I could find quickly, many times from Senators' own websites. I decided I needed to know who I am trusting to make these decisions. (If I had more time, I would have linked every site for you and done more research.)

Senate Judiciary Committee members' records on the LGBT community:

John Cornyn (R): Senator Cornyn posted on his senate page in Defending the Defense of Marriage Act, 9/4/03: "that every individual is worthy of respect"; "I believe that the Senate has a duty to ensure that, on an issue as fundamental as marriage, the American people, through their representatives, decide the issue." He wrote that "judicial activism has imperiled the future of the widely supported bill." He wrote that we "should not abandon the definition of marriage to the purview of the courts." Senator Cornyn is a former judge.

From the article "John Cornyn and Gay Republicans" he is quoted as saying:

"It does not affect your daily life very much if your neighbor marries a box turtle. But that does not mean it is right. . . . Now you must raise your children up in a world where that union of man and box turtle is on the same legal footing as man and wife."

"I don't want people to misunderstand and think that I don't respect the dignity of every human being regardless of sexual orientation," Cornyn said.

Mike Crapo (R): From Senator Crapo's website: "At a time where public support for liberal social platforms like same-sex marriage and marijuana legalization is growing, the GOP should focus on 'limited government and a free and open economy. The government should not be caretakers,' he said."

Ted Cruz (R): from his website: "CNN: Cruz introduces bill defending states' rights on marriage
Sen. Ted Cruz is again putting down a marker in defense of traditional marriage, introducing a bill aimed at protecting states' rights in the same-sex marriage debate.
On Tuesday, Cruz re-introduced the State Marriage Defense Act, which would prevent the federal government from asserting its own definition of marriage on the states.
'Even though the Supreme Court made clear in United States v. Windsor that the federal government should defer to state 'choices about who may be married,' the Obama administration has disregarded state marriage laws enacted by democratically-elected legislatures to uphold traditional marriage,' Cruz said in a statement announcing the bill.
'I support traditional marriage and we should reject attempts by the Obama administration to force same-sex marriage on all 50 states. The State Marriage Defense Act helps safeguard the ability of states to preserve traditional marriage for their citizens,' he said.
Eleven senators - John Boozman of Arkansas, Mike Crapo of Idaho, Steve Daines of Montana, James Inhofe and James Lankford of Oklahoma, Mike Lee of Utah, Pat Roberts of Kansas, Tim Scott of South Carolina, Jeff Sessions and Richard Shelby of Alabama and David Vitter of Louisiana - have cosponsored the bill. Texas Rep. Randy Weber introduced a partner bill in the House, which has 22 cosponsors."

Jeff Flake (R): In 2013, Senator Flake voted in favor of Employment Non-Discrimination Act, which would protect gay and transgender people. According to Politico, he consulted with his son, Democrat Tammy Baldwin who approached him about the bill, and a conservative Republican lawmaker with a transgender child. From his website, he states: Flake Statement Supreme Court's Marriage Ruling

Posted on Jun 26 2015

WASHINGTON, D.C. - U.S. Sen. Jeff Flake (R-Ariz.) today issued the following statement regarding the Supreme Court's ruling on Obergefell v. Hodges:

'I've always felt that states ought to have wide latitude to define and recognize marriage. The Supreme Court has now ruled that marriage is a fundamental right, a right that cannot be denied to same-sex couples.'

Lindsey Graham (R): Senator Graham's statement after the Supreme Court marriage equality ruling: "I am a proud defender of traditional marriage and believe the people of each state should have the right to determine their marriage laws. However, the Supreme Court has ruled that state bans on gay marriage are unconstitutional, and I will respect the Court's decision. Furthermore, given the quickly changing tide of public opinion on this issue, I do not believe that an attempt to amend the U.S. Constitution could possibly gain the support of three-fourths of the states or a supermajority in the U.S. Congress. Rather than pursing a divisive effort that would be doomed to fail, I am committing myself to ensuring the protection of religious liberties of all Americans. No person of faith should ever be forced by the federal government to take action that goes against his or her conscience or the tenets of their religion. As president, I would staunchly defend religious liberty in this nation and would devote the necessary federal resources to the protection of all Americans from any effort to hinder the free and full exercise of their rights. While we have differences, it is time for us to move forward together respectfully and as one people."

He has also compared marriage equality to polygamy in 2012: 'Is it possible for three people to genuinely love each other and want to share their lives together? Is it OK to have three people marry each other?'

Chuck Grassley (R): Senator Grassley's statement on the Supreme Court ruling on marriage equality from his website:

"Traditional marriage has been a pillar of our society for thousands of years—one that has remained constant across cultures, even with the rise and fall of nations. I believe marriage is between one man and one woman. Marriage is a sacred institution. Its definition should not be subject to the whims of the Supreme Court where five justices appointed to interpret the Constitution instead imposed social and political values inconsistent with the text of the Constitution and the framers' intent. Today's decision robs the right of citizens to define marriage through the democratic process.

"Regardless of whether you agree or disagree with the Supreme Court's decision, everyone deserves to be treated with respect, and nobody should have their deeply-held religious beliefs trampled by their government. Although the decision is the law of the land, at least for now,

history has taught us that a cultural debate like this one will not be settled with this ruling. I expect we will be debating marriage for years to come."

When the Senate Judiciary Committee passed the Respect for Marriage Act with a partisan 10-8 vote, Senator Grassley stated: "Traditional marriage in many states until the 1960s was limited racially for reasons that had nothing to do with the creation of marriage as an institution and everything to do with racial discrimination," said the committee's ranking member, Iowa Republican Sen. Chuck Grassley, at the hearing. He cited the Supreme Court case that ended the ban on interracial marriage. "*Loving v. Virginia*, which has been referenced a number of times, has nothing to do with gay marriage."

Orrin Hatch (R): Senator Hatch's view on marriage from his website: "Marriage is the fundamental building block of our society. To preserve traditional marriage, I have introduced and promoted constitutional amendments defining marriage as being between a man and a woman."

In June of 2018, Senator Hatch marked Pride Month on the Senate floor. Senate floor. "Hatch, whose National Suicide Hotline Legislation passed a House subcommittee Wednesday morning, spoke about suicide risk for LGBT youth on the Senate floor as he urged the House of Representatives to pass his proposal.
'Today in honor of Pride Month, I wish to devote a significant portion of my remarks to them, my young friends in the LGBT community,' Hatch said.
'No one should ever feel less because of their gender identity or sexual orientation.'
Hatch discussed the bullying and discrimination LGBT youth face, saying that many even face estrangement from their own families.
'The LGBT community deserves our unwavering love and support, and the assurance that not only is there a place for them in this society, but that it is far better off because of them,' he said.
Hatch emphasized that LGBT youth need help, and 'we desperately need them'
'We need their light to illuminate the richness and diversity of God's creations; we need the grace, beauty and brilliance they bring to the world,' he said."

John Kennedy (R): I could not find statements from Senator Kennedy regarding LGBT rights or marriage equality.

Mike Lee (R): Just in March of 2018, he reintroduced the First Amendment Defense Act (FADA): which he says is designed to "prevent the federal government from discriminating against individuals or institutions based on their beliefs about marriage." His outline of protecting the first amendment is outlined on his website. When I read the Newsweek article from September 2015 by Walter Olson, I am concerned. I would like to hear more from Senator Lee about how "Some same-sex marriage extremists are now trying to use the power of the state to punish those that have traditional religious beliefs about marriage."

Ben Sasse (R): From Senator Sasse's website: "Sasse Statement on Supreme Court Same-Sex Marriage Ruling

'Marriage brings a wife and husband together so their children can have a mom and a dad.'
June 26, 2015

U.S. Senator Ben Sasse issued the following statement after the Supreme Court handed down its decision on same-sex marriage in *Obergefell* v. *Hodges*:
'Today's ruling is a disappointment to Nebraskans who understand that marriage brings a wife and husband together so their children can have a mom and dad. The Supreme Court once again overstepped its Constitutional role by acting as a super-legislature and imposing its own definition of marriage on the American people rather than allowing voters to decide in the states.'
'As a society, we need to celebrate marriage as the best way to provide stability and opportunity for kids. As President Obama has said, there are good people on both sides of the issue. I hope we all can agree that our neighbors deserve the freedom to live out their religious convictions.'

On NBC's Meet the Press in 2013, Senator Flake stated: "'I believe that marriage should be between a man and a woman. I still hold to the traditional definition of marriage,' Flake said, adding that while he supported measures like repealing "don't ask, don't tell,' he couldn't imagine changing his mind on gay marriage before leaving office."

Thom Tillis (R): After Amendment 1 was struck down by a judge, he defended it in a lawsuit.

Richard Blumenthal (D): From his website in 2012: "Blumenthal Applauds President Obama's Comments On Same-Sex Marriage
Wednesday, May 9, 2012
(Washington, DC) – Today, Senator Richard Blumenthal (D-CT) issued the following statement praising President Obama's comments on same-sex marriage:
'I am pleased that President Obama endorsed same-sex marriage today, and his support will help gay and lesbian Americans find the equal respect and recognition that comes through marriage. The issues of equality, and basic human rights, should not be up for debate, and the President's comments today make that clear.'
'In my view, federal law should not discriminate against citizens of Connecticut who lawfully exercise rights under our Connecticut Constitution. Nor should government disadvantage people on the basis of whom they love. That is why I am a cosponsor of the Respect for Marriage Act, which would repeal the Defense of Marriage Act. Very simply, this legislation ensures that individuals married in one state can continue to receive the federal benefits they are entitled to receive as a married couple, regardless of their state of residence.'
'I will continue to fight for equality for same-sex couples to ensure that they are guaranteed all the same rights as heterosexual couples. Marriage equality is a human right, and I am committed to working with my colleagues to see this through.'"

Cory Booker (D): Our Secretary of State thinks that my family is a perversion and that it is inappropriate for me to marry my wife—and Senator Booker grilled him on this issue. Senator Booker is famous for his fierce defense of LGBT rights and it may be challenging to adequately summarize this record in the short time I have.

Christopher Coons (D): From Senator Coons's website in 2013: "Senator Coons, colleagues reintroduce bill to fully repeal Defense of Marriage Act
Introduces 'Respect for Marriage Act' to give federal protections to same-sex couples
WASHINGTON – Just hours after the Supreme Court's historic decision striking down Section 3 of the Defense of Marriage Act, U.S. Senator Chris Coons (D-Del.) joined Senator Dianne Feinstein (D-Calif.) and 39 of their colleagues in reintroducing the *Respect for Marriage Act*, which would repeal the entirety of the Defense of Marriage Act and remove the remaining statutory obstacles to full implementation of the decision. Senator Coons was an original cosponsor of the bill when it was introduced in 2011.
'The Supreme Court took a historic step toward equality today for loving, committed couples across our country by striking down part of the Defense Marriage Act," Senator Coons said. "The decision means that more than one thousand federal benefits, rights and protections now need to be updated. Even with the Court's decision today, statutory and regulatory artifacts and ambiguity will prevent immediate equality for same-sex couples that are legally married. The *Respect for Marriage Act* will finish the job begun by the Court and end federal discrimination against same-sex couples once and for all.'"
Of the 39 colleagues who co-sponsored, not a single one was Republican. See Senator Coon's website for the cosponsors.

Dick Durbin (D): In 2013, he announced support of 2013 Illinois Marriage Equality Bill. To the Illinois General Assembly, he stated: "I don't often write to express my position on issues before the General Assembly. But as a citizen of this Land of Lincoln I want to be clearly on record in regard to an issue of historic importance," Durbin wrote. "I believe those whom God has brought to this Earth with a different sexual orientation and who seek a loving relationship in the eyes of the law should be given that opportunity. I urge you to vote for Marriage Equality in Illinois so that our state can be part of the emerging national consensus on this issue of justice."

Dianne Feinstein (D): In 1996, Senator Feinstein was one of 14 senators who voted no against DOMA. She sponsored the Respect for Marriage Act. Need I say more?

Kamala Harris (D): Senator Harris has a pride flag outside her Senate office. I went to meet her after Day 1 of the Senate Judiciary Committee hearing on Kavanaugh. She was busy at the time and not available, but I did get a picture of myself in front of the pride flag and took a Cliff bar from the staff member. Do I really need to research her record?

Mazie Hirono (D): 2013 from her website: HIRONO CELEBRATES SUPREME COURT RULING OVERTURNING DOMA
WASHINGTON, D.C. – Senator Mazie K. Hirono, a member of the Senate Judiciary Committee, released the following statement celebrating the Supreme Court's decision to strike down the Defense of Marriage Act:

"This is a historic day for civil rights and marriage equality. I am heartened by the Supreme Court's decision affirming equal protection for married gay couples under the 5th Amendment.

"The marriage equality movement has come a long way, both in Hawaii and across the country.

In 1998, I was part of a small group of Hawaii leaders who spoke out against an amendment to the Hawaii constitution that enabled legislation banning same-sex marriage.

"There are still many instances in our society where discrimination occurs – from our immigration system to workplaces across the country to states that still ban gay marriage. I will continue to join efforts to end these injustices and fight for equal treatment of all people under the law."

Amy Klobuchar (D): In 2013, Klobuchar released this statement available on her website: "U.S. Senator Amy Klobuchar today made the following statement after the Supreme Court released its decisions on two cases related to same-sex marriage: the Defense of Marriage Act and California's Proposition 8.
'America is a nation founded on equality for all people and today the Supreme Court took a major step toward advancing that equality. I was a cosponsor of the bill to repeal the Defense of Marriage Act and the Court's decision to strike it down is a true victory for those who have fought so hard for this day. As states continue to take up this critical issue, my hope is that they will choose to stand on the side of equality and follow in the footsteps of Minnesota, where we successfully fought back a divisive constitutional amendment and enacted marriage equality with bipartisan support.'"

Patrick Leahy (D): In 2014, he proposed a bill to apply marriage equality to copyright act. Senator Leahy said that the bacon joke by Trump judicial nominee is a same-sex marriage 'attack.'

Sheldon Whitehouse (D): In 2013, Senator Whitehouse hailed the passage of same-sex marriage law. His website reads: "U.S. Senator Sheldon Whitehouse released the following statement today regarding Rhode Island's new law granting same-sex couples the right to marry: 'I'm proud of our state for taking this important step toward equality for all, and I want to particularly congratulate Governor Chafee on an historic legislative victory. His staunch support – along with the work of Speaker Fox and his allies in the legislature, and the grassroots efforts of the LGBT community – made this great day possible for Rhode Island.'
Whitehouse is a long-time supporter of marriage equality. He is a cosponsor of the Respect for Marriage Act, which would repeal the law that prohibits recognition of same-sex marriage under federal law."

In the few minutes of research I had left, I looked into the history of the Employment Non-Discrimination Act. I wanted to see what the legislative branch gets done instead of leaving things for *liberal activist judges* to deal with. I discovered that it truly *is* apparently okay with our legislature for me to be fired for being gay. Similar legislation has been introduced and discussed since 1974. Yes, we've been having the legislative conversation about me being fired for being gay for 44 years now. This conversation has been had so many times that I grow weary in scrolling through all the Congresses who have faced it. With no legislative resolution. If I'm a bit frustrated by that, I cannot imagine what legislators who value this bill feel. Why can't Congress get it done, as Senator Sasse mentioned? Well, I guess this would be a hard bill to accomplish if most legislatures think that I should be able to be fired for being gay. Or if they feel they would lose voters for saying differently. We cannot agree on common sense.

I heard a lot at the hearing about *common sense*. "The rules of legal interpretation are rules of common sense" was mentioned by Judge Kavanaugh. I also heard a lot about how judges follow the constitution as written. About how we do not make up new constitutional rights. About how judges do not rewrite the laws as he wishes they were. And I even heard about *getting a grip*, which I've been trying to do, by the say, since the hearing.

Common sense says my marriage should have always been recognized. Common sense says my wife should have been on my son's birth certificate when he was born. Common sense says I should not be able to be fired for being gay. Common sense says my marriage should be backdated to 2001. However, all of these common sense issues are litigated in court. And apparently, they aren't so "common sense" to everyone. Common sense says women should have always had the right to vote. Common sense says slavery was wrong. Common sense says segregation was wrong. Common sense says biracial marriage should have always been legal. Common sense says... Common sense says.... Common sense says...

Furthermore, common sense says that in such an ornate, beautiful, high-profile, high-security hearing for a Supreme Court justice nominee, there should be rules about documents submitted including a time frame. Common sense. Common sense says I am legitimately confused that it is different than that.

And yet we are in court, over common sense. All the time. Our beautiful nation is great, but it hasn't always used common sense. You can understand that a lot of words promising common sense doesn't do much to assure a Nobody like me.

- In fact, have civil rights ever been handed over?
- Are they mostly fought for and often actually litigated?
- My most nagging question: why don't both parties recognize and value civil rights? Why are many civil rights seemingly partisan?

Finally, after reviewing the Senators' records for myself, I have a clearer picture as to who has the decision-making power right now. Frankly, right now, the majority disagrees with me over common sense. I am seen as rewriting marriage and redefining marriage. I am seen as comparable to polygamy and as comparable to a box turtle getting married. I am seen as a threat to others' religious liberty. I was depressed to find out that not one Republican Senator on the committee has evolved on the issue of marriage equality. I did not list the voting record, but apparently many of you think it is okay to be fired for being gay. You feel that your religious views about the validity of my marriage should determine whether or not I have the rights and benefits of marriage under the law.

So the bottom line is, in their eyes, my children do not deserve the same protections as their children, because I am not married to a man. And my marriage isn't really deserving of equal treatment under the law. It should have never been called marriage legally. It doesn't matter that I've been faithful every minute of the day for 17 years to my wife and that we co-navigate this parenting journey together. I feel truly uncomfortable with the majority of senators' outlook on my civil rights; the outlook is that this isn't even a civil rights issue and was an overreach of the court and some kind of overstepping of the court. Once again, Congress didn't get it done.

It's too political. Respect for Marriage was a partisan vote. The Supreme Court is also political. But remember, I'll accept being treated equally any way it comes. I'll eat my dinner with a fork or a spoon.

- So I am supposed to trust a majority conservative committee, who doesn't view marriage equality as a civil right *at all*, to make decisions about a lifetime Supreme Court justice nominee who will make for a majority conservative Supreme Court, *and* who was nominated by President Trump? Why again?
    - Don Willet, Trump nominee, confirmed 50-47, 5th Circuit Court of Appeals: "I could support recognizing a constitutional right to marry bacon."
    - Neil Gorsuch, Trump nominee, US Supreme Court, dissented in Arkansas birth certificate case. Read the case and dissent for yourself.
    - Mike Pompeo, Secretary of State, Trump nominee: "We'd endorsed perversion and called it an alternative lifestyle."
    - I just don't have the time and energy to research more. We all get the point now.

Please remember that I've only touched on part of one concern, just a portion of LGBT concerns. However, clusters of concerns are often shared by the same people and somewhat predict what other areas of belief and priorities someone has and even how someone votes.

After reading the Republican senators' quotes, I'd like to invite any willing Republican Senator to my home to meet my wife and children. I'd like you to see my children and understand that my family is really more similar to yours than different. I'd like you to see my children's faces when you make statements about what the law should be pertaining to my family. I'd like my wife to charm you with her food. It will prepare you. If it hasn't happened yet, your child or grandchild will be coming out as gay to you. That will be hard on them with you being so high-profile with your statements. Prepare yourselves for their sakes.

And now, truly, the Nobodies out here like me…our lives hang in the hands of the majority of Senators.

Thank you for your time. Thank you for allowing me as a guest in such a truly wonderful and simultaneously, a sadly flawed process. I will always value that experience. I will be forever altered and will become a better advocate by the unsettling experience of having the very people who make decisions about Americans' lives and welfare right before my very eyes. Finally, Senators, both Democratic and Republican, I want to thank you all for your service. I do not envy your job, (especially after watching the hearing firsthand!). Thank you for the work that you do.

Sincerely,

Kari Chin, LCSW
A Real Person in the Real World with Real Cases

CITY OF WEST HOLLYWOOD

CITY HALL
8300 SANTA MONICA BLVD.
WEST HOLLYWOOD, CA
90069-6216
TEL: (323) 848-6400
FAX: (323) 848-6562

TTY: For hearing impaired
(323) 848-6496

CITY COUNCIL
JOHN J. DURAN
Mayor
JOHN D'AMICO
Mayor Pro Tempore
JOHN HEILMAN
Councilmember
LINDSEY P. HORVATH
Councilmember
LAUREN MEISTER
Councilmember

August 14, 2018

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building,
Washington, D.C. 20510

RE: NOMINATION OF JUDGE BRETT KAVANAUGH TO THE U.S. SUPREME COURT

Dear Senator Feinstein,

On August 6, 2018 the City Council of the City of West Hollywood adopted Resolution No. 18-5095 in opposition to the nomination of Judge Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

As a city of "firsts", from banning assault weapons to becoming a sanctuary and pro-choice city, West Hollywood strongly opposes the replacement of retiring Justice Anthony Kennedy, who was often the swing vote of many crucial civil rights and liberties cases, with Judge Kavanaugh. Judge Kavanaugh could irreparably throw off the balance of the court in terms of key social justice issues, including LGBTQ equality, women's reproductive rights, gun control, and affordable healthcare, among other important subjects. Based on his past rulings, Judge Kavanaugh has clearly established a judicial philosophy that is inconsistent and counter to the progressive values of the City of West Hollywood and California.

For all these reasons, we urge you to join us in demanding the withdrawal of Judge Kavanaugh's nomination.

Sincerely,

John J. Duran,
Mayor

JJD:HGM:af

Enclosed: Resolution No. 18-5095

RESOLUTION NO. 18-5095

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF WEST HOLLYWOOD IN OPPOSITION TO THE APPOINTMENT OF JUDGE BRETT KAVANAUGH TO THE U.S. SUPREME COURT

THE CITY COUNCIL OF THE CITY OF WEST HOLLYWOOD DOES HEREBY RESOLVE AS FOLLOWS:

WHEREAS, President Donald Trump nominated Judge Brett Kavanaugh to be an Associate Justice of the Supreme Court, replacing retiring Justice Anthony Kennedy, who was often the swing vote on many crucial civil rights and liberties cases; and

WHEREAS, the nomination of Judge Kavanaugh has raised concerns among Democrats and progressive organizations because of his embrace of the conservative legal movement and very narrow interpretation of the Constitution and the Bill of Rights. By contrast, he has adopted a very broad and deferential policy toward presidential authority and power; and

WHEREAS, prior to his appointment to the D.C. Circuit Court of Appeals, Judge Kavanaugh was a Republican operative who made his name in legal circles as a senior counsel for Ken Starr's highly partisan investigation of President Bill Clinton. He served as White House staff secretary to President George W. Bush and had no previous judicial experience when President Bush nominated him to the D.C. Circuit; and

WHEREAS, the next Supreme Court justice will shape civil and constitutional rights in this country for generations and the nomination of Judge Kavanaugh could alter the balance of the court in terms of key social justice issues, including LGBTQ equality, women's reproductive rights, gun control, and affordable healthcare; and

WHEREAS, the City of West Hollywood is a city of "firsts", serving as a model for progressive policies such as banning assault weapons, and declaring itself a sanctuary city and a pro-choice city; and

WHEREAS, based on his past rulings, Judge Kavanaugh has clearly established a judicial philosophy that is in opposition to the progressive values and legislative priorities of the City of West Hollywood.

NOW, THEREFORE BE IT RESOLVED, that the City Council of the City of West Hollywood opposes the nomination of Judge Brett Kavanaugh to the U.S. Supreme Court, and urges the United States Senate to reject the nomination.

PASSED, APPROVED, AND ADOPTED by the City Council of the City of West Hollywood at a regular meeting held this 6th day of August, 2018 by the following vote:

AYES:	Councilmember:	Horvath, Meister, Mayor Pro Tempore D'Amico, and Mayor Duran.
NOES:	Councilmember:	None.
ABSENT:	Councilmember:	Heilman.
ABSTAIN:	Councilmember:	None.

JOHN J. DURAN, MAYOR

ATTEST:

YVONNE QUARKER, CITY CLERK

Hon. Mitch McConnell, Maj. Leader
U.S. Senate
317 Russell Senate Office Building
Washington, D.C. 20510

Hon. Charles S. Schumer, Min. Leader
U.S. Senate
322 Hart Senate Office Building
Washington, D.C. 20510

Hon. Charles Grassley, Chairman
U.S. Senate Committee on the Judiciary
135 Hart Senate Office Building
Washington, D.C. 20510

Hon. Dianne Feinstein, Ranking Member
U.S. Senate Committee on the Judiciary
331 Hart Senate Office Building
Washington, D.C. 20510

September 5, 2018

Dear Leader McConnell, Leader Schumer, Chairman Grassley, and Ranking Member Feinstein:

We, the undersigned civil rights organizations, write to express grave concern with the decision of William Burck, as reflected in his August 31, 2018 letter to Chairman Grassley, to withhold more than 100,000 pages of documents from the White House files of Judge Brett Kavanaugh on the grounds of executive privilege. For the reasons stated below, these documents are likely to be highly probative in setting forth Judge Kavanaugh's views and we urge you to assert your role as a co-equal branch of government and to take all reasonable steps to seek these documents, including subpoenaing the National Archives and Records Administration for them.

According to Mr. Burck, "the most significant portion of [the withheld] documents reflect deliberations and candid advice concerning the selection and nomination of judicial candidates." We also note that Mr. Burck chose to withhold these documents from the Senate entirely, while making other documents available to the Senate on a confidential basis. The withheld documents would appear to be especially relevant to Judge Kavanaugh's nomination

because they are likely to reveal Judge Kavanaugh's views on issues that may come before the federal judiciary. For example, it would not be surprising if Judge Kavanaugh expressed favor or disfavor toward a judicial nominee because of that nominee's views on one or more issues.

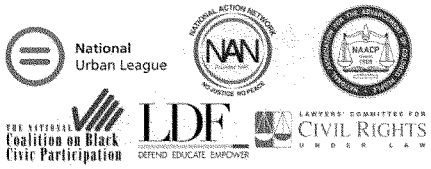
As a co-equal branch of government that has the responsibility to provide advice and consent on judicial nominees, the Senate not only has the right to review these documents but the duty to do so. The Senate's need for these documents in understanding Judge Kavanaugh's views on issues that are likely to come before the Supreme Court outweighs any interest that the President has in maintaining the confidentiality of documents that are at least fifteen years old regarding judicial nominees and potential judicial nominees of a prior President. As a result, we urge you to demand production of these files to the Senate and hold open the Judiciary Committee's hearings regarding Mr. Kavanaugh until those files are produced and can be reviewed.

We also understand that the Justice Department provided advice on the application of the Presidential Records Act and constitutional privileges, and that they were responsible, in part, for determining which documents were produced to the Senate Judiciary Committee. It is critical that the Committee hear directly from Mr. Burck and from the U.S. Department of Justice to understand how they interpreted and applied the privilege, particularly since this is the first time it has been invoked in the context of a Supreme Court nomination and since the action was taken at the 11th hour. The Senate must act now to assess the appropriateness of the purported executive privilege designation and to ensure that the privilege was not applied in an overly broad manner. We were surprised that Chairman Grassley has been relatively silent on the validity of the executive privilege designation and believe that the American public deserves to understand why executive privilege applies in this context, if at all.

As leaders of the civil rights organizations listed below, we are increasingly concerned that the Senate is proceeding down a dangerous path that will undermine the integrity of the confirmation process for the current vacancy on the United States Supreme Court and for future generations. Our organizations are committed to equal justice for African Americans and have, on behalf of our members, constituents or clients, petitioned the United States Supreme Court for the vindication of those rights under the Constitution. We respectfully request that the Senate take immediate corrective action on the matters identified above.

Sincerely,

Kristen Clarke, President and Executive Director, Lawyers' Committee for Civil Rights Under Law
Sherrilyn Ifill, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.
Marc Morial, President, National Urban League
Rev. Al Sharpton, Founder and President, National Action Network
Vanita Gupta, President and CEO, Leadership Conference on Civil and Human Rights
Melanie Campbell, President and CEO, Convener, National Coalition on Black Civic Participation
Derrick Johnson, President and CEO, NAACP



August 16, 2018

Majority Leader McConnell
Russell Senate Office Building
Washington, DC 20510

Chairman Grassley
135 Hart Senate Office Building
Washington, DC 20510

Majority Leader McConnell and Chairman Grassley,

As leaders of the civil rights organizations listed below, we write to express our grave concern regarding the Senate's failure to protect the integrity of the confirmation process for the current vacancy on the United States Supreme Court. Each of our organizations is specifically committed to equal justice and protection for African Americans and have, on behalf of our members, constituents or clients, petitioned the United States Supreme Court for the vindication of those rights under the Constitution.

History has shown that the Supreme Court is often the final guardian of the rights of our nation's historically disenfranchised communities. For our organizations and the constituents that we represent, the Supreme Court has and continues to play a vital role in giving meaning to the words of the Constitution that guarantee equal protection, full citizenship, and protection from discrimination for African Americans. For these reasons, our organizations have a particular and powerful interest in a fair, open and transparent process for the lifetime appointment of justices to our nation's highest Court.

We believe that the Senate's failure to ensure a confirmation process of the highest integrity and transparency is inconsistent with the sacred obligation assigned to the Senate in our constitution to offer "advise and consent" for Supreme Court nominees and threatens the separation of powers as envisioned by the Framers. Thus, we regard your decision to commence confirmation hearings for Judge Kavanaugh before the Senate Judiciary Committee receives the full disclosure of all documents related to this nomination, including those held by the National Archives, as an unprecedented abdication of the Senate's constitutional obligation to meaningfully review and evaluate the fitness of this nominee on behalf of the American people.

In the past you have demanded full transparency and comprehensive evaluation of the records underlying Supreme Court nominees. Full, complete and comprehensive disclosure of all documents and records has been the guiding standard in place during the nominations of Justices Roberts, Alito, Kagan and Sotomayor. There is no legitimate reason to depart from that standard here.

Partisan politics should not and must not infect the integrity of the Supreme Court confirmation process. Our federal courts derive their legitimacy from the confidence of the people. Any process that undermines the legitimacy of our courts, weakens the court in the eyes of the American people. This attempt to push through the confirmation of a justice despite having no access to more than a million pages of documents strikes a devastating blow to the integrity of this confirmation process. Any nominee to emerge from a process shrouded in secrecy would sit on the Court bearing the stain of illegitimacy.

For these reasons, we demand that confirmation hearings for Judge Kavanaugh should be postponed until the Senate Judiciary Committee receives the full record from the National Archives from Judge Kavanaugh's extensive public service. Confirmation hearings should commence only after the Committee has had a meaningful opportunity to review the record and prepare for hearings with the nominee.

We regard this as a matter of great urgency and of the highest importance. We respectfully request a meeting with Senate leadership as soon as possible to discuss a process to restore the faith and trust of the communities we represent in the Senate and the legitimacy of the Supreme Court confirmation process.

Sincerely,

Melanie Campbell, President and CEO, National Coalition on Black Civic Participation

Kristen Clarke, President and Executive Director, Lawyers Committee for Civil Rights Under Law

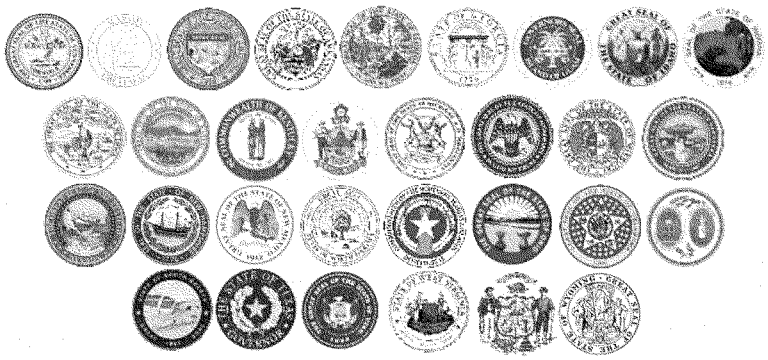
Sherrilyn Ifill, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. (LDF)

Derrick Johnson, President and CEO, NAACP

Marc Morial, President, National Urban League

Rev. Al Sharpton, Founder and President, National Action Network

CC: Democratic Leader Charles S. Schumer and Senate Judiciary Ranking Senator Dianne Feinstein



July 25, 2018

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Schumer
Democratic Leader
United States Senate
Washington, D.C. 20510

Dear Leader McConnell and Leader Schumer:

As governors, we stand in support of President Donald Trump's nomination of Judge Brett M. Kavanaugh and encourage the United States Senate to move expeditiously to confirm his appointment as Associate Justice of the Supreme Court of the United States. We make this request based on his track record of upholding the Constitution and his distinguished credentials that eminently qualify him to serve on the nation's highest court.

As Judge Kavanaugh stated in his remarks to the nation, his judicial philosophy is straightforward. He believes a judge must be independent and open-minded and must interpret the law as written. As his record shows, he will interpret the Constitution as written, informed by history, tradition, and precedent. Judge Kavanaugh will adjudicate legal disputes with impartiality, preserving the Constitution of the United States and the rule of law.

Judge Kavanaugh's impeccable credentials demonstrate he is worthy of this nomination. After receiving his undergraduate and law degrees from Yale, Judge Kavanaugh clerked for Justice Anthony Kennedy of the Supreme Court, Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit, and Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit. He went on to become a Bristow Fellow in the Office of the Solicitor General of the United States, an associate in the Office of Independent Counsel Ken Starr, and a partner at Kirkland & Ellis. Judge Kavanaugh later served President George W. Bush as associate counsel, senior associate counsel, and assistant to the president and staff secretary. Judge Kavanaugh also teaches at Harvard Law School.

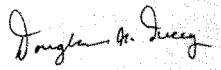
Nominated to the United States Court of Appeals for the D.C. Circuit by President George W. Bush and confirmed by the United States Senate in 2006, Judge Kavanaugh has written roughly 300 opinions, which have been cited by judges across the country. If confirmed as Associate Justice, we have no doubt Judge Kavanaugh will continue to set aside his personal preferences and make decisions based on the law.

Thirty years ago, President Ronald Reagan nominated Justice Anthony Kennedy, a man who devoted his career to securing the liberty of our nation, to the Supreme Court of the United States. It seems right and fitting for one of Justice Kennedy's own law clerks to follow in his footsteps and continue our nation's great tradition of the rule of law. We strongly urge the United States Senate to expeditiously confirm Judge Brett Kavanaugh and look forward to him serving as an Associate Justice of the Supreme Court.

Sincerely,

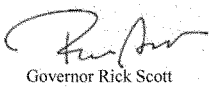
Governor Bill Haslam
Tennessee

Governor Kay Ivey
Alabama



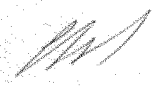
Governor Douglas A. Ducey
Arizona

Governor Asa Hutchinson
Arkansas



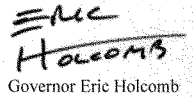
Governor Rick Scott
Florida

Governor Nathan Deal
Georgia

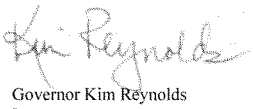


Governor Edward J. Baza Calvo
Guam

Governor C.L. "Butch" Otter
Idaho

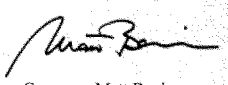


Governor Eric Holcomb
Indiana



Governor Kim Reynolds
Iowa

Governor Jeff Colyer
Kansas

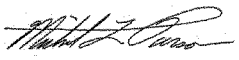


Governor Matt Bevin
Kentucky

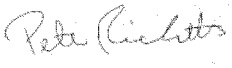
Governor Paul R. LePage
Maine

Governor Rick Snyder
Michigan

Governor Phil Bryant
Mississippi



Governor Michael L. Parson
Missouri



Governor Pete Ricketts
Nebraska

Governor Brian Sandoval
Nevada

Governor Christopher T. Sununu
New Hampshire

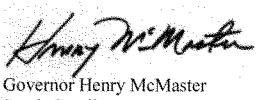
Governor Susana Martinez
New Mexico

Governor Doug Burgum
North Dakota

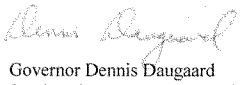
Governor Ralph Torres
Northern Mariana Islands

Governor John R. Kasich
Ohio

Governor Mary Fallin
Oklahoma

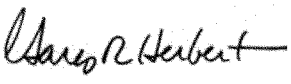


Governor Henry McMaster
South Carolina



Governor Dennis Daugaard
South Dakota

Governor Greg Abbott
Texas



Governor Gary R. Herbert
Utah

Governor Jim Justice
West Virginia

Governor Scott Walker
Wisconsin

Governor Matthew H. Mead
Wyoming

cc: Chairman Chuck Grassley
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Ranking Member Dianne Feinstein
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

30th Alaska State Legislature

Judiciary Committee
Chairman
Resources Committee
Vice-Chair
Education Committee
Vice-Chair
State Affairs Committee
Select Committee on Legislative Ethics
Joint Armed Services Committee

Senator John Coghill

Session Address:
State Capitol, Room 119
Juneau, AK 99801-1182
(907) 465-3719
Fax (907) 465-3258

Interim Address:
1292 Sadler Way, Suite 340
Fairbanks, AK 99701
(907) 451-2997
Fax (907) 451-3526
(877) 465-3719

www.alaskasenate.org

July 30, 2018

Via Mail & Email

The Honorable A. Mitchell McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building Washington, D.C. 20510
senator@mcconnell.senate.gov

The Honorable Charles Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building Washington, D.C. 20510
senator@schumer.senate.gov

The Honorable Charles Grassley
Chairman
United States Senate Judiciary Committee
135 Hart Senate Office Building Washington, D.C. 20510
chuck_grassley@grassley.senate.gov

The Honorable Dianne Feinstein
Ranking Member
United States Senate Judiciary Committee
331 Hart Senate Office Building Washington, D.C. 20510
senator@feinstein.senate.gov

Re: Nomination of Judge Brett M. Kavanaugh to the Supreme Court of the United States

Dear Senators McConnell, Schumer, Grassley, and Feinstein:

As Alaska State Senate Judiciary Chair, I urge the United States Senate to hold a hearing on and confirm the nomination of Judge Brett M. Kavanaugh.

I believe that adherence to our Constitution, and our Founders' intent, is important for the stability of the United States.

Many believe that Judge Kavanaugh possesses similar characteristics of Justice Scalia.

My support for Judge Kavanaugh is based on the following:

1. Judges should understand that the judicial branch interprets the law. Making the law is the sole purview of the legislative branch.
2. Judges should read the words of a statute as written.
3. Judges should read the text of the Constitution as written, mindful of history and tradition.
4. Judges should not make up new constitutional rights that are not in the text of the Constitution.

5. Judges should not shy away from enforcing constitutional rights that are in the text of the Constitution.
6. Judges should understand that changing the Constitution is in the amendment process. Policy changes within constitutional bounds is for legislatures.
7. Judges should remember that separation of powers and federalism are not mere matters of etiquette, but are essential to protecting individual liberty as the individual rights guaranteed in the Constitution's text.
8. Judges must remember that courts have a critical role: When a party has standing, there must be enforcement of separation of powers. There must be federal limits.

I strongly urge all Senators to support the prompt confirmation of Judge Kavanaugh to the United States Supreme Court.

Sincerely,

Alaska State Senator John Coghill

cc: President Donald J. Trump
Vice President Michael R. Pence
Senator Lisa Murkowski
Senator Dan Sullivan
Congressman Don Young

Committee For Justice
Holding Judges and Politicians Accountable to the Constitution

The Committee for Justice
1629 K St. NW Suite 300
Washington, D.C. 20006

(202) 270-7748
committeeforjustice.org
@CmteForJustice

September 4, 2018

The Honorable Chuck Grassley
Chairman, Senate Committee on the Judiciary

The Honorable Dianne Feinstein
Ranking Member, Senate Committee on the Judiciary

RE: Nomination of Brett Kavanaugh to the Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein,

We, the president and public policy director of the Committee for Justice (CFJ), write to you regarding the nomination of Brett Kavanaugh to be an Associate Justice of the United States Supreme Court. Founded in 2002, CFJ is a nonprofit legal and policy organization that promotes the rule of law and constitutionally limited government, including engaging in the national debate about a variety of technology issues.

In order to provide the greatest added value to this committee's consideration of the Kavanaugh nomination, this letter will focus on an issue which has not gotten a lot of attention—specifically, what Judge Kavanaugh's confirmation to the Supreme Court would mean for America's tech industry. To answer that question, we look to the areas of federal law that will be most impactful on the future of that industry, including the First Amendment, antitrust law, and administrative law.

With regard to the last of these areas, we discuss the difficulty of reconciling critics' claim that Judge Kavanaugh has not been deferential enough to the authority of executive agencies with their claim that he will be too deferential to executive power if confirmed to the Supreme Court.

Administrative Law

America's tech industry is subject to a number of regulatory agencies—including, in part, the Federal Communications Commission (FCC), the Federal Trade Commission (FTC), and the Federal Aviation Administration (FAA)—and there are calls for additional regulations every day. Consequently, the willingness of the courts to carefully scrutinize agency rulemaking is vitally important to the continued vibrancy of the industry.

Of the 307 opinions Judge Kavanaugh has written while serving on the U.S. Court of Appeals for the D.C. Circuit, more than one hundred review agency decisions. It bodes well for our nation's tech industry that, as clearly demonstrated by Kavanaugh's well-established record in these cases, he is willing to enforce the constitutional limits on the authority of regulatory agencies. In one of the more notable such case, Kavanaugh wrote in a dissent that the FCC's "net neutrality rule might be wise policy ... [but] congressional inaction does not license the Executive Branch to take matters into its own hands," adding that the FCC's action "will affect every Internet service provider, every Internet content provider, and every Internet consumer."[1]

[1] *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).

As we recently described, Judge Kavanaugh views the nearly blind deference to executive agencies that some argue for as an abdication of the judicial branch's duty and a violation of the constitutional separation of powers.[2] He has applied this more skeptical approach to regulators under both Republican and Democratic administrations, seeking not to promote any particular ideology but to protect Americans from unaccountable bureaucrats.

Particularly important is Judge Kavanaugh's strong voice in emphasizing that *Chevron* deference—named for the 1984 Supreme Court decision in *Chevron v. Natural Resources Defense Council*[3]—has its limits. The *Chevron* doctrine, which holds that courts should defer to an executive agency's interpretation of a statute when its language does not clearly answer the question at issue, has allowed agencies to turn statutory ambiguity into justification for expanding the scope of their authority. As Judge Kavanaugh wrote, *Chevron* deference "encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations."[4]

Judge Kavanaugh is a fitting replacement for Justice Anthony Kennedy, who wrote shortly before his retirement of his "concern with the way in which the Court's opinion in [*Chevron*] has come to be understood and applied."[5] "The type of reflexive deference exhibited in some of these cases is troubling," said Kennedy. "The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles."

Judicial skepticism about the broad application of agency deference is important for any industry that is vulnerable to overreaching regulations, but this is particularly true for the tech industry. The slow-moving, one-size-fits-all nature of government regulation can be an enormous obstacle to the technological and entrepreneurial innovation that has made America's tech industry an engine of economic growth and consumer choice, even during difficult economic times.

Furthermore, regulatory compliance costs pose an existential threat to the small startup companies that make up much of the American tech industry and drive economic growth. Those costs stifle competition and doom many of the startups that might otherwise grow to compete with the giant tech companies that are the main target of regulators. Judge Kavanaugh's judicial record demonstrates that, if confirmed, he will help to ameliorate this problem by holding federal agencies to their responsibility of conducting cost-benefit analyses before imposing costly regulations.[6]

Presidential Power

Some critics of Judge Kavanaugh's nomination have characterized his enforcement of the constitutional limits on federal regulators' authority as not deferential enough to executive agencies. It is puzzling that many of these same critics also worry that Kavanaugh will be too deferential to presidential power. In fact, Democrats on the Senate Judiciary Committee are making this concern a main theme of their opposition to the nominee.

These twin concerns of critics would be reconcilable if regulatory agencies and the White House were different branches of our federal government. However, those agencies and the presidency are both part of the executive branch. Judge Kavanaugh's critics should keep in mind that, because Article Two of the

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[2] Ashley Baker, *Kavanaugh's administrative law opinions should be given due deference*, The Hill, August 27, 2018, http://thehill.com/opinion/judiciary/403694-kavanaughs-administrative-law-opinions-should-be-given-due-deference.
[3] 104 S. Ct. 2778.
[4] Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016).
[5] *Pereira v. Sessions*, 138 S.Ct. 2105 (2015) (Kennedy, J., concurring).
[6] *See, e.g., White Stallion Energy Center v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014).

Constitution vests all "the executive power" of the United States in the President, any judicial decision that strengthens the authority of federal agencies necessarily also strengthens the President's power.

Free Speech

At the center of the technological transformation of America and the world is the Internet, which has brought Americans together to discuss and debate issues in a way no town square ever could. Overreaching, costly, or poorly thought out regulation of the Internet can wind up silencing ordinary Americans who want to participate in the political process online and can't afford expensive alternatives such as television advertising.[7] Whether we are talking about social media, online newspapers and blogs, email, or the online ads that keep all these services free, the continued vibrancy of the Internet depends on the protection of free speech—for both individual Americans and the websites they use—every bit as much as more traditional media and means of communication do.

Early in the Internet revolution, courts recognized the vital importance of free expression online, most notably in a landmark 1997 Supreme Court decision striking down provisions of the Communications Decency Act that effectively banned "indecent" and "patently offensive" communications online,[8] as well as in lower court decisions that broadly interpreted online platforms' statutory immunity from liability for third party speech. Without such protection by the courts, the Internet would likely be but a mere shadow of what it has become.

Fortunately, Judge Kavanaugh's judicial record makes it clear that he believes in the robust protection of free speech. In two D.C. Circuit cases decided on other grounds, Judge Kavanaugh wrote separately to discuss the First Amendment problems raised by the FCC actions challenged by the plaintiffs. In *Cablevision Systems Corp. v. FCC*,[9] Kavanaugh wrote in dissent:

> *"The First Amendment endures, and it applies to modern means of communication as it did to the publishers, pamphleteers, and newspapers of the founding era. … [V]ideo programming distributors (such as Comcast, DIRECTV, DISH, Time Warner, Cablevision, Verizon, and AT & T) and video programming networks … are editors and speakers protected by the First Amendment's guarantees of freedom of speech and of the press."*

Notably, Judge Kavanaugh's strong First Amendment record includes enforcing the constitutional limits on defamation claims. Kavanaugh has written opinions upholding freedom of the press against claims of defamation for insinuating questions posed in an article (*Abbas v. Foreign Policy Group*[10]) and inaccurate reporting on a criminal conviction (*Kahl v. Bureau of Nat'l Affairs*[11]). Without judges willing to enforce the First Amendment in such cases, the free-wheeling nature of social media and other online expression would likely be impossible.

Antitrust Law

During the past twenty years, giant tech companies have been a major focus of the public and legal debate about antitrust law. Recently, growing concerns about data privacy, content filtering, ranking of

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[7] *See, e.g.*, Christina Pesavento and Ashley Baker, *No Safe Harbor: Congress Threatens Free Speech Online*, JURIST, October 28, 2017, https://www.jurist.org/commentary/2017/10/pesavento-baker-safe-harbor.
[8] *Reno v A.C.L.U.*, 117 S. Ct. 2329 (1997).
[9] 597 F.3d 1306 (D.C. Cir. 2010). The other case is *Comcast Cable Communications v. FCC*, 717 F.3d 982 (D.C. Cir. 2013).
[10] 783 F.3d 1328 (D.C. Cir. 2015).
[11] 856 F.3d 106 (D.C. Cir. 2017).

search results, and the like have led to increasing calls to break up the tech giants. While these issues need to be addressed, there is a risk that overreaction to them among lawmakers and the public could lead to poorly thought out or overreaching application of antitrust laws to these companies, which would endanger America's technological preeminence and the jobs that depend on it.

Therefore, our nation needs judges who will apply antitrust laws in a manner which is both balanced and reflective of modern economic principles. Judge Kavanaugh's judicial record indicates that he will do exactly that.

For example, in *United States v. Anthem*, where the D.C. Circuit allowed the Justice Department to block the merger of two health insurance companies, Judge Kavanaugh dissented, arguing that the majority failed to sufficiently consider consumer welfare, the touchstone of modern, economics-based antitrust jurisprudence.[12] In *FTC v. Whole Foods*, Kavanaugh again dissented, arguing that the merger of Whole Foods and Wild Oats would not be anticompetitive, based on his application of an economically rigorous approach to market definition.[13]

Conclusion

In the areas of the law most important to the future of America's tech industry—antitrust, agency deference, and free speech—Judge Kavanaugh's record demonstrates that, if he is confirmed, his addition to the Supreme Court will contribute to the continued vibrancy of America's tech industry and the innovation and economic growth it spurs.

We ask that this letter be entered in the record for this week's hearing on Judge Kavanaugh's nomination.

Sincerely,

Curt Levey
President
The Committee for Justice

Ashley Baker
Director of Public Policy
The Committee for Justice

[12] 855 F.3d 345 (D.C. Cir. 2017).
[13] 548 F.3d 1028 (D.C. Cir. 2008).

Common Cause
Holding Power Accountable

805 Fifteenth Street NW, Suite 800
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August 31, 2018

Dear Senator,

The Senate's power and responsibility to provide its informed "advice and consent" to the president's lifetime Supreme Court appointments carries enormous significance for the nation's confidence in its rule of law. We urge the Senate to use this power judiciously, in keeping with each senator's solemn obligation to defend the Constitution from all threats, both foreign and domestic. One of those threats is the decline of trust in government and other democratic institutions. If plummeting trust in government infects a polarized public's confidence in the Supreme Court, our country suffers.

Common Cause urges the Senate to withhold its consent to lifetime Supreme Court appointments until a full and complete record of what is at stake is laid bare. Withholding consent, including for Judge Brett Kavanaugh, is the most prudent course to take. It comports with the Senate's role as the deliberative body of a co-equal branch of government. A rush to judgment will risk undermining confidence in the Supreme Court. Only the Senate has the power to put brakes on the confirmation process. We urge you to use them.

Common Cause does not come to this decision lightly. For nearly 50 years, including the tenure that Archibald Cox, fired Watergate Special Prosecutor, served as our Chairman, we have pursued our mission to protect democracy, its processes, and the integrity of government. We lament how broken the judicial confirmation process has become in recent decades. There are many to blame. But the extraordinary circumstances surrounding a Supreme Court appointment at this time—including an incomplete record of the nominee's professional papers and incomplete Department of Justice (DOJ) investigations concerning President Trump and alleged corruption of the electoral process—compel us to urge a delay.

First, the absence of a complete record from Judge Kavanaugh's tenure in the George W. Bush administration does not allow the Senate to fulfill its constitutional responsibility to provide informed advice and consent. The American people deserve to have access to this material, too.

According to the National Archives and Records Administration (NARA), the "several million pages of records related to Judge Kavanaugh [are] significantly more than for prior Supreme Court nominees who worked in the White House–for example, NARA processed and released roughly 70,000 pages on Justice Roberts and 170,000 pages on Justice Kagan." Although the confirmation hearings are scheduled to begin on September 4, NARA released a statement two weeks ago that it cannot complete its review of documents that Chairman Grassley requested until "the end of October." According to NARA, those responsive documents number approximately 900,000 pages.

Even those documents will provide an under-inclusive set of materials to vet the nominee. For example, Chairman Grassley did not request documents related to Judge Kavanaugh's nearly three-year tenure as staff secretary to President Bush, a professional experience that Judge Kavanaugh himself called "most useful" and "most instructive" to his role as a judge. NARA estimates that the staff secretary materials number into the millions of pages. Ten of your colleagues on the Judiciary Committee have taken the unprecedented step of filing a Freedom of Information Act request for responsive materials from Judge Kavanaugh's time as staff secretary. You, and the American people, should have access to these relevant materials before providing your advice and consent.

The information deficit outlined above should not be your sole concern, however. As you know, there are incomplete Department of Justice investigations related to President Trump and the electoral process. Their nature is of utmost importance.

Special Counsel Robert Mueller was charged by the DOJ with investigating the attack by a foreign power on the 2016 election and any links to the Trump campaign. It has so far resulted in nearly three dozen indictments, five guilty pleas, and one jury conviction of the president's campaign chairman, Paul Manafort.

In a separate matter in the Southern District of New York, President Trump's former personal lawyer, Michael Cohen, pleaded guilty to eight criminal charges, including two federal campaign finance felony violations that Common Cause raised in complaints filed with the DOJ in January and February of this year. Cohen told a federal judge, under oath, that he committed his election-related crimes "in coordination with and at the direction of" then-candidate Donald Trump. If confirmed, this links the president to criminal conduct that violated the laws intended to protect the integrity of the electoral process and guard against corruption.

We do not pre-judge the president's guilt or innocence or the outcome of the proceedings. Still, the president routinely attacks the Mueller investigation as illegitimate and frequently excoriates the Attorney General for insufficient loyalty. This is relevant to your consideration of confirming a Supreme Court nominee.

The Supreme Court may have to resolve constitutional disputes arising out of DOJ probes that involve the president's conduct. It did during Watergate. Issues could include, among other things, whether a sitting president can be criminally indicted; whether the pardon power includes self-pardons or family pardons; whether the president must comply with subpoenas, submit to depositions or cooperate with criminal investigations; and whether the president has obstructed the Special Counsel's investigation.

Judge Kavanaugh has opined on some of these issues in other contexts. He suggested that *United States v. Nixon*, the unanimous Supreme Court decision obligating President Nixon to disclose the Oval Office tapes, was "wrongly decided." Two years ago, he told an audience at the American Enterprise Institute that he would "put the final nail in" *Morrison v. Olson*, the Supreme Court decision that upheld the now-

expired Independent Counsel Act. Of course, at any hearing of this nominee, these issues must be among those held to your highest scrutiny.

Because the DOJ's proceedings are incomplete, the president and DOJ investigators are in the best position to assess the scope of the president's potential legal liability. But only the president would know what specifically to seek in a nominee's background that would lead him to approve any future defenses the president might assert. This means the president may know of relevant issues that are as yet unknown to the Senate. This is another reason for developing a more complete record.

In addition to these DOJ probes, the president is the defendant in civil lawsuits alleging that his ongoing ownership of the Trump Organization has resulted in violations of the constitution's Emoluments Clause – a legal issue that may well end up before the Supreme Court.

For all these reasons, a cloud hangs over the very constitutional officer who is vested with the power to choose a person for a lifetime appointment to the highest court in our judicial system and who may later sit in judgment of them. Once confirmed, the appointment cannot be undone by a majority vote.

If a nominee confirmed under the current circumstances participates in future decisions arising out of the DOJ probes and does not recuse themselves, the Supreme Court's independence—and appearance of independence—will be compromised. The public may view any resulting decisions from the Court as tainted by a conflict-of-interest.

The Advice and Consent clause was intended by the Framers of the Constitution to be a serious and deliberative process, not one that is rushed, or timed to achieve maximum political leverage on key members of the Senate who are up for election in November, or logrolled through a vote of a simple majority of the Senate, as if there is little at stake.

The constitutional duty before you now, as senator and representative of your constituents, is whether to provide or withhold consent to the confirmation. Your judgment would be better informed if rendered later, after more information about the nominee's record and aforementioned DOJ investigations is public. You will then be able to evaluate more fully the bases of the president's decision to choose a specific nominee for a lifetime seat on the high court.

In our system of checks and balances and co-equal branches of government, the president nominates an individual to the Supreme Court for a lifetime appointment, and the Senate decides whether to confirm that nominee. Withholding advice and consent, pending further resolution of the serious issues discussed in this letter, will best protect public confidence in the independence and integrity of the Supreme Court and the Senate.

Democracy is resilient, but it takes our constant vigilance to uphold its promise.

Sincerely,

Karen Hobert Flynn
President
Common Cause

CONCERNED
WOMEN *for* AMERICA
LEGISLATIVE ACTION COMMITTEE

August 29, 2018

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein,

I write on behalf of the hundreds of thousands of supporters of Concerned Women for America Legislative Action Committee (CWALAC) to encourage you to give prompt consideration to the nomination of Brett Kavanaugh to the U.S. Supreme Court. It is time to put aside political maneuverings and consider this nominee on his own merits.

Judge Kavanaugh's extensive judicial record alone gives a clear and most accurate picture of the type of judge he is. It shows he is a thoughtful, impartial jurist who respects his limited role as set forth by the U.S. Constitution. But beyond that, the unprecedented amount of material available for consideration, outside of his more than 300 opinions, only corroborates that he should be confirmed without delay.

As of the writing of this letter, the U.S. Senate had received more than 450,000 pages and counting of documents related to the nomination of Judge Kavanaugh, with more than 200,000 pages related to his government work. This is an historic amount of information available that should be more than enough for the Judiciary Committee and all members of the Senate to give a full and fair consideration to any nominee.

We commend you for conducting such a transparent process in the midst of these corrosive, hyper-partisan times. We are confident that, after examining Judge Kavanaugh's record, reasonable senators will find the same thing we have — this is an extremely qualified nominee whose credentials are second to none. His judicial opinions reveal to us a judge who faithfully applies the text of the Constitution and the laws enacted by "We the People," leaving personal policy preferences aside.

Because religious liberty is among our seven core issues, CWALAC is especially impressed by Judge Kavanaugh's commitment to constitutional principles in this area. The Constitution is clear in defending the rights of all Americans to practice their faith, free of government compulsion. In cases like *Newdow v. Roberts*, *Archdiocese of Washington v. WMATA*, and *Priests for Life v. HHS*, among several others, Judge Kavanaugh shows what a measured, fair, and impartial approach to religious liberty looks like.

It is no wonder why the U.S. Supreme Court has looked positively at his opinions more than a dozen times and why his opinions are regularly cited in courtrooms across the country.

The quality and depth of his writings are remarkable and show us, not only his incredible intellectual acumen, but also his commitment to develop the exceptional legal talent around him. It is not surprising to see that 39 of his 48 clerks have gone on to clerk at the Supreme Court level.

As the largest public policy organization for women in the country, CWALAC takes special note of Judge Kavanaugh's commitment to the development of women in the legal field. As you are aware, Judge Kavanaugh employed the first all-female class of law clerks in the history of the D.C. Circuit Court, and more than half of his law clerks have been women. There is no question that his incredible efforts to advance women in the legal field will yield incredible fruit for generations to come. As a matter of fact, one of his clerks, Britt Grant, is already being considered by President Donald J. Trump for the U.S. Supreme Court.

I hope you find the time to highlight Judge Kavanaugh's commendable efforts in this area at the hearings. Senators from both sides of the aisle should be thrilled by Judge Kavanaugh's intentional efforts to support women. As part of CWALAC's "Women for Kavanaugh" bus tour around the country, we found a significant group of women had not heard about this part of his record and were thrilled to discover it. Conservative women especially are thrilled to stand in support of Kavanaugh.

Of course, we are aware this is not part of Judge Kavanaugh's judicial philosophy, which is what is most important when considering his nomination, but we believe it speaks to his character. We need men and women of impeccable character on the U.S. Supreme Court, as a qualification beyond outstanding legal credentials. Judge Kavanaugh's 25 years of public service, while earning public praise from friends and adversaries alike, speak of the trustworthiness of his character.

It is why we as conservative women can join with liberal, feminist Lisa Blatt, who wrote for *The New York Times*, "Sometimes a superstar is just a superstar," saying, "The Senate should confirm him." That is the sort of bipartisan support standing behind Judge Brett Kavanaugh for the U.S. Supreme Court. We urge you to give him a full, unbiased hearing, and ultimately confirm him to serve the American people in the highest court of the land.

Sincerely,

Penny Nance,
CEO and President

cc: Sen. Orrin Hatch
Sen. Patrick Leahy
Sen. Lindsey Graham
Sen. Dick Durbin
Sen. John Cornyn
Sen. Sheldon Whitehouse
Sen. Michael Lee
Sen. Amy Klobuchar
Sen. Ted Cruz
Sen. Christopher Coons
Sen. Ben Sasse
Sen. Richard Blumenthal
Sen. Jeff Flake
Sen. Mazie Hirono
Sen. Mike Crapo
Sen. Cory Booker
Sen. Thom Tillis
Sen. Kamala Harris
Sen. John Kennedy

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September 4, 2018

Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C. 20510

Honorable Charles Schumer
Minority Leader
United States Senate
Washington, D.C. 20510

Honorable Charles Grassley
Chairman
Judiciary Committee
United States Senate
Washington, D.C. 20510

Honorable Dianne Feinstein
Ranking Member
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Leader McConnell, Leader Schumer, Chairman Grassley, and Ranking Member Feinstein,

The members of the Congressional Black Caucus (CBC) express our strong opposition to the nomination of D.C. Circuit Judge Brett Kavanaugh to the United States Supreme Court. Based on a thorough review of his record, we have concluded that the confirmation of Judge Kavanaugh to the highest bench would endanger historically significant legal precedents of importance to African Americans and, more broadly, the balance of inclusive justice itself. As Members of the CBC, we cannot overstate what is at stake for African Americans and communities of color, who have spent more than a century fighting to achieve equal protection in our country and who continue this effort, particularly through the federal courts and the United States Supreme Court. Judge Kavanagh's record as a federal judge gives every indication that he lacks respect for well-established precedents and would engage in aggressive judicial activism that could mean the reversal of important decisions that have afforded African Americans a measure of equal citizenship in a nation that has often stood in the way of its pursuit.

Repeatedly, Judge Kavanaugh has demonstrated a lack of respect for the judicial precedents that have ensured equal protection under the law for decades. Specifically, he has shown inadequate commitment to legal precedents that protect communities of color, women and, more recently, LGBTQ Americans. Instead, he has embraced jurisprudence so out of the mainstream of legal thought that even his conservative Republican-appointed judicial colleagues often have not agreed with him. Although serving on a court with a majority appointed by Republican presidents, Judge Kavanaugh averages a higher number of dissents annually than any other member of the D.C. Circuit Court. Case law precedents and the laws they represent are the contours of our legal system, ensuring that cherished rights are

protected. A judge who so frequently questions key legal precedents endangers the legal framework that has benefitted African Americans. Our substantive concerns, along with the ongoing investigations under Special Counsel Robert Mueller implicating the president, coupled with this nominee's ability to influence the outcome of an appeal, leave us no choice but to strongly urge rejection of Judge Kavanaugh's nomination.

We are particularly concerned about Judge Kavanaugh's likely impact on voting rights for communities that have historically been targeted for exclusion from the electorate. In *South Carolina v. United States*, Judge Kavanaugh condoned barriers to voter participation enacted by states. Under the then-enforced Voting Rights Act the Obama administration blocked enforcement of South Carolina's state-issued photo identification voting law in 2011, primarily because it affected up to eight percent of black South Carolinians, while impacting only up to four to five percent of whites. In his opinion ruling for the state, Judge Kavanaugh claimed the results of the South Carolina law "do[] not have the effects that some expected and some feared." This statement totally ignored the disparate impact of the photo ID law on African Americans and the real people who were hurt by the South Carolina law. For example, 92 year-old South Carolina native Larrie Butler, one of the many law-abiding, civically-engaged citizens involved, was stripped of his opportunity to vote because of difficulties imposed by the South Carolina voter ID law. Unable to obtain a birth certificate, Mr. Butler had to go through extraordinary steps to get the proper identification required for him to vote, but still failed to qualify. In light of the disproportionate numbers of African Americans who have been disenfranchised, it is unsettling that a nominee to the highest court expressed skepticism about the law's clear racial impact in a state with a long history of disenfranchisement of African Americans.

Judge Kavanaugh's record on matters related to criminal justice is of special concern to the CBC. He has spoken and written repeatedly for overturning precedent that protects civilians from overzealous law enforcement officers. Such a change would deeply reshape criminal law at a time when African Americans are already subject to disproportionate police surveillance and shootings. In a speech he delivered less than a year ago, Judge Kavanaugh suggested that it was appropriate to make "the probable cause standard more flexible." He also appeared to support decisions making it easier for police to conduct searches "without a warrant or individualized suspicion" and challenged the exclusionary rule that prohibits courts from accepting evidence obtained through an illegal search or seizure. Judge Kavanaugh has even supported narrowing the rights enumerated in *Miranda v. Arizona*—the landmark case, long accepted by law enforcement, which ensures that individuals are aware of their constitutionally protected rights before making incriminatory statements while in custody. Together, these opinions show a callous disregard for long-established rights for the accused who, under our system of justice, are innocent until proven guilty, a basic tenet of our criminal justice system. Judge Kavanaugh's advocacy for regressive changes to a criminal justice system that already falls short in many ways should trouble all Americans who support fair and equal treatment by law enforcement.

Judge Kavanaugh has also demonstrated hostility to a woman's fundamental right to make decisions regarding her own body, a right firmly established in our constitutional law over 45 years ago and since upheld several times by the Supreme Court. An adverse position would be particularly harmful to Black women who would be disproportionately affected because of systemic barriers to preventative care and affordable healthcare and the resultant use of abortion. In 2017, Judge Kavanaugh tried to block a lower court's ruling requiring the government to allow an undocumented woman entering the United States to have an abortion. According to a conservative Texas court, the woman had gone through all of the cumbersome legal steps required in Texas to obtain an abortion. Fortunately, the full D.C. Circuit overturned Judge Kavanaugh's decision—yet another example of a Republican-led court refusing to accept thinking outside of the conservative mainstream. Although Judge Kavanaugh proclaimed acceptance of the precedential value of *Roe v. Wade* during his 2006 confirmation hearing, his opinion in the 2017 case is another reason to doubt his purported commitment to binding precedent. The determination he showed to deter abortion in this case casts doubt on his willingness to uphold decades of established law protecting a woman's fundamental reproductive rights.

Judge Kavanaugh also has been hostile to affordable health care, a major concern for African Americans. In a uniquely troubling dissent in a case that ultimately upheld the Affordable Care Act, Judge Kavanaugh wrote, "Under the Constitution, the president may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional, even if a court has held or would hold the statute constitutional." This unheard of view goes much further than an attempt to overturn existing precedent. It is dangerous to the rule of law itself. As numerous constitutional scholars have written, in our republic, the president cannot pick and choose which laws Congress passes to enforce, claiming constitutional breach, after a court has already deemed the law constitutional. Under our constitutional system, "[i]t is emphatically the province and duty of the judicial department to say what the law is," as Justice John Marshall famously said in *Marbury v. Madison*, and, under Article II of the Constitution, the president must "take care that the laws be faithfully executed." Judge Kavanaugh's view that the president may deem a law unconstitutional and refuse to enforce it, even after the Supreme Court has upheld it, represents an extreme view of the authority of the executive relative to the other branches. This notion of executive power is a departure from constitutional jurisprudence that must be repudiated in a republic governed by a written constitution. We would be particularly concerned if decisions of the Supreme Court could be ignored by the executive, considering that minorities in our country must disproportionately rely on the Court to ensure equal protection.

Finally, the ongoing Special Counsel investigation into the Trump administration's role in reported collusion with foreign governments makes the timing of Judge Kavanaugh's nomination unfortunate and adds to our objection to his nomination. Despite playing a pivotal role in the investigation of President Clinton in the 1990's, Judge Kavanaugh has since softened his stance on the legitimacy of such investigations of sitting presidents. His views favoring expansive executive power are deeply embedded. In a 2017 speech, Judge Kavanaugh said, "To be sure, I do not agree with all of [former Chief Justice William H. Rehnquist's] opinions... *Morrison v. Olson* in 1988 comes quickly to mind as the Rehnquist opinion I still have some trouble with..." *Morrison*, of course, is the case that upheld the constitutionality of the Independent Counsel. Furthermore, in reference to sitting presidents facing criminal prosecution while in office, in a 2009 *Minnesota Law Review* article Judge Kavanagh wrote, "that the President should be excused from some of the burdens of ordinary citizenship while serving in office." This would mean, of course, that there would be no deterrent to a lawless president while in office, except the nuclear-sized, rarely used weapon of impeachment. There is little reason to believe that Judge Kavanaugh would uphold the constitutionality of Special Counsel Robert Muller's bipartisan work, given his related views. With the possibility that an appeal related to the investigation's outcome could be considered by the Supreme Court in the future, we are justifiably worried about this nomination.

For nearly eight decades, African Americans have arduously fought to secure many historic legal victories. Change often has been incremental, but Judge Kavanaugh's nomination threatens even these gains. As the first African American Supreme Court Justice Thurgood Marshall once said, "I wish I could say that racism and prejudice were only distant memories...We must dissent because America can do better, because America has no choice but to do better."

Sincerely,

Cedric L. Richmond
Chair, Congressional Black Caucus

Eleanor Holmes Norton
Chair, CBC Judicial Nominations Working Group

September 6, 2018

Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C. 20510

Honorable Charles Grassley
Chairman
Judiciary Committee
United States Senate
Washington, D.C. 20510

Honorable Charles Schumer
Minority Leader
United States Senate
Washington, D.C. 20510

Honorable Dianne Feinstein
Ranking Member
Judiciary Committee
United States Senate
Washington, D.C. 20151

Dear Majority Leader McConnell, Leader Schumer, Chairman Grassley and Ranking Member Feinstein:

We write to you to express our deep concerns and strong opposition to President Trump's Supreme Court nominee Judge Brett Kavanaugh. The American people deserve a justice that will uphold and protect the rights of all those living in the United States. Unfortunately, a thorough review of Judge Kavanaugh's record demonstrates that he falls considerably short of this critical standard. Judge Kavanaugh's confirmation would be a serious setback for equity and justice in our nation and would deeply harm immigrants and communities of color.

Judge Brett Kavanaugh's judicial record, including his D.C. Circuit decision to limit a young undocumented woman's right to choose, demonstrates that he would lend strong support to Trump's anti-immigrant agenda. In *Garza v. Hargan*, Kavanaugh stayed the Texas district court's order for a young immigrant woman to access an abortion. This not only raises concerns about a woman's fundamental right to choose, but Kavanaugh's decision was reversed *en banc* four days after his ruling. Kavanaugh dissented to this decision and stated that "a new right" for undocumented immigrant minors was created when allowing this young woman access to an abortion. Kavanaugh's erroneous argument that the D.C. Circuit court created "a new right" raises deep concerns that, if he was confirmed to the Supreme Court, Kavanaugh would roll back the long-established constitutional rights of not only women, but immigrants as well.

Another concerning case regarding immigrant communities that Kavanaugh has ruled on is *Agri Processor v. NLRB*. Once again in this case, Kavanaugh drafted an opinion that suggests he would roll-back the rights of immigrants. Both the NLRB and the majority of the D.C. Circuit ruled that the workers at Agri Processor had the right to vote to unionize. But Kavanaugh dissented, arguing that "illegal immigrant" workers hired by Agri Processor were

not protected under the National Labor Relations Act and were therefore unable to unionize and have access to vital worker protections, including improved working conditions and wages.
These cases demonstrate that Kavanaugh has an established judicial track record that undermines the rights of immigrants and women, and strongly demonstrates that he is not fit to serve on the highest court in the land.

This Administration has made it a top priority to limit legal immigration and target and deport all undocumented immigrants, including Dreamers, Temporary Protected Status (TPS) recipients and immigrant mothers and fathers with U.S. citizen children. As a result, we have seen President Trump institute a myriad of cruel and reckless immigration policies. The majority of these policies are being litigated across the country and the Supreme Court will soon decide the constitutionality and legality of some of these policies. The next Supreme Court justice may play a critical role in determining the fate of Dreamers and TPS holders, as well as the government's ability to indefinitely detain children and families in detention centers.

Furthermore, critical laws such as the Affordable Care Act (ACA) have helped millions of Americans, including millions of Hispanics, gain access to health care. Unfortunately, just a year after President Obama signed the bill into law, Judge Kavanaugh dissented on a 2011 decision to uphold the constitutionality of the ACA. This opinion is deeply concerning, could threaten health insurance coverage for millions of Americans, and would be particularly harmful to the Hispanic community, which has seen the largest reduction in the uninsured rate of any other ethnic group.

Based on Judge Kavanaugh's judicial record, there is little doubt that he will side with the Trump Administration on cases that carry enormous consequence for Hispanic families. His record of anti-immigrant decisions will have a negative impact on due process and equal protections for all individuals, including undocumented immigrants in the United States.

We therefore strongly urge you to oppose Judge Kavanaugh's nomination and to insist on a nominee with a record demonstrating greater respect for well-established precedents and that ensures equal protections for all Americans, including immigrants and communities of color.

Sincerely,

Congressional Hispanic Caucus Chair Michelle Lujan Grisham (NM-01); First Vice Chair Congressman Joaquin Castro (TX-20); Second Vice Chair Congressman Ruben Gallego (AZ-07); Whip Congressman Pete Aguilar (CA-31); Freshman Representative Congressman Adriano Espaillat (NY-13); Congressman Darren Soto (FL-09); Congresswoman Grace F. Napolitano (CA-32); Congresswoman Norma J. Torres (CA-35); Congresswoman Nanette Diaz Barragán (CA-44); Congresswoman Lucille Roybal-Allard (CA-40); Congressman Luis Gutiérrez (IL-04);Congressman Raúl M. Grijalva (AZ-03); Congressman Juan Vargas (CA-51); Congressman Albio Sires (NJ-08); Congresswoman Nydia Velázquez (NY-07); Congressman José E. Serrano (NY-15); Congressman Ruben J. Kihuen (NV-04); Congressman Jimmy Gomez (CA-34); Congressman Ben Ray Luján (NM-03); Congresswoman Linda T. Sánchez (CA-38)

CONSTITUTIONAL ACCOUNTABILITY CENTER

September 13, 2018

The Honorable Charles E. Grassley
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
U.S. Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

I wrote to you last week on behalf of the Constitutional Accountability Center ("CAC") to express concerns about Judge Brett Kavanaugh's nomination to the United States Supreme Court.[1] CAC is a non-profit think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests.

As litigators, and as defenders of the Constitution and the rule of law, CAC has a vested interest in nominations to the federal courts; and there are no nominations more important than those to the Supreme Court, the one court designed by the Framers to be the final governmental arbiter of constitutional liberties and protections. The American people are entitled to Supreme Court Justices who will not only safeguard the rights and liberties protected by the Constitution, but also serve as an impartial, independent check on the President and Congress. It is with these considerations in mind that we reviewed the nomination of Judge Brett Kavanaugh.

When President Trump nominated Judge Kavanaugh, he and supporters of the nomination touted Judge Kavanaugh as an originalist. To live up to the name, originalists—and CAC considers itself among them—must be faithful to the text, history, and values of the whole Constitution, including the many Amendments that have, over time, pushed our country further along the arc of progress. These Amendments, among other things, removed the stain of slavery from our nation's charter, guaranteed equal protection of the law to all persons, guaranteed the right to vote free from discrimination based on race and gender, and eradicated the poll tax so that the right to vote does not depend on a person's economic status. To have a justice on the Supreme Court who takes seriously this arc of progress which is written into the words of our Constitution and uses it as his or her guiding principle in deciding the cases of national import that reach the Supreme Court is something CAC would celebrate—even if that nominee is not necessarily the one that we would have chosen. To determine whether Judge Kavanaugh was such a nominee, we undertook a thorough examination of his record and watched closely his statements during his confirmation hearings.

[1] *See*, Letter from CAC to Chairman Grassley & Ranking Member Feinstein on the Nomination of Judge Brett Kavanaugh to the U.S. Supreme Court (Sept. 3, 2018), ***available at*** https://www.theusconstitution.org/wp-content/uploads/2018/09/CAC-Pre-Hearing-Testimony.pdf.

Unfortunately, after studying Judge Kavanaugh's record on constitutional issues, we became concerned about what that record suggested—specifically, that he might be a selective originalist who would turn a blind eye to the Constitution's text, history, and values when construing the Constitution's many broadly worded guarantees of equality and individual rights.[2] In CAC's view, a selective originalist gives pride of place only to parts of the Constitution, while ignoring the latter, more progressive Amendments that prohibit states from infringing on individual rights, protect substantive fundamental rights and equality, and give Congress broad powers to help realize these constitutional promises. This runs contrary to CAC's belief that constitutional interpretation should begin with a careful analysis of constitutional text and history, including the text and history of parts of the Constitution that enshrine progressive values.

We also studied Judge Kavanaugh's record on business issues, and that study raised further concerns. Our analysis demonstrated Judge Kavanaugh routinely sided with corporations and employers, and against employees, consumers, and others, even when it required him to distort the text of the law and ignore binding precedent.[3] We were worried, that if confirmed, Judge Kavanaugh would continue the Supreme Court's trend toward improperly favoring the interests of big business over all Americans.[4]

Judge Kavanaugh's duty to be forthright and candid during his confirmation hearing was particularly important because of the extraordinary actions of the President who nominated him. President Donald Trump established litmus tests for his nominations to the Supreme Court, made numerous comments disparaging federal judges who do not rule in his favor, abused the power of his office, and is now an unindicted alleged co-conspirator in a felony committed by his personal attorney. Consequently, there was a cloud of suspicion before Judge Kavanaugh was even nominated, and thus a profound burden placed on him to demonstrate that, if confirmed, he would serve as an independent check on the elected branches when they violate the law, including limits on corruption in the executive branch; would not be a rubber stamp for the U.S. Chamber of Commerce and other big business interests; and would be open-minded, fair, and guided by the text, history, and values of the whole Constitution—not just by the parts he prefers, or by a right-wing political agenda.

Unfortunately, during his confirmation hearing, Judge Kavanaugh obfuscated his views and failed to assuage our concerns about his willingness to enforce the whole Constitution. Furthermore, he provided answers that could not be squared with the text and history of the Constitution. There is too much doubt that Judge Kavanaugh will be faithful to the whole Constitution or will treat all Americans fairly when he's asked to weigh their legal rights against the interests of big business. **As a result, CAC cannot endorse the confirmation of Judge Kavanaugh to the U.S. Supreme Court and urges the Senate to vote NO on his confirmation.**

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[2] David H. Gans, *Supreme Court Nominee Brett Kavanaugh: Will He Respect The Whole Constitution?* (Aug. 2018), https://www.theusconstitution.org/wp-content/uploads/2018/08/Supreme-Court-Nominee-Brett-Kavanaugh-Will-He-Respect-The-Whole-Constitution.pdf.

[3] Ashwin P. Phatak, *Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?* (Aug. 2018), https://www.theusconstitution.org/wp-content/uploads/2018/08/CAC-Kavanaugh-Business.pdf.

[4] Our ongoing study of the U.S. Chamber of Commerce's success before the Supreme Court has shown that the Court's pro-business majority has ruled in favor of the Chamber in 70% of the merits cases in which it has filed since Chief Justice John Roberts' confirmation to the Supreme Court in 2005. *See, Corporations and the Supreme Court: CAC's long-term study of the U.S. Chamber of Commerce and its record before the Roberts Court,* https://www.theusconstitution.org/series/chamber-study/ (last visited Sept. 12, 2018).

1. AN ORIGINALIST?

As previously stated, an originalist must be faithful to the text, history, and values of the whole Constitution, including the Amendments that have, over time, pushed our country further along the arc of progress. During his opening statement, Judge Kavanaugh described his judicial philosophy as follows: "a judge must interpret statutes . . . [and] the [C]onstitution as written, informed by history and tradition and precedent."[5] While he did not specifically note the importance of the Amendments in discussing his method of legal interpretation, he did later exalt the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—deeming them "the most important amendments . . . in the Constitution in many respects because [they] brought the promise of racial equality that had been denied at the time of the original Constitution into the text of the Constitution."[6] CAC could not agree more.

Although Judge Kavanaugh has described himself as an originalist,[7] his pre-hearing record, as we have shown, raises concerns about whether he will enforce the text, history, and values of the whole Constitution. Regrettably, Judge Kavanaugh's testimony at his confirmation hearing did not dispel those concerns. While Judge Kavanaugh, at times, gave excellent answers to questions about certain constitutional provisions and constitutional precedents of the Supreme Court, his unwillingness to address other provisions and cases heightened the concerns about his fidelity to the entire Constitution.

Not surprisingly, a number of Senators sought to elicit Judge Kavanaugh's jurisprudential views of landmark Supreme Court rulings protecting fundamental rights. This is a legitimate line of questioning of a Supreme Court nominee, and recent nominees to the Court have regularly answered such questions.[8] But in response to Senators' questions about some of the most important constitutional rulings by the Court in the past 65 years, Judge Kavanaugh was very selective in his replies, agreeing with some, but refusing to answer questions about others. There was no principled rule separating the cases he praised, and those he refused to discuss.

For example, when asked by Senator John Cornyn about cases in which the Supreme Court overturned precedent, Judge Kavanaugh responded with *Brown v. Board of Education*,[9] which overturned *Plessy v. Ferguson*.[10] Judge Kavanaugh testified that "*Plessy* was wrong the day it was decided. It was inconsistent with text and meaning of the 14th Amendment which guaranteed equal protection."[11] According to him, *Brown* was "the single greatest moment in Supreme Court history";[12] he found the opinion to be both "inspirational" and "powerful";[13] and he unequivocally declared the decision to be "correct."[14] Indeed, he went even further, rightfully

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[5] Politico Staff, *Full text: Brett Kavanaugh confirmation hearing opening statement,* POLITICO (Sept. 4, 2018, 4:49 PM ET), https://www.politico.com/story/2018/09/04/full-text-brett-kavanaugh-confirmation-hearing-opening-statements-806420.
[6] *Confirmation Hearing on the Nomination of Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary,* 115th Cong. (Sept. 5, 2018) [hereinafter *September 5 Hearings*], (statement of Judge Kavanaugh in conversation with Sen. Cornyn), *available at* https://www.youtube.com/watch?v=x9fHsogAkLU.
[7] *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Lee) (statement of Judge Kavanaugh in conversation with Sen. Kennedy).
[8] *See infra* at notes 24, 25.
[9] 347 U.S. 483 (1954).
[10] 163 U.S. 537 (1896).
[11] *September 5 Hearings* (statement of Judge Kavanaugh in conversation with Sen. Cornyn).
[12] *Id.*
[13] *Id.*

saying that *Brown* merely "corrected [*Plessy*] on paper. It's still decades and we're still seeking to achieve racial equality. The long march for racial equality is not over."[15]

We appreciate this recognition, particularly given that several of President Trump's nominees to lower court federal judgeships have refused to agree with the holding of this seminal 1954 Supreme Court civil rights case.[16]

However, Judge Kavanaugh's references to *Brown* stand in sharp contrast to his refusal or failure to state whether he agreed with, or thought the Court got the text and history of the Constitution right, in *Griswold v. Connecticut*,[17] *Eisenstadt v. Baird*,[18] *Roe v. Wade*,[19] *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[20] *Lawrence v. Texas*,[21] and *Obergefell v. Hodges*.[22] In these cases, the Supreme Court held that the Constitution protects fundamental rights going to the heart of personal liberty and autonomy—reproductive freedom (including the right to use contraceptives and the right to choose abortion), sexual intimacy between consenting adults, and marriage equality for same sex partners. Judge Kavanaugh's refusal to affirm his agreement with any of these foundational rulings makes him an outlier among recent Supreme Court nominees.

When asked about these cases, Judge Kavanaugh merely described them as precedents of the Supreme Court,[23] which, of course, is also true of *Brown*. Even Chief Justice John Roberts, at his own Supreme Court confirmation hearing, testified that he agreed with the Court's ruling in *Griswold*,[24] while Justice Samuel Alito, at his hearing, stated that he agreed with the ruling in *Eisenstadt*.[25] But Judge Kavanaugh would not state his agreement with any of the cases that make up an important fabric of American law: the last half century of constitutional precedents beginning with *Griswold* that protect the full scope of liberty for all in accordance with constitutional text and history.

Furthermore, in discussing some legal issues, he has been very specific in his language, using potential signals—dog whistles—to likeminded conservatives aware of what such terms connote: "racial spoils system" for

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[14] *Confirmation Hearing on the Nomination of Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. (Sept. 6, 2018) [hereinafter *September 6 Hearings*], (statement of Judge Kavanaugh in conversation with Sen. Klobuchar), *available at* https://www.youtube.com/watch?v=4yGW0oEiLpg.
[15] *September 5 Hearings* (statement of Judge Kavanaugh in conversation with Sen. Cornyn).
[16] Perry Grossman and Dahlia Lithwick, *Mimes in Robes: Trump's judicial nominees are now refusing to answer any questions about what it is they actually believe*, Slate (Apr. 26, 2018, 5:46 PM), https://slate.com/news-and-politics/2018/04/why-it-matters-that-trumps-judicial-nominees-refuse-to-answer-questions-about-brown-v-board.html.
[17] 381 U.S. 479 (1965).
[18] 405 U.S. 438 (1972).
[19] 410 U.S. 113 (1973).
[20] 505 U.S. 833 (1992).
[21] 539 U.S. 558 (2003).
[22] 135 S. Ct. 2584 (2015).
[23] *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Harris); *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Feinstein); *September 6 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Coons).
[24] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 207 (Sept. 13, 2005) (statement of Chief Justice John G. Roberts, Jr. in conversation with Sen. Kohl).
[25] *Confirmation Hearing on the Nomination of Samuel A. Alito to be an Associate Justice of the Supreme Court of the United States before the S. Comm. on the Judiciary*, 109th Cong. 318 (Jan. 10, 2006) (statement of Justice Samuel A. Alito in conversation with Chairman Specter).

affirmative action,[26] "abortion on demand" for abortion,[27] "abortion inducing drugs" for birth control,[28] and "*existing* precedent" for precedent that could be overturned.[29]

As we noted in our issue brief *Supreme Court Nominee Brett Kavanaugh: Will He Respect the Whole Constitution?*, Judge Kavanaugh has stated that our liberty is primarily protected by the structure of the Constitution.[30] Constitutional structure certainly plays a part in protecting liberty, but it is merely one of the ways the Constitution safeguards liberty, and it does not account at all for the Constitution's many limits on abuse of power by state governments contained in the original Constitution, the Fourteenth Amendment, and other part of our national charter. During his confirmation hearing, Judge Kavanaugh told the Senators that "separation of powers . . . [is] "the foundational protection of individual liberty,"[31] and "[f]ederalism . . . helps further individual liberty,"[32] a view that ignores the efforts of the Framers of the Fourteenth Amendment to ensure that states substantively respected fundamental principles of liberty. Federalism is a basic value, but it does not give states the license to run roughshod over the full range of fundamental rights and equality. Coupled with his refusal to say whether cases protecting the full scope of liberty were rightly decided, the need to oppose Judge Kavanaugh's nomination started to become clear.

Judge Kavanaugh also failed to take advantage of an opportunity to assuage our concerns when asked by Senator Ben Sasse about the Declaration of Independence.[33] Judge Kavanaugh rightly stated that the Declaration of Independence itself is not law that is applied in courts, but that many protections in the Constitution stemmed from grievances our Founding Fathers included in the Declaration. However, he failed to note that the "set of principles [he] think[s] guide our beliefs: life, liberty, and the pursuit of happiness, all men are created equal, all people are created equal in our society,"[34] are enshrined in the Fourteenth Amendment. As the Reconstruction Framers recognized, the Fourteenth Amendment would be the "gem of the Constitution" because "it is the Declaration of Independence placed immutably and forever in our Constitution."[35] The Fourteenth Amendment was designed to guarantee to all the "unalienable rights" to which the Declaration referred. Judge Kavanaugh, however, failed to honor this critical aspect of our Constitution's text and history, and, as noted above, refused to express his agreement with a half-century of the Supreme Court's jurisprudence protecting the full scope of liberty for all and fulfilling the Constitution's guarantees.

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[26] *September 5 Hearings,* (statement of Judge Kavanaugh in conversation with Sen. Harris) (referencing Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, Wall Street Journal (Sep. 27, 1999), reproduced at https://turtletalk.files.wordpress.com/2018/07/are_hawaiians_indians_the_jus.pdf).
[27] *Id.,* (statement of Sen. Blumenthal) (referencing Kavanaugh's dissent in *Garza v. Hargan,* 874 F.3d 735 (D.C. Cir. 2017)).
[28] *September 6 Hearings,* (statement of Judge Kavanaugh in conversation with Sen. Cruz).
[29] *September 5 Hearings* (statement of Judge Kavanaugh in conversation with Sen. Blumenthal); *September 6 Hearings* (statement of Judge Kavanaugh in conversation with Sen. Klochbar); *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Feinstein); *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Leahy) (emphasis added)
[30] David H. Gans, *Supreme Court Nominee Brett Kavanaugh: Will He Respect The Whole Constitution?* (Aug. 2018), https://www.theusconstitution.org/wp-content/uploads/2018/08/Supreme-Court-Nominee-Brett-Kavanaugh-Will-He-Respect-The-Whole-Constitution.pdf.
[31] *September 5 Hearings,* (statement of Judge Kavanaugh in conversation with Sen. Cruz).
[32] *Id.*
[33] *September 6 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Sasse).
[34] *Id.*
[35] *See* Hon. Schuyler Colfax, "My Policy Revisited: Necessity of the Constitutional Amendment" (Aug. 7, 1866), *in* Cincinnati Commercial, Aug. 9, 1866, *reprinted in Speeches of the Campaign of 1866 in the States of Ohio, Indiana, and Kentucky* 14 (1866).

Judge Kavanaugh's record and testimony turned a blind eye to the text, history, and values of the Reconstruction Amendments in other ways as well. He ignored the fact that the Framers of the Fourteenth Amendment were the originators of affirmative action.[36] As the hearing demonstrated, Kavanaugh has long attacked race-conscious efforts to help realize the Fourteenth Amendment's values of equality as constitutionally suspect, denouncing what he has called a "naked racial set-aside"[37] and a government-sponsored "racial spoils system."[38] During the hearing, he never recognized the sweeping enforcement power granted to Congress in the Thirteenth, Fourteenth, and Fifteenth Amendments. Indeed, when questioned about the Supreme Court's 2013 decision in *Shelby County v. Holder*, which gutted the Voting Rights Act, he pointed to the continued availability of the national prohibition on voting discrimination contained in Section 2, but refused to answer whether Section 2 is constitutional,[39] even though it has been upheld by the Supreme Court,[40] and has been called "an important part of the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting."[41]

Judge Kavanaugh's selective willingness to discuss the Constitution and constitutional precedents unfortunately leaves us with the doubts we had prior to his hearing as to whether he will be faithful to the entire Constitution. Indeed, Judge Kavanaugh's testimony leaves us with even greater concerns than we had going into the hearings.

2. A RELIABLE VOTE FOR BUSINESS?

As we noted in our issue brief, *Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?*, CAC's review of Judge Kavanaugh's record on the D.C. Circuit found that, as an appellate judge, he routinely sided with corporations and employers, and against employees, consumers, and others, even when the latter had the text of law and precedent on their side.[42] He often did so in dissent, staking out positions that his colleagues—sometimes even conservative colleagues—were unwilling to join, suggesting his pro-corporate bent may be outside the mainstream. As an organization focused on fair and equal justice for all, we found his consistent support for corporate interests over the rights of individuals particularly troubling when coupled with the fact that the Roberts Court, with the conservative Justices leading the charge, has ruled in favor of the party supported by the U.S. Chamber of Commerce in 70 percent of the cases in which the Chamber filed a merits brief.[43] Unfortunately, Judge Kavanaugh said nothing during his confirmation hearing that quelled our concerns.

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[36] Brief of Constitutional Scholars and Constitutional Accountability Center as Amici Curie In Support of Respondents, *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016) (No. 14-981).
[37] Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, N.Y. Times (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html.
[38] Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, Wall Street Journal (Sep. 27, 1999), reproduced at https://turtletalk.files.wordpress.com/2018/07/are_hawaiians_indians_the_ius.pdf).
[39] *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Harris).
[40] *Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984).
[41] *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring) (quoting S. Rep. 97-417, at 4 (1982)).
[42] Ashwin P. Phatak, *Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?* (Aug. 2018), https://www.theusconstitution.org/wp-content/uploads/2018/08/CAC-Kavanaugh-Business.pdf.
[43] *See* Brian R. Frazelle, *A Banner Year for Business as the Supreme Court's Conservative Majority Is Restored | October Term 2017*, Constitutional Accountability Center (July 17, 2018), https://www.theusconstitution.org/think_tank/a-banner-year-for-business-as-thesupreme-courts-conservative-majority-is-restored/.

In fact, his statements concerning his environmental record were rather discouraging, as they misrepresented his rulings. When Senator Orrin Hatch asked Judge Kavanaugh to provide examples of cases in which he upheld environmental regulations duly authorized by Congress, he responded with several cases including *National Resources Defense Council v. EPA*[44] and *National Mining Association v. McCarthy*.[45] In *NRDC v. EPA*, Judge Kavanaugh actually ruled against safeguards to limit air pollution,[46] and the issues in *National Mining Association* were procedural, not substantive.[47]

Judge Kavanaugh also stood by his labor record without providing satisfactory explanations for his rulings against workers. For example, his dissent in *Agri Processor v. NLRB*[48] conflicted with the text of the National Labor Relations Act and the Supreme Court's decision in *Sure-Tan v. NLRB.* Although *Sure-Tan* expressly established that undocumented workers "come within the broad statutory definition of 'employee,'"[49] Judge Kavanaugh continued to cite it as reason to deny undocumented workers the right to unionize.[50]

Judge Kavanaugh also demonstrated his hostility toward independent agencies, which play a critical role in regulating businesses and marketplaces. Indeed, the independence of these agencies—that is, the fact that the heads of these agencies cannot be fired at will by the President, but only for good cause—allows them to enact reasonable business regulations without political interference or the undue influence of corporate interests. When Senator Amy Klobuchar and Senator Chris Coons asked him if *Humphrey's Executor v. United States*,[51] the seminal Supreme Court decision that upheld the constitutionality of independent agencies over 80 years ago, was correctly decided, Judge Kavanaugh merely stated that "it's a precedent of the Supreme Court, and it's been reaffirmed many times."[52] That answer stands in marked contrast to his response when Senator Coons followed up his question on *Humphrey's* with, "Was *Marbury v. Madison* well decided?," and Judge Kavanaugh responded, "Of course."[53] Judge Kavanaugh's refusal to express full-throated support for the 80-year-old *Humphrey's Executor* in the wake of having previously attacked it numerous times is cause for grave concern.[54]

Judge Kavanaugh has also expressed significant hostility toward another decades-old doctrine, the *Chevron* doctrine, which has long been a cornerstone of administrative law and has long been central to the federal government's ability to regulate big businesses and protect consumers, the environment, workers, and others.[55] *Chevron* deference provides that courts will defer to an agency's interpretation of a statute when the "statute is silent or ambiguous with respect to the specific issue" so long as "the agency's answer is based on a permissible construction of the statute."[56] At his confirmation hearing, Judge Kavanaugh frankly acknowledged that he has

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[44] 749 F. 3d 1055 (D.C. Cir. 2014).
[45] *See* 758 F. 3d 243 (D.C. Cir. 2014); *September 5 Hearings,* (statement of Judge Kavanaugh in conversation with Sen. Hatch).
[46] 749 F. 3d 1055 (D.C. Cir. 2014).
[47] Ana Unruh Cohen, *Questioning Kavanaugh's Environmental Record,* NRDC (Sept. 7, 2018), https://www.nrdc.org/experts/ana-unruh-cohen/questioning-kavanaughs-environmental-record.
[48] 514 F. 3d 1 (D.C. Cir. 2008)
[49] 467 U.S. 883, 892 (1984).
[50] *September 5 Hearings,* (statement of Judge Kavanaugh in conversation with Sen. Durbin).
[51] 295 U.S. 602 (1935).
[52] *September 5 Hearings,* (statement of Judge Kavanaugh in conversation with Sen. Klobuchar).
[53] *September 5 Hearings,* (statements of Judge Kavanaugh and Sen. Coons).
[54] Ashwin P. Phatak, *Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?* (Aug. 2018), https://www.theusconstitution.org/wp-content/uploads/2018/08/CAC-Kavanaugh-Business.pdf.
[55] *Id.*
[56] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

concerns about the doctrine, noting that "the whole question of ambiguity has become a difficult inquiry . . . . and I wrote a law review article . . . about that problem of judges disagreeing about ambiguity and how much is enough."[57]

Judge Kavanaugh has also supported expanding the so-called "major rules" doctrine, so that "major agency rules of great economic and political significance"[58] cannot be premised on an "ambiguous grant of statutory authority."[59] At his confirmation hearing, Judge Kavanaugh described the rule as simply meaning that if a rule is "of major economic or social significance, you shouldn't defer to the agency,"[60] but as a judge on the D.C. Circuit, he has gone much further. Rather than simply suggesting that agencies do not receive deference from courts when they address major questions (as Chief Justice Roberts has suggested[61]), Judge Kavanaugh's version of the doctrine would prevent agencies from regulating at all as to major questions if "Congress has not clearly authorized the [agency] to issue the rule."[62]

As Senator Hirono said during Judge Kavanaugh's confirmation hearing, "there is a pattern to [his] dissents and [his] pattern is that [he] do[es] not favor . . . regular people." The American people deserve a judiciary where all litigants are treated equally. Judge Kavanaugh's record and his performance at his confirmation hearing suggest he would put his thumb on the scale of justice in favor of big business, much to the detriment of consumers, employees, and others seeking to hold corporations accountable.

3. AN INDEPENDENT CHECK?

During his opening statement to the Senate Judiciary Committee, Judge Kavanaugh claimed, "I do not decide cases based on personal or policy preferences. I am not a pro-plaintiff or pro-defendant judge. I am not a pro-prosecution or pro-defense judge. I am a pro-law judge."[63] This is the proper role of a judge—to apply the law dispassionately and equally to all, without allegiance to the President who nominated them or adherence to the political platform of the party associated with either that President or the majority of Senators who voted to confirm them.

Before the confirmation hearing even began, the burden on Judge Kavanaugh to demonstrate his independence was profound. After all, the President who nominated him had announced that he had litmus tests for Supreme Court justices, had made numerous comments disparaging federal judges who do not rule in his favor, had instituted authoritarian unconstitutional executive actions, and was an unindicted alleged co-conspirator in a

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[57] *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Klobuchar); see also *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Flake) (Kavanaugh reiterating that questions of statutory ambiguity are "a huge problem" and explaining that "that's at the . . . heart of the concern I have about how certain cannons of statutory interpretation have been applied, including . . . Chevron"); *Id.*, (statement of Judge Kavanaugh in conversation with Sen. Kennedy) (Kavanaugh describing "certain broad conceptions of deference" as "a judicially orchestrated shift of power from the legislative branch to the executive branch").
[58] *U.S. Telecom Ass'n v. FEC*, 855 F.3d 381, 419, (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)
[59] *Id.* at 421.
[60] *September 5 Hearings*, (statement of Judge Kavanaugh in conversation with Sen. Kennedy).
[61] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).
[62] *U.S. Telecom Ass'n*, 855 F.3d at 418.
[63] Politico Staff, *Full text: Brett Kavanaugh confirmation hearing opening statement*, POLITICO (Sept. 4, 2018, 4:49 PM ET), https://www.politico.com/story/2018/09/04/full-text-brett-kavanaugh-confirmation-hearing-opening-statements-806420.

felony committed by his personal attorney. Unfortunately, Judge Kavanaugh did not meet the burden that context placed on him because he failed to provide forthright answers to the questions Senators posed.

Among President Trump's litmus tests for a Supreme Court justice is one who would overturn *Roe v. Wade*, help end the Affordable Care Act, and expand gun rights.[64] When asked if he could commit to never overturning *Roe v. Wade*, Judge Kavanaugh declined to answer.[65] When asked if *Roe* was rightly decided, he would only say "it has been reaffirmed many times over the past 45 years. . . and most prominently, most importantly reaffirmed in *Planned Parenthood v. Casey* in 1992."[66] When asked about his dissent in *Seven-Sky v. Holder*—a challenge to the individual mandate of the Affordable Care Act—in which Judge Kavanaugh wrote that the president may decline to enforce a statute that regulates private individuals when he deems the statute unconstitutional, even if a court has held that statute constitutional,[67] Judge Kavanaugh deflected and would only discuss prosecutorial discretion.[68] Finally, during the hearing, Judge Kavanaugh repeated his extreme views of the Supreme Court's Second Amendment precedents, which he reads as prohibitions on all innovative gun laws, regardless of the burden they impose. At his confirmation hearing, Judge Kavanaugh did not say anything to dispel the notion that he was picked to satisfy the President's litmus tests.

President Trump has made numerous statements disparaging members of the federal judiciary when they do not rule in his favor. Senator Blumenthal cited 41 tweets attacking the judiciary, including specific insults to Justice Ruth Bader Ginsburg and Judge Gonzalo Curiel. Judge Kavanaugh refused to comment. Even when reminded that then-Judge Gorsuch condemned those attacks during his confirmation hearing—describing them as "disheartening and demoralizing,"[69] —Judge Kavanaugh refused to agree.[70] It is discouraging that Judge Kavanaugh did not stand up for his colleagues and the integrity of the judiciary in the face of attacks made by the President who nominated him.

Judge Kavanaugh also failed to make it clear that he would be willing to serve as a check on the President. When asked by Senator Flake if "a president should be able to use his authority to pressure executive or independent agencies to carry out directives for purely political purposes"—specifically referring to the President's attacks on Attorney General Jeff Sessions and the Justice Department—Judge Kavanaugh did not answer the question.[71] When asked if a sitting President generally could be required to respond to a subpoena, Judge Kavanaugh refused to respond to a hypothetical question.[72] When asked about a president having an "absolute right" to pardon himself, Judge Kavanaugh refused to provide a forthright response.[73] When asked if a sitting president could be indicted, Judge Kavanaugh claimed he has never taken a position on the constitutionality of indicting or

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[64] Charles Cameron and Jonathan Kastellec, *The litmus test for a Supreme Court nominee,* Vox (July 5, 11:50 AM ET), https://www.vox.com/mischiefs-of-faction/2018/7/5/17532488/litmus-test-supreme-court-nominee.
[65] *September 5 Hearings,* (statement of Judge Kavanaugh in conversation with Sen. Blumenthal).
[66] *Id.,* (statement of Judge Kavanaugh in conversation with Sen. Feinstein).
[67] *Seven-Sky v. Holder,* 661 F.3d 1, 21 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction and not deciding on the merits).
[68] *September 5 Hearings,* (statement of Judge Kavanaugh in conversation with Sen. Blumenthal).
[69] Josh Dawsey and Seung Min Kim, *Gorsuch calls Trump's judge attacks 'demoralizing' and 'disheartening,'* POLITICO (Feb. 8, 2017, 5:15 PM ET, updated Feb. 8, 2017, 8:35 PM ET), https://www.politico.com/story/2017/02/donald-trump-neil-gorsuch-judge-234812.
[70] *September 6 Hearings,* (statement of Justice Kavanaugh in conversation with Sen. Blumenthal).
[71] *September 5 Hearings,* (statements of Judge Kavanaugh and Sen. Flake).
[72] *September 6 Hearings,* (statements of Judge Kavanaugh and Sen. Coons).
[73] *September 5 Hearings,* (statements of Judge Kavanaugh and Sen. Leahy).

investigating a sitting president.[74] When asked if he still believed that a president can fire at will a prosecutor criminally investigating him, Judge Kavanaugh was noncommittal, stating, "that was my view in 1998."[75] And when asked if he had ever had a conversation with any lawyer at the firm of Kasowitz Benson Torres about Special Counsel Robert Mueller or his investigation into Russian interference in the 2016 presidential election, it took him two days to say no.[76] The suspicion that Judge Kavanaugh would not serve as an independent check on the President led Senator Blumenthal to ask him if he would recuse himself from "any of the issues involving his personal criminal or civil liability,"[77] to which Judge Kavanaugh demurred, responding "I need to be careful."[78]

For Judge Kavanaugh to satisfy the burden the President placed on him, he needed to be forthright in his answers. Instead, Judge Kavanaugh chose to avoid answering key questions that could have shed real light on the important issue of his independence from the President who has nominated and his ability to serve as a check on the other branches of government, whether congressional or executive.

CONCLUSION

Should Judge Kavanaugh be confirmed to a lifetime appointment as an Associate Justice, we sincerely hope that our concerns about him will prove to be wrong. If he is confirmed, we at CAC will present to Justice Kavanaugh the best originalist arguments, rooted in the text, history, and values of the Constitution, in support of constitutional rights, liberties, and structural protections that help make our nation more free, fair, and equal for all. For the history of our whole Constitution is one of progress over time, increased democratic participation, and the constant quest to make equality and justice a reality for all persons in this country. True and faithful originalists recognize this progressive arc and apply it to the constitutional questions before them. Should he be confirmed, we hope Justice Kavanaugh will do the same. Unfortunately, with the information before us at this point—and in a moment where the stakes could not be higher—we cannot be sure that a Justice Kavanaugh will faithfully apply the whole Constitution to preserve our fundamental rights and constitutional freedoms and must oppose his nomination to the Supreme Court.

Sincerely,

Elizabeth B. Wydra
President, Constitutional Accountability Center
[redacted]
Phone: 202-296-6889 | Twitter: @BizzieOnWydra

cc: All Members, United States Senate

[74] *Id.*, (statements of Judge Kavanaugh and Sen. Coons).
[75] *Id.*
[76] *Id.* (statements of Judge Kavanaugh Sen. Harris); *September 6 Hearings*, (statements of Judge Kavanaugh and Sen. Blumenthal) (statements of Judge Kavanaugh and Sen. Harris).
[77] *September 5 Hearings*, (statement of Justice Kavanaugh in conversation with Sen. Blumenthal).
[78] *Id.*

P.O. Box 53313 ♦ 1921 Florida Ave. NW ♦Washington, DC 20009-9997 ♦ www.drsforamerica.org

August 30, 2018

Dear Senate Leader McConnell and Leader Schumer:

Doctors for America (DFA) was founded in 2009 on the principle of "patients over politics" – that we, as physicians and medical trainees who are responsible for caring for millions of patients in this generation and the next across America each day, should be advocates in ensuring the interests of our patients are front and center. DFA is more than 18,000 physicians, medical students, and health advocates across all 50 states. They work in private practices, academic centers, community health centers, and government-run systems such as the Veteran's Affairs and the Indian Health Services and are spread between delivery of primary and subspecialty care. Our vision is to build a robust and sustainable national grassroots movement of physicians and medical trainees dedicated to advocacy that improves the health of the nation.

We focus primarily on the issues of accessibility, affordability, and quality of health care; advocating for policies that advance public health; and alleviating inequities that compromise the abilities of some of our most vulnerable patients to access care. Over our nine-year history, DFA has initiated issue-based working groups focusing on a wide range of public health issues, ranging from gun violence prevention to food insecurity, substance use to women's health, drug pricing and affordability to health system reform. Driven by pragmatic idealism, DFA is bringing the voice of physicians to communities across the country and to the national stage. We use the strength of our diverse backgrounds, our common vision, and a deep care for the patients and communities we serve to influence policy conversations at the national, state, and local levels.

Historically, DFA has not taken a position on Supreme Court nominations. However, the environment in which we currently live is anything but normal. We feel compelled as medical professionals to speak out when we feel the well-being of our patients is under threat, and the nomination of Brett Kavanaugh presents such a monumental risk to our patients. The gains in health care access and health outcomes that have been achieved through the implementation of the Affordable Care Act have had a dramatic positive impact – and make no mistake, the effects of expansion of insurance coverage to tens of millions of Americans are real for the patients we see each day. - and We have worked tirelessly over the last years to secure advances on countless public health issues in our country. All of these gains stand to be overturned – wrongly, we believe, both legally and morally – were Mr. Kavanaugh to be confirmed to the Supreme Court.

As DFA physicians, we always place our patients over politics. Returning to an era of discrimination based on pre-existing conditions; overturning the gains made by the ACA; gutting the freedoms, resources and, protections that women rely on for their health; ; eliminating efforts at gun violence prevention; de-regulating clean air and other anti-pollution initiatives; and dismantling clean water safe guards all will do dramatic damage to the health of our patients and our ability to care for them. Additionally, by gutting safeguards of voting rights, by opposing initiatives created to ensure our patients are able to exercise their voice in who represents their interests, and by asserting executive authority to circumvent accountability and government transparency, this nomination threatens to disenfranchise millions of our patients, weakening their abilities to ensure that their interests are represented in our democracy. With these protections diluted, our patients will not be able to protect themselves from these changes and the harm they may cause. This, in our minds, is completely unacceptable!

As you well know, the politics that now have engulfed the Supreme Court involve strategic political lawsuits all designed to weave themselves together through targeted legal maneuvers explicitly constructed to undermine the foundation of the American health care system. These lawsuits are cynical, unnecessarily retributive, and callous to the real human impact they may have. Decisions in these cases that Mr. Kavanaugh's nomination is likely to sway

will adversely affect the health and welfare of hundreds of millions of Americans, in the cruelest and most inhumane ways, all for political gain.

Our friends within the health care justice community have stated it well, which DFA 100% supports:

• Constitutionality of the Affordable Care Act, including protections for people with pre-existing health care conditions, is under constant attack. In one suit currently before the federal courts, *Texas v. Azar,* the State of Texas and co-plaintiffs cynically argue that the Affordable Care Act is unconstitutional because the individual mandate to purchase health insurance is no longer being enforced – a circular argument based on a vindictive decision made by members of their own party in the Executive Branch to not enforce or severely undermine the law. The Trump Administration has sided with the plaintiffs, choosing not to defend the law despite their constitutional obligation to do so, while arguing that protections for people with pre-existing conditions must be vacated. A decision to overturn the ACA in whole or in part would have devastating impacts for millions of people, threatening coverage for millions, including children with "preexisting" conditions at birth, pregnant women, people with life-threatening conditions such as cancer, as well as our elderly patients who suffer a range of chronic illnesses such as Alzheimer's Disease, diabetes, and heart disease.

• Women's access to critical health care services, including contraception, is under threat. The Supreme Court may be asked to rule on the constitutionality of federal and state laws that limit women's access to providers and common contraceptives. It is well-established that expanded access to reproductive health care services including contraception reduces maternal mortality – thus, this lawsuit is an existential threat to millions of American women,

• Another series of lawsuits asserts federal authority to roll back health coverage for low-income people through Medicaid using "Demonstration Waiver" authority. In June, a federal judge ruled that the federal government's decision to approve Kentucky's waiver making dramatic cuts to Medicaid was unjustified under federal law because of its likely impact driving people off the program for failing to complete necessary forms. More than a dozen other states either have implemented or are seeking to implement similar policies. The Supreme Court is likely to take up this issue in the coming years. It goes without saying that these cuts and cruel reductions in access risk the health of hundreds of thousands of the Americans for whom you are sworn to advocate.

• The abilities of consumers, providers, and other stakeholders to hold state Medicaid programs accountable in federal court for violating federal Medicaid requirements might be gutted. The Supreme Court has previously ruled on this issue but may be asked to review it again as the Trump administration has proposed to further cut back federal oversight of rates and access in Medicaid.

On behalf of the millions of patients that we serve, we will be amplifying our voices as physicians throughout our country in our opposition to the nomination of Mr. Kavanaugh to the Supreme Court. . It is unconscionable that cynical political calculations are held paramount to the health and welfare of hundreds of millions of our patients. We will fight to protect our democratic values, the values that made our country great, and the U.S. Constitution from political ideology. We hope that we can count you as allies in that fight.

Sincerely,

Doctors for America - 18,000 physicians, medical trainees, and health advocates representing all 50 states

EARTHJUSTICE

August 30, 2018

The Honorable Chuck Grassley, Chairman
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Diane Feinstein, Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: Earthjustice Opposes the Supreme Court Nomination of Judge Brett Kavanaugh

Dear Chairman Grassley and Ranking Member Feinstein:

We write today on behalf of our millions of members and supporters to express our strong opposition to the confirmation of D.C. Circuit Judge Brett Kavanaugh to a lifetime seat on the United States Supreme Court. Judge Kavanaugh is an unacceptable choice for the Supreme Court, and we urge the Senate to immediately suspend his nomination hearing, and to ultimately reject his nomination.

Who serves as a Supreme Court Justice is among the most profoundly important choices we make as a nation, and one of the most solemn duties that our constitution entrusts to the U.S. Senate. In carrying out that duty, is it incumbent on the Senate to carefully, and thoroughly, scrutinize every nominee, and to thoughtfully consider every aspect of his or her professional record that might have a bearing on judicial philosophy. A robust, fully informed, and transparent confirmation process is essential to the integrity of our system of laws and our democracy. Because this confirmation process has been deeply flawed, we urge the Senate to suspend any confirmation hearings. It should consider proceeding only once the Senate has received, and *fully* considered, all pertinent records from Judge Kavanaugh's years as a political lawyer in the George W. Bush White House (as contemplated by the Presidential Records Act). The American public deserve to know the full scope of his views on important matters of health and environmental policies, and other matters. It is unprecedented, and unwise, to rush to confirm a lifetime nomination while the Senate is denied the opportunity to review materials from formative periods of the nominee's political career. To do so would be a disservice to America and an insult to our democracy.

The stakes for American democracy could not be higher. United States Supreme Court Justices do not simply decide cases; they determine whether and how the law works, and for whom. They define what the law means for generations to come, and the lower courts are bound to follow the precedent they set. An appointment of a new Justice affects the very nature of our democracy, fundamentally defining the landscape of American law. In the end, a nominee to the Supreme Court should be rejected unless he or she is willing to uphold the values, protect the rights, and serve in the interests of the American people – not just corporations, the wealthy, and the political elites.

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What we know already is enough to give the Senate serious pause, and to convince Earthjustice that Judge Kavanaugh is the wrong person for the job. Judge Kavanaugh's lengthy record on the federal bench exposes him as an activist judge who has used cases to effectively rewrite statutes, creating new obstacles for agency regulation and scuttling protective regulatory outcomes.

His hundreds of judicial opinions and legal writings reveal a judicial philosophy that is hostile to the power of government (especially agencies like the Environmental Protection Agency), and that values corporate profits over people and the health of the public. Moreover, Judge Kavanaugh's decisions reveal a tendency to limit the public's right to access justice through the courts (such as by adopting obstructive "standing" requirements), while at the same time removing barriers for polluters. As a result, a Supreme Court informed by Judge Kavanaugh's brand of legal decision-making would make it harder for people to protect the air they breathe, the water they drink, and the planet on which they live. And those most vulnerable, including children, the elderly, poor communities, and communities of color would feel the impacts most profoundly. Too many communities, especially poor communities and communities of color, are threatened by toxic wastes, unhealthy air, dangerous industrial facilities, pipeline accidents, contaminated drinking water, and hazardous chemicals in their homes.

We need a Supreme Court Justice who will not stand as an obstacle to improving public health, but who will stand up to for people's right to live healthy productive lives. Someone who will combat environmental racism and fight for environmental justice, to ensure that the law protects every family and every community, regardless of race, ethnicity, national origin, citizenship status, or income. As discussed below, Judge Kavanaugh is not that person.

I. Judge Kavanaugh's Environmental Record Results in Dirtier Air and Water

In key cases, Judge Kavanaugh has backed the rights of corporations to pollute the air and water over the public's right to breathe clean air, drink clean water, and live in safe communities.

As shown in dissents written by Judge Kavanaugh in *White Stallion*[1] and *Mingo Logan*,[2] he reads burdensome obligations into the Clean Air Act and the Clean Water Act that Congress did not include in the statutory text. For example, in *White Stallion*, he argued that the EPA could not even consider limiting toxic mercury pollution from power plants without first evaluating the cost to the power companies. And in *Mingo Logan*, he argued that before vetoing a permit that would have allowed coal companies to dump toxic mining wastes into public waterways, EPA should have considered the cost to coal companies. In these cases, he invented the requirement to consider costs to industry where Congress did not include that requirement, while at the same time seeking to force the EPA to ignore important real-world benefits – all in order to stack the

[1] *White Stallion Energy Center v. EPA*, 748 F. 3d 1222, 1258-73 (D.C. Cir. 2014).
[2] *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710 (D.C. Cir. 2016).

deck in favor of the outcomes desired by corporate polluters. This tendency to read into statutes a requirement to consider costs to corporate polluters – while ignoring important benefits to the environment, and improvements in the health of children, families, and the American public – not only usurps Congressional authority, it puts our health and well-being at risk.

Several of Judge Kavanaugh's decisions would significantly reduce agency power to protect public health, by recrafting statutes to eliminate authority that Congress has given agencies. For example, his narrow interpretation of the Clean Air Act expressed in *EME Homer City*[3] (an interpretation later overturned by the Supreme Court) would have severely constrained EPA's ability to protect the people in downwind states from pollution emanating from upwind sources. His interpretation in the *Mexichem*[4] case prevented the EPA from requiring replacements for harmful chemical substitutes for chlorofluorocarbons. His narrow reading of the phrase "air pollutant" in *Coalition for Responsible Regulation*[5] could effectively undermine the regulation of greenhouse gases under the Clean Air Act.

His judicial writings also reveal his anti-regulatory approach to evaluating whether an agency action is appropriate under the relevant statute. In cases that raise questions about whether an agency has acted within the scope of its regulatory authority, Judge Kavanaugh favors a deeply subjective "common sense" test – where the statute means whatever he thinks makes sense. Rather than considering an agency's interpretation of a law that Congress has entrusted it with administering, after that agency has provided notice and opportunity for public comment on such interpretation, and then giving special consideration to the agency's conclusions, Kavanaugh would have judges simply impose their own, "common sense," ad-hoc "best reading of the statute."[6] When Judge Kavanaugh has utilized this approach, his "best reading" has been in service of his inclinations toward limited federal authority to regulate, not in the best interest of achieving Congress' protective aims under the relevant statutory program. For example, in his dissent in *US Telecom Ass'n v FCC*,[7] Judge Kavanaugh outlined a novel "major questions" doctrine that he would have used to reject the FCC's rational interpretation of legislative language and thereby undermine its "net neutrality" rules that it adopted to protect consumers. As a Supreme Court Justice, we could expect more of the same, and such an ad-hoc approach to statutory interpretation could ultimately increase regulatory uncertainty and create a perverse incentive for agencies to under-regulate in the first instance.

II. Judge Kavanaugh Politicizes Agency Decision-Making Processes

Judge Kavanaugh's record demonstrates a belief that federal agencies should be more inherently political, which would compromise both the integrity and continuity of their decision-

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[3] *EME Homer City Generation L.P. v EPA*, 696 F. 3d 7 (D.C. Cir 2012).
[4] *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017).
[5] *Coal. for Responsible Regulation Inc. v. EPA*, 2012 U.S. App. LEXIS 25997 (D.C. Cir. Dec. 20, 2012).
[6] *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907, 1912 (2017).
[7] *US Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).

making. He has argued that all federal agencies should operate directly under the political thumb of the President, and should function merely as political extensions of executive branch policy-making. He believes that any degree of separation from direct presidential control is unconstitutional.

In *Free Enter. Fund,*[8] Judge Kavanaugh's dissent argued that the establishment of the Public Company Accounting Oversight Board, an independent agency, violated separation of powers principles because the board's members are insulated from "at will" presidential removal. Application of this legal principle would make all agencies more political, would increase regulatory uncertainty, would undermine policy continuity, and would destabilize decision-making related to important issues of safety, economic stability, consumer protection, public health, and the environment. Part and parcel to this extreme view of separation of powers, Judge Kavanaugh believes that sitting Presidents are all but immune from the legal consequence of their actions while they are in office – effectively rendering them constitutionally above the law.

III. Judge Kavanaugh's Corporate-serving Double Standard Blocks Access to Courts

One of the most troubling judicial philosophies revealed by Judge Kavanaugh's decisions is his limited view of the rights of ordinary people and public interest groups to access our court system, and his contrastingly permissive view of corporations' right to do so. Critical public health and environmental laws would have little power and meaning in practice if the public cannot get into court to enforce them.

For example, in *Grocery Mfrs. Ass'n v. EPA*[9] Judge Kavanaugh argued in dissent for giving processed-food manufactures standing to challenge EPA's approval of certain ethanol-containing gasoline blends based solely on the mere chance of increased corn prices, even without quantification of the speculative economic injury. Conversely, in *Public Citizen, Inc. v. National Highway Traffic Safety Admin,*[10] Judge Kavanaugh ruled against the public interest group and its members' right to be in court to challenge the adequacy of vehicle tire-safety standards on behalf of highway drivers. He did so because Public Citizen did not demonstrate "with certainty" that its members would suffer some particularized and currently identifiable harm other than an increased risk from more severe accidents.

Judge Kavanaugh has a troubling pattern of siding with corporations, the wealthy, and the powerful while erecting barriers for those defending the health, safety, and well-being of the American people. It is essential that whoever occupies a seat on the Supreme Court upholds the

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[8] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F. 3d 667 (D.C. Cir. 2008); see also *PHH Corp v. Consumer Fin. Prot. Bureau,* 839 F.3d 1 (D.C. Cir. 2017).
[9] *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (2012).
[10] *Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 489 F. 3d 1279 (D.C. Cir. 2008).

right of access to the courts for all, and honors the constitutional obligation to provide an impartial check on the power of Congress and the President.

Conclusion

Judge Kavanaugh's approach to the law threatens key elements of environmental and public health protections, and makes it harder for people to hold the government and big corporate polluters accountable. His confirmation to the United States Supreme Court would create a deeply conservative majority that would tip the scales of justice and the law further away from the people's rights and more towards corporate control of our democracy. We strongly oppose Judge Kavanaugh as a nominee and assert that careful scrutiny of his record reveals a predisposition to subordinate the rights of people to the interests of corporate profit making. These qualities in a Supreme Court Justice would threaten the health and well-being of children, families, workers, and communities, and undermine efforts to protect the ecosystems, natural resources, and global climate systems upon which we all rely.

Accordingly, we strongly urge you to reject his nomination and vote against his confirmation. In the meantime, both because the most relevant documents have not been delivered to the Senate and the American people, *and* because this nomination is now clouded by the shocking and deeply disturbing legal turmoil that threatens to engulf the Trump presidency, we call on the Judiciary Committee to suspend any hearings on this nomination.

Sincerely,

Trip Van Noppen
President
Earthjustice

epic.org

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September 4, 2018

Senator Chuck Grassley, Chairman
Senator Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Dear Chairman Grassley, Ranking Member Feinstein, and Members of the Judiciary Committee:

We write on behalf of the Electronic Privacy Information Center. EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues.[1] EPIC participates in a wide range of activities, including research and education, litigation, and advocacy. The EPIC Advisory Board includes leading experts in law, technology, and public policy.[2] EPIC regularly files amicus briefs in the U.S. Supreme court,[3] and EPIC routinely shares its views with the Senate Judiciary Committee regarding nominees to the Supreme Court.[4]

We write to you now regarding the nomination of Judge Brett M. Kavanaugh to the United States Supreme Court. Although we take no position for or against the nominee, EPIC

[1] EPIC, *About EPIC*, https://www.epic.org/epic/about.html.
[2] EPIC, *EPIC Advisory Board*, https://www.epic.org/epic/advisory_board.html.
[3] *See, e.g.*, amicus curiae briefs of EPIC in *United States v. Microsoft*, 138 S. Ct. 1186 (2018) (arguing that human rights law and privacy standards should govern law enforcement access to personal data stored abroad); *Dahda v. United States*, 138 S. Ct. 1491 (2018) (arguing that it is not for the courts to create atextual exceptions to federal privacy laws); *Byrd v. United States*, 584 U.S. ___ (2018) (arguing that relying on rental contracts to negate Fourth Amendment standing would undermine legitimate expectations of privacy); *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (arguing that evidence obtained via suspicionless identification should be suppressed); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (arguing that hotel guest registries should not be made available for inspection absent judicial review); *Riley v. California*, 134 S. Ct. 2473 (2014) (arguing that the search of a cell phone incident to arrest requires a warrant); *United States v. Jones*, 132 S. Ct. 945 (2012) (arguing that a warrant is required for the use of GPS tracking techniques); *Sorrell v. IMS Health Inc.*, 564 U.S. 52 (2011) (arguing that the privacy interest in medical records justifies regulating datamining of prescription records). *See generally* EPIC, EPIC Amicus Curiae Briefs: Supreme Court, https://epic.org/amicus/?c=Supreme+Court.
[4] *See, e.g.*, Letter from EPIC to Senator Chuck Grassley, Chairman, & Senator Dianne Feinstein, Ranking Member (Mar. 20, 2017) (concerning the nomination of Justice Neil Gorsuch), https://epic.org/privacy/gorsuch/EPIC-SJC-Gorsuch-Mar2017.pdf; Letter from EPIC to Senator Patrick Leahy, Chairman, & Senator Jeff Sessions, Ranking Member (June 28, 2010) (concerning the nomination of Justice Elena Kagan), https://epic.org/privacy/ kagan/EPIC_Kagan_Ltr.pdf; EPIC, 1972 Alito Princeton Privacy Report (2005), https://www.epic.org/ privacy/justices/alito/princeton/; Letter from EPIC to Senator Arlen Specter, Chairman, & Senator Patrick Leahy, Ranking Member (Sept. 9, 2005) (concerning the nomination of Chief Justice John Roberts), https://epic.org/privacy/justices/roberts/0905letter.pdf.

has strong concerns about Judge Kavanaugh's views regarding the privacy rights of Americans. In *Klayman v. Obama*, Judge Kavanaugh went out of his way to set out theories to defend the suspicionless surveillance of the American public that surprised even conservative legal scholars.[5]

We are also very troubled by the ongoing secrecy concerning documents from Judge Kavanaugh's years in the White House. That was a period that witnessed a dramatic increase in government surveillance programs in the United States, some of which were revised or scrapped after their true scope became known.[6] There is strong evidence that Brett Kavanaugh was a central figure in these activities, including specifically the renewal of the unlawful warrantless wiretapping program and the secret expansion of the PATRIOT Act.[7] We urge the Committee members, and the Senate, to review these documents before conducting the hearing.

We have prepared a detailed memo[8] that reviews Judge Kavanaugh's view on several key issues. In all of his Fourth Amendment opinions, Judge Kavanaugh has sided with government surveillance and police searches over both Constitutional and statutory privacy rights. This bias poses a threat to our Constitutional freedoms and possibly our democracy. Judge Kavanaugh's views are also out of step with a series of recent Supreme Court opinions that carry forward Fourth Amendment protections to the digital age on such issues as GPS tracking,[9] cell phone searches,[10] and cell site location data.[11]

Americans are rightly concerned about the scope of government surveillance, the impact of new technologies, and the protection of Constitutional freedoms.[12] Judicial independence is critical to the effective protection of Constitutional liberties and the Acts of Congress that safeguard the rights of the people. Judge Kavanaugh's opinions on the bench and the memos from his White House years raise substantial concerns that this nominee is out of step with the views of the American people and the Court.

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[5] *Klayman v. Obama*, 805 F.3d 1148 (2015).
[6] *See generally* Charlie Savage, Alicia Parlapiano & Sarah Wheaton, *Electronic Surveillance Under Bush and Obama*, N.Y. Times (June 7, 2013), https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/07/us/07nsa-timeline.html.
[7] Judge Kavanaugh worked directly for Attorney General Gonzalez at the time the warrantless surveillance program was launched. Released documents of Judge Kavanaugh's time in the White House also reveal that he helped draft the Presidential signing statement for the Patriot Act. *See* E-mail from Brett Kavanaugh, Associate Counsel, White House to Edmund A. Walsh, Speechwriter, White House 688-90 (Oct. 24, 2001), https://www.judiciary.senate.gov/imo/media/doc/08-02-18%20GWB%20Document%20Production%20-%20Pages%201%20-%205,735.pdf.
[8] Memo from EPIC to Senate Judiciary Comm. (Sept. 4, 2018), https://epic.org/privacy/kavanaugh/EPIC-Kavanaugh-memo-Sept2018.pdf.
[9] *See United States v. Jones*, 565 U.S. 400 (2012).
[10] *See Riley v. California*, 134 S. Ct. 2473 (2014).
[11] *See Carpenter v. United States*, 138 S. Ct. 2206 (2018).
[12] Abigail Geiger, *How Americans Have Viewed Government Surveillance and Privacy Since Snowden Leaks*, Pew Research Center (June 4, 2018), http://www.pewresearch.org/fact-tank/2018/06/04/how-americans-have-viewed-government-surveillance-and-privacy-since-snowden-leaks/.

The Senate Judiciary Committee should pursue questions with the nominee about these issues, particularly whether Judge Kavanaugh still believes that his opinion in *Klayman* was correct.

Thank you for your consideration of EPIC's views. We would be pleased to provide you and your staff any additional information you may need.

Sincerely,

Marc Rotenberg
President, EPIC

James Bamford
Author

Ann Bartow
Professor, Pace Law School

Colin Bennett
Professor, University of Victoria

Christine L. Borgman
Distinguished Professor and Presidential Chair in Information Studies, UCLA; Director, UCLA Center for Knowledge Infrastructure

David Chaum
Chaum, LLC

Danielle Keats Citron
Morton & Sophia Macht Professor of Law, University of Maryland School of Law

Whitfield Diffie
Vice President and Fellow, Chief Security Officer (retired), Sun Microsystems

David J. Farber
Distinguished Career Professor of Computer Science and Public Policy, Carnegie Mellon University

Ian Kerr
Professor, University of Ottawa Faculty of Law

Len Kennedy
Senior Advisor, Neustar, Inc.

Lorraine Kisselburgh
Lecturer and Faculty Fellow, Purdue University

Harry Lewis
Gordon McKay Professor of Computer Science, Harvard University

Gary T. Marx
Professor, MIT

Mary Minow
Library Law Consultant

Dr. Pablo G. Molina
Adjunct Professor, Georgetown University

Erin Murphy
Professor of Law, New York University

Dr. Peter G. Neumann
Computer Science Laboratory, SRI International

Helen Nissenbaum
Professor, Information Science; Director, Digital Life Initiative, Cornell Tech

Frank Pasquale
Professor of Law, University of Maryland School of Law

Dr. Deborah C. Peel, M.D.
Founder and Chair, Patient Privacy Rights

Bilyana Petkova
Assistant Professor, Maastrict University

Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law, Berkeley Law School

Bruce Schneier
Fellow and Lecturer, Harvard Kennedy School

Nadine Strossen
John Marshall Harlan II Professor of Law, New York Law School

Sherry Turkle
Abby Rockefeller Mauzé Professor of the Social Studies of Science and Technology, MIT

James Waldo
Gordon McKay Professor of the Practice of Computer Science, Harvard John A. Paulson School of Engineering and Applied Sciences

Christopher Wolf
Board Chair, Future of Privacy Forum

Shoshana Zuboff
Charles Edward Wilson Professor of Business Administration (emeritus), Harvard Business School

(Affiliations are for identification only.)

EQUALITY CALIFORNIA

FOR ALL

September 13, 2018

The Honorable Members of the United States Senate
Washington, DC 20510

RE: Opposition to Nominee Brett Kavanaugh for U.S. Supreme Court

Dear Senators:

Equality California is writing to express our opposition to the nomination of Judge Kavanaugh to the U.S. Supreme Court on the grounds that his confirmation represents a serious threat to LGBTQ civil rights, reproductive freedom and the precedent of *Roe v Wade*. Ensuring that Supreme Court precedents are upheld and followed is important to the vast majority of Americans, but Judge Kavanaugh expressed no commitment to momentous LGBTQ civil rights cases in his confirmation hearings. In addition, Judge Kavanaugh's radical views about the breadth and scope of presidential power fall far outside mainstream thinking about presidential accountability under the law and the separation of powers.

Particularly troubling to Equality California is Judge Kavanaugh's repeated refusal to answer simple questions posed by Senator Kamala Harris about whether he thought the landmark marriage case, *Obergefell v. Hodges,* was correctly decided. His evasiveness about *Obergefell* and other recently-decided civil rights cases are noteworthy, given that he readily expressed his views about many other Supreme Court decisions that he considered to be established precedent.

Because much of Judge Kavanaugh's writings during his tenure in the George W. Bush White House have not been disclosed, it is impossible to know what he thinks about issues that are vital to the lives of wellbeing of LGBTQ people: whether he believes that same-sex couples are entitled to all the rights normally conveyed by marriage, whether he understands that LGBTQ people are often discriminated against in the workplace and need employment protections, and whether he thinks that the children of same-sex couples or immigrants deserve legal safeguards. Nor has Judge Kavanaugh given any indication as to whether he believes that transgender servicemembers have earned the right to serve their country, whether gender-nonconforming students should be allowed to use the restrooms and school

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3701 Wilshire Blvd
Suite 725
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facilities that correspond with their gender, and many other questions directly related to LGBTQ lives and wellbeing.

Many LGBTQ legal protections rest on the U.S. Supreme Court's extensive rulings affirming constitutional rights to privacy and equal protection, as well as protections from sex discrimination under the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972. But Judge Kavanaugh's prior writings and evasive answers to pointed questions about *Roe v. Wade* during the hearing sent an unmistakable signal that, once seated, he would welcome the opportunity to strike down *Roe* altogether or to whittle away existing protections to the point that they are rendered meaningless. His record on *Roe* presents a stark threat to both reproductive rights for women and LGBTQ civil rights protections which are supported by Members of Congress in both political parties and wide margins of the general public.

Judge Kavanaugh's hostility to the Affordable Care Act (ACA) is also of deep concern to Equality California. The ACA provided millions of LGBTQ people and their families access to affordable, comprehensive and non-discriminatory healthcare for the first time in their lives. Our community experiences a higher-than-average rate of pre-existing conditions that previously made millions of Americans uninsurable – including HIV/AIDS, gender dysphoria, certain kinds of cancers, substance use and mental health conditions. The protections included in the ACA, as well as the expansion of Medicaid, have helped countless LGBTQ people stay healthy and literally saved lives.

But in his current capacity on the U.S. Court of Appeals for the DC Circuit, Judge Kavanaugh has sought to dismantle the ACA, as evidenced by his dissenting opinion that the individual mandate is unconstitutional and his effort to undermine the comprehensive coverage afforded by the ACA by seeking to allow private companies to cite their personal objections to providing contraceptive benefits to their employees. These "license to discriminate" laws are a direct threat to LGBTQ health and wellbeing.

Our final concern lies with Judge Kavanaugh's dangerously broad view of presidential power. Judge Kavanaugh's legal writings clearly indicate that he values executive authority over individual civil rights and that he believes the president of the United States is, unlike any other person, above the law. This view that presidential power is virtually unbridled — in conflict with the Court's unanimous rulings in *Clinton v. Jones* and *United States v. Nixon* — again puts him far outside even the conservative judicial mainstream.

Equality California strongly believes that Judge Brett Kavanaugh's nomination to the U.S. Supreme Court represents a serious threat to the lives and well-being of millions of LGBTQ people and our families living in every

corner of the nation — from San Francisco to Bangor, from Anchorage to Charleston. We respectfully urge you to oppose his confirmation.

Sincerely,

Rick Zbur
Executive Director

Valerie Ploumpis
National Policy Director

cc: Senator Dianne Feinstein
cc: Senator Kamala Harris

September 5, 2018

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and Committee Members:

On behalf of Everytown for Gun Safety, America's largest gun violence prevention organization, I write to express our opposition to the nomination of Judge Brett M. Kavanaugh to be an Associate Justice on the United States Supreme Court.

Judge Kavanaugh's judicial record demonstrates a dangerous view of the Second Amendment that elevates gun rights above public safety. Ten years ago, the Supreme Court issued its ruling in *District of Columbia v. Heller*, which established that while "law-abiding, responsible citizens" have a right to a gun in the home for self-defense, the Second Amendment is not absolute and allows for reasonable gun laws. Since then, judges appointed by both Republicans and Democrats have repeatedly upheld common-sense gun safety laws as consistent with the Second Amendment. But not Judge Kavanaugh.

Judge Kavanaugh instead argues for an extreme outlier approach to Second Amendment analysis, which he has laid out in a 52-page dissenting opinion in a 2011 case commonly referred to as *Heller II*. To determine whether a gun law is constitutional under the Second Amendment, Judge Kavanaugh asks only one question: Is the law "sufficiently rooted in text, history, and tradition"? In other words, if a gun regulation is "longstanding" or "analogous" to a longstanding regulation, Judge Kavanaugh would likely uphold it. If not, he would likely strike it down.

No court has adopted Judge Kavanaugh's aberrational view of the Second Amendment. Even his Republican-appointed colleagues on the United States Court of Appeals for the D.C. Circuit have criticized his approach as "nowhere suggested" and "clearly . . . 'not announce[d]'" by the Supreme Court's decision in *Heller*. Instead, the consensus among the federal courts—including all ten federal appeals courts to consider what the correct Second Amendment test should be—has consistently been to apply a two-step inquiry that also asks whether and how much a gun law contributes to public safety today. This judicial consensus, which Judge Kavanaugh has refused to follow, is what has led courts to deny nearly all legal challenges to gun safety laws in the decade since *Heller*—around 90%, according to one recently published academic study.[1]

Under Judge Kavanaugh's very different and purely historical approach to the Second Amendment, many critical measures to combat gun violence would be at risk. We already know from his *Heller II* dissent that, contrary to every federal and state appellate court to consider the issue, Judge Kavanaugh would strike down restrictions on AR-15s and other assault weapons

[1] Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep Bear Arms After* Heller, 67 Duke L. J. 1433, 1472 (2018).

EVERYTOWN
FOR GUN SAFETY

like those used in Parkland, Las Vegas, Orlando, Newtown, Aurora, and so many other deadly mass shootings. We also know that Judge Kavanaugh refused to join his fellow judges who voted to uphold the District of Columbia's prohibition on large-capacity magazines.

If Judge Kavanaugh becomes a Supreme Court Justice, his alarming approach to the Second Amendment could also call into question a number of other important gun safety measures, including red flag laws, which empower family members and law enforcement to seek a court order temporarily restricting a person's access to guns when they pose a danger to self or others; domestic violence restraining order laws, which disarm domestic abusers and prohibit them from possessing firearms; and even laws requiring criminal background checks on all gun sales.

Simply put, Judge Brett Kavanaugh's record reflects an extreme interpretation of the Second Amendment that ignores public safety and is well outside the judicial mainstream. If Judge Kavanaugh's views prevail on the Supreme Court, they threaten to invalidate a wide range of some of the most important and effective gun safety regulations at the federal, state, and local levels, posing a serious threat to the safety of American families. We strongly oppose and urge the Committee to reject this nomination to the Supreme Court.

Respectfully submitted,

John Feinblatt
President, Everytown for Gun Safety Action Fund

August 14, 2018

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Chuck Schumer
Democratic Leader
United States Senate
Washington, DC 20510

Dear Leader McConnell and Leader Schumer:

The undersigned national and state organizations, representing health care consumers and patients, providers, and other stakeholders, are writing to urge the Senate to carefully consider the stakes for our health care system and for millions of people's ability to access care, as it undergoes the confirmation process for the next Supreme Court justice.

In the coming years, the Supreme Court is likely to hear cases that involve the basic pillars of our health care system. Adverse decisions in these cases would jeopardize the health care of millions of people. Issues of particular interest to the undersigned organizations include:

- **Constitutionality of the Affordable Care Act, including protections for people with pre-existing health care conditions.** One suit, *Texas v. Azar*, is currently before federal courts. In this suit, the State of Texas and co-plaintiffs argue that the Affordable Care Act is unconstitutional because the individual mandate to purchase health insurance is no longer being enforced. The Trump Administration has partially sided with the plaintiffs, choosing not to defend the law, while arguing that protections for people with pre-existing conditions must be vacated. A decision to overturn the ACA in whole or in part would have devastating impacts for millions of people, threatening coverage for millions, including children, pregnant women, people with life-threatening conditions such as cancer, as well as older adults, who suffer a range of chronic illness, including diabetes and heart disease.

- **Women's access to critical health care services, including contraception.** The Supreme Court may be asked to rule on the constitutionality of federal and state laws that limit women's access to providers and common contraceptives.

- **Federal authority to roll back health coverage for low-income people through Medicaid using "Demonstration Waiver" authority.** In June, a federal judge ruled that the federal government's decision to approve Kentucky's waiver making dramatic cuts to Medicaid was unjustified under federal law, because of its likely impact driving people off the program for failing to complete necessary forms. More than a dozen other states either have implemented or are seeking to implement similar policies. The Supreme Court is likely to take up this issue in the coming years.

- **The ability of consumers, providers, and other stakeholders to hold state Medicaid programs accountable in federal court for violating federal Medicaid requirements.** The Supreme Court has previously ruled on this issue, but may be asked to review it again as the Trump administration has proposed to further cut back federal oversight of rates and access in Medicaid.

The Senate's constitutionally prescribed duty to "advise and consent" on this confirmation should be executed with thoughtful consideration of the nominee's record on health care issues. As the

confirmation process continues, we urge the Senate to remember that our health care system and the health care of millions hang in the balance. Unless a Supreme Court nominee is willing to make clear commitments to protect the rights of families in America to obtain essential health care, we fear that the consequences of confirmation for the nation's health and well-being could be serious and adverse.

Sincerely,

National Organizations

Families USA
ACA Consumer Advocacy
Academy of Ethnomedical Sciences
AIDS United
Alliance for Retired Americans
American Medical Student Association
American Muslim Health Professionals
American Nurses Association
American Public Health Association
Asian & Pacific Islander American Health Forum
Autistic Self Advocacy Network
Center for Law and Social Policy (CLASP)
Center for Policy Analysis
Center for Popular Democracy
Center for Public Representation
Central Conference of American Rabbis
Congregation of Our Lady of Charity of the Good Shepherd, US Provinces
Disability Rights Legal Center
Doctors for America
Farmworker Justice
GLMA: Health Professionals Advancing LGBT Equality
Health Care for America Now (HCAN)
HIV Medicine Association
Interfaith Center on Corporate Responsibility
Justice in Aging
League of Women Voters of the United States
LEAnet
Main Street Alliance
MomsRising
NAACP
National Advocacy Center of the Sisters of the Good Shepherd
National Association of Pediatric Nurse Practitioners
National Association of Social Workers
National Black Justice Coalition
National Center for Transgender Equality
National Consumers League
National Council of Jewish Women
National Disability Rights Network
National Health Law Program

National Latina Institute for Reproductive Health
National LGBTQ Task Force Action Fund
National Physicians Alliance
Pathways for Rare and Orphan Studies
People Demanding Action
Planned Parenthood Federation of America
Population Connection Action Fund
Positive Women's Network - USA
Presbyterian AIDS Network (PAN)
Project Inform
Ryan White Medical Providers Coalition
Service Employees International Union (SEIU)
Sexuality Information and Education Council of the United States (SIECUS)
Sierra Club
Social Security Works
Strategic Health Resources
Talking Eyes Media
The Society for Patient Centered Orthopedics
UnidosUS
Union for Reform Judaism
United Spinal Association
Universal Health Care Action Network
Voices for Progress
VOR
Young Invincibles

State-Based Organizations

Alabama
NEAL Together: 'A Community for Change'

Arizona
PowerSource Tucson, Inc

California
ACCE Action
Alameda Health Consortium
California Food Policy Advocates
California Pan-Ethnic Health Network
California Physicians Alliance
Community Health Councils
Congress of California Seniors
CONGRESS OF CALIFORNIA SENIORS
Equality California
Give for a Smile
Health Access California
Los Angeles LGBT Center
Maternal and Child Health Access

SEIU Nurse Alliance of California
The Children's Partnership
Westside Family Health Center

Colorado
Colorado Consumer Health Initiative

Connecticut
Protect Our Care CT
Southwestern AHEC, Inc.
Universal Health Care Foundation of CT

District of Columbia
DC Fights Back
Iona/DC Coalition on Long Term Care

Florida
Organize Florida

Hawaii
Waikiki Health

Illinois
AgeOptions
Ecker Center
Open Door Clinic of Greater Elgin

Kentucky
Kentucky Equal Justice Center
Kentucky Protection and Advocacy
Kentucky Voices for Health

Maine
Consumers for Affordable Health Care

Massachusetts
Disability Law Center
Personal Disability Consulting, Inc.

Michigan
Community AIDS Resource and Education Services of Southwest Michigan
Fibromyalgia Association of Michigan
HIV AIDS Alliance of Michigan
MichUHCAN
The Grand Rapids Red Project

Mississippi
Back Bay Mission

Disability Rights Mississippi
Mississippi Chapter of APSE
MS Human Services Coalition

Missouri
Empower Missouri

Nevada
Nevada Policy Practice Academy

New Jersey
New Jersey Citizen Action

New York
Bailey House, Inc.
Hunger Action Network of NYS

North Carolina
Equality North Carolina
Pisgah Legal Services

Oregon
Cascade AIDS Project

Pennsylvania
Consumer Health Coalition
Equality Pennsylvania

Tennessee
Black Children's Institute of Tennessee
Disability Rights Tennessee
Nashville CARES

Texas
Children's Defense Fund – Texas

Virginia
Virginia Organizing

West Virginia
West Virginians for Affordable Health Care
West Virginians Together for Medicaid
WV Citizen Action Group

Wisconsin
Wisconsin Federation of Nurses & Health Professionals, AFT, AFL-CIO

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fax 202.697.5058
info@familyequality.org

August 31, 2018

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington D.C. 20510

RE: Family Equality Council Opposes Confirmation of Judge Brett Kavanaugh to the Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein:

We write to submit this letter to the Congressional Record and to urge you and Senate Judiciary Committee members to oppose the confirmation of Judge Brett Kavanaugh to the Supreme Court. Attached are two letters from July 17, 2018, and July 31, 2018, which we signed on to, that outline numerous reasons that we feel seating Justice Kavanaugh on the Supreme Court could bring harm to and reduce protections for our families and children.

Family Equality Council connects, supports, and represents the three million parents who are lesbian, gay, bisexual, transgender and queer (LGBTQ) in this country and their six million children. We are a community of parents and children, grandparents and grandchildren that reaches across this country. For nearly 40 years we have raised our voices toward fairness for all families. Family Equality Council also supports LGBTQ youth seeking families including foster youth.

Our members are very worried about the impact that Brett Kavanaugh's nomination to the Supreme Court will have on our families, and particularly on our children.

Lesbian married couples in Michigan and Texas who have been denied the opportunity to apply to be foster parents simply because of whom they love are suing in federal court to overcome this discrimination. These cases could eventually land before the Supreme Court. And there, the Court will decide whether these families will experience full marriage equality or what Justice Ruth Bader

Ginsburg has called "skim milk marriage" without all the attendant rights, benefits and responsibilities that straight spouses enjoy.

LGBTQ Americans are worried about whether a Supreme Court with Brett Kavanaugh on it will stand up for all American families - including ours. We worry how Kavanaugh will rule when we seek redress for the harms and discrimination we've experienced. We worry about whether we should take a promotion that would move us from a state with strong LGBTQ family legal protections to a state where we or our children could be turned away by public services or businesses simply because of who we are and whom we love.

We worry about whether Kavanaugh thinks a religiously affiliated hospital should be allowed to keep a gay person from visiting their ill spouse. We worry about whether Kavanaugh thinks health care providers, child care providers, or government employees should be allowed to deny services to our children because their parents are LGBTQ. We worry about whether a Supreme Court with Kavanaugh on it will require states to provide the same publicly funded benefits to all married persons.

Brett Kavanaugh has said that he respects precedent. President Trump's previous nominee to the Court, Neal Gorsuch, said the same thing – but once on the Supreme Court turned around and opposed full marriage equality by dissenting from the Court's ruling that both same-sex spouses must be listed on their child's birth certificate. Justice Gorsuch opposed the Arkansas lesbian parents in the *Pavan* case even though the Court's *Obergefell* opinion had included "birth and death certificates" in its list of "rights, benefits, and responsibilities" of marriage.

LGBTQ families worry because the Senate Judiciary Committee has rushed forward with Kavanaugh's confirmation hearing even though Senators have not received hundreds of thousands of requested documents dating from his lengthy tenure as staff secretary to President George W. Bush. These documents could spotlight any role Kavanaugh played in Bush's efforts to amend the constitution to limit marriage to a union between a man and a woman. We worry because Kavanaugh's nomination was approved by far-right conservative organizations opposed to LGBTQ equality including the Heritage Foundation and Federalist Society which are committed to rolling back civil rights protections – and which support overturning *Roe* and its promise of personal liberty upon which so many legal protections for LGBTQ people and our families are based.

We are also disturbed by Judge Kavanaugh's refusal in his confirmation hearing to answer basic questions about the liberty and equality of LGBTQ people. While praising the correctness and greatness of other precedents of the Supreme Court, he repeatedly refused to express agreement with a single one of the Court's landmark decisions protecting LGBTQ people. He refused to comment on the *Obergefell* ruling that ensures full marriage equality nationwide for same-sex spouses. He refused to say not only whether firing an employee for being LGBTQ is illegal, but even

whether it is immoral. And, he continued to refuse to address his involvement in attacks on LGBTQ people's basic rights while he served in the George W. Bush White House.

The Supreme Court will rule in future cases whether full marriage equality is still the law of the land or whether the personal beliefs of some Americans can dictate the lives of others and chip away at that equality. The Court will rule whether our nation's nondiscrimination laws include protections for LGBTQ people — as many lower courts have already concluded. This would impact employment, housing, healthcare and education civil rights statutes. The Court will rule whether qualified transgender people can be excluded from serving in the military, simply because of who they are. And the Court will rule whether LGBTQ people and their families can be turned away from businesses open to the general public, simply because of who they are or whom they love.

We can't afford another Supreme Court justice who will undermine LGBTQ people, our families, and our children. Kavanaugh's support for corporations over individuals, willingness to allow employers to curtail worker's benefits based on personal beliefs, and dissents against the Affordable Care Act show that he is outside the mainstream. On behalf of the families we represent, Family Equality Council demands that the U.S. Senate reject Kavanaugh's nomination and confirm a fair-minded jurist who will protect all families and our children.

For more background information on current legal attacks on LGBTQ people and our children and the discrimination our families face you can see the following:

- Putting Children at Risk: How Efforts to Undermine Marriage Equality Harm Children, a June 2018 publication by Family Equality Council and the Movement Advancement Project.

- Voices of Children amicus briefs documenting the harms to the children of LGBTQ people due to anti-LGBTQ discrimination. One of these briefs was cited from the bench by Justices Kennedy in the *Obergefell* marriage equality case. The five Supreme Court are authored by Family Equality Council and the following partners: Lambda Legal, COLAGE, Campaign for Southern Equality, Child Rights Project, Emory University, and Bryan Cave LLP.

Thank you for your consideration of our concerns regarding Judge Kavanaugh's nomination.

Sincerely,

Denise E. Brogan-Kator

Denise Brogan-Kator
Chief Policy Officer
Family Equality Council

FATHERS AND ALLIES OPPOSE THE CONFIRMATION OF BRETT KAVANAUGH

October 1, 2018

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

FATHERS AND ALLIES OPPOSE THE CONFIRMATION OF BRETT KAVANAUGH
WE WILL NOT SET BACK THE CLOCK ON SEXUAL ASSAULT

Dear Ranking Member Feinstein:

Many Americans connected with the trauma that was expressed by Dr. Christine Blasey Ford's courageous testimony before the Senate Judiciary Committee. In the days preceding her testimony, and even more so after, many women have come forward with their own horrific stories of sexual abuse and pain.

Unfortunately, we have all encountered men who do not treat women as equals. Brett Kavanaugh's belligerence and unrestrained indignation in this hearing suggest he is lying about his past actions and betray the idea that he has the temperament to be a judge, let alone a justice of the Supreme Court. What has been left out of the national dialog, we feel, is a father's visceral reaction to Brett Kavanaugh's attack. We are disgusted and enraged to know that some show concern for the damage that his attack on Dr. Blasey Ford might inflict on his reputation and future prospects. We feel just the opposite.

It is essential to the future of our country that we send the right message to all men no matter their age through the immediate removal of Mr. Kavanaugh from any form of judicial role in our country. If our sons engage in any verbal or physical sexual behaviors without continuing consent, they should have to take responsibility for these crimes. This is the only way that our nation can move forward.

We don't want our daughters and sons to become a silent statistic. Sexual assault is the most underreported crime in the US. Victims often do not report for a variety of reasons including shame, embarrassment, fear of being held responsible, being punished, or disbelieved. Assault ruins the lives of children, women, and men every day. One incident of sexual assault can create a trauma that lasts a lifetime. This trauma can manifest itself in psychological issues such as chronic depression and anxiety, drug and alcohol abuse, physical abuse, and trust issues that permanently scar a person from having healthy intimate relationships.1 If the Senate puts Kavanaugh on the Court they are telling our daughters to not report sexual harassment and assault and that living with the effects of this trauma is acceptable. Likewise, the Senate is telling boys and men that girls and women don't matter and there are no consequences for their actions.

In 1997, psychologist Dr. Jennifer Freyd, identified a phenomenon known as DARVO.2 This is a powerful gaslighting strategy employed by perpetrators to deny having committed an assault whereby they portray themselves as the victim to gain sympathy and to discredit the assault victim. In other words, the perpetrator reverses the roles of the attacker and the real victim of attack. The belligerence that acquaintances of Kavanaugh have described was so clearly and inappropriately on display as he denied and attacked instead of highlighting the importance of seriously addressing sexual assault in this country.3 Additionally, his displays of entitlement and willingness to lie to protect his privilege disqualify him.

Being on the Supreme Court is a privilege and not a right. To approve Kavanaugh leads to the possibility of a rapist on the Court. To deny his confirmation eliminates this risk, given there are hundreds of other qualified candidates beyond reproach with no risk of having engaged in sexual assault.

We are calling on the United States Senate to vote against the confirmation of Bret Kavanaugh. Should you fail women as citizens of this great nation we will exercise all our power by using our voices, our votes, and our money to ensure those responsible for putting this man on the court will never have the chance again.

Sincerely,
Scott Shoemate San Diego CA Business Owner

Michael Campos San Diego, Ca PhD, Father
David Wesley Chester San Diego, CA Director, Expressive Arts Institute
Gregg Stewart La Jolla, CA
Gary Kleinman La Jolla, Ca
Matthew Ready Los Angeles, CA
Cesar Figueroa La Jolla CA
Kevin Shenoy Chappaqua NY Father
Jared Miller Delray Beach, Florida
Manuel Weiskopf Los Angeles, CA
Edward Brill Solana Beach, California Dr.
Lucas Matheny Los Angeles, CA
Melanie Smith Hamburg NY Mrs.
Jamie Brodnax Jessup Maryland
Justin davidson San Diego, ca Engineer
Anna De Angelis La Jolla, CA Dr
Chris Sanders San Diego, CA
Alexander Lichstein Santa Monica Me
Dan Roberts Santa Monica, CA
Avram Sills Santa Monica, CA Father
Gary Kleinman la Jolla, california Opposing Kavanaugh
Gregory Van Horn Willowbrook, IL
Matthew Edstrom La Jolla, CA 92037 CMO - Traditional Mortgage Acceptance Corp.
Nikhil Sinha San Francisco, CA Chief Executive Officer
Peter Spruyt Los Angeles, CA
Adam Horowitz Greenbrae, CA
Frank Beiser San Diego, Ca Voter.
Francis Costello La Jolla, CA 92037
Dylan Lewis San Diego, CA Mr.
Rick Tinney San Diego, CA
Banda La Jolla, California Not to be confirmed. There are better options.
Alyssa Kriss Newbury Park, California
James thomas San Diego. CA Dad
Jackson McKay Thousand Oaks, California
Juan Lashley CA Concerned citizen
Eric Pearly Montclair, NJ Business Owner
Ronald William Groth La Jolla, CA Father
Greg Scherman La Jolla, CA
Hugh hamilton Los angeles CA Mr
Wendell Eckholm San Diego, CA Small Business Owner
Tim Scott La Jolla, CA Father
Sravya Singampalli Newbury Park, California
Saghir shaikh San Diego Engineer
Jolie Loeb Los Angeles, CA
laura saggers santa monica
Allan Kretchman Woodland Hills, Calif Mr.
Lisa Taglieri Santa Monica California
Hugh Fitzgerald Santa Monica California
Steve Carll Honolulu HI
Meghan Rose Los Angeles, CA writer
Gottlieb CA Ms
Nona Sue Friedman Los Angeles, CA Brett Kavanaugh should not be allowed to serve on the Supreme Court
Alan Wolovitch Los Angeles, CA Father
Bromwich Santa Monica, ca Architect and advance planning technician
Evelyn Norel Los Angeles, Ca 90046
Lizette Sanchez-Hayutin Santa Monica, CA
Kim Huffman Cary Los Angeles, CA
Jungbae E San Diego, CA
Victoria Andersson Los Angeles CA DESIGNER
Ghulam Memon Houston, TX Father
Tara Timpone Los Angeles, CA
Amy Kiehl Los Angeles, CA Program and Policy Development Specialist
Andrew Elvis Miller Los Angeles, California Actor/Director
Jonathan Palmer Los Angeles, CA Mr.
Sarah Koskoff Los Angeles, CA Writer
Morina Lichstein Santa Monica, CA Remove Brett Kavanaugh from any US Judiciary position of power
Samir Memon Katy, Texas
elaine kretchman woodland hills california owner

Michael Cherney Sedona, Arizona
Charles Cook Los Angeles, CA Mr.
Hilary Back Carbondale, CO doctor
Brett Benner Los angles,ca
Andrea Wolf-Sobel Los Angeles, CA
David sobel Los Angeles, CA
Clinton D. Wilburn Los Angeles, CA Father
Dorsett Los Angeles, CA
Judith Essex PhD San Diego CA Dr.
Sonia Teder-Moore La Jolla, CA Educator
elena cielak los angeles california ms.
jack katz los angeles california mr
Lisa Norling Los Angeles, CA
Daryl Barbieri Los Angeles, CA
Sarah LaBrache Los Angeles, CA Vice President, CBS Marketing and Parent of 2 Girls
Todd Louiso Los Angeles, CA Actor
Allison Meyerson Los Angeles, CA Citizen
DIANE WEISS LOS ANGELES
Diane Gross Los Angeles, CA
Stuart Melvin Los Angeles, CA Mr.
Laureen Tieche Culver City, CA Leader
Jonathan Berzer Los Angeles, California
Marvin Woodside San Francisco, CA Dr.
Sandrine Junod yust Los Angeles, CA
Yust Alexander Los Angeles, CA
Elizabeth Tobias San Diego, CA MA, Therapist, Mom, wife, daughter
Gaia Campos San Diego CA Daughter, student
jean huffman roswell, ga mrs.
Kim Huffman Roswell, GA Retired
Italo Sessegolo Kintnersville, PA BI Developer
George Campos Buffalo, Ny Grandpa
Smith Los Angeles Ca
Meghan Kasperlik Brooklyn, NY
Virginia Campos Buffalo, NY Voting citizen
Stephanie Elias Los Angeles CA Mother
Evelyn Weiskopf Los Angeles, CA
wynne wilson altadena ca
Sara Saak Buffalo, NY Mother,
Peter Sepenuk Los Angeles, CA
Weiskopf Los Angeles, CA Concerned parent
Lynn Hutchinson Marina del Rey, CA Voter, Mother
Parkash Chugani San Jose, CA Father
Becky Zagha Victorville, CA Mother
Diya Patel San Francisco
Kathryn Campos Buffalo, NY
Danielle Kelly Los Angeles, CA Parent of a daughter and son. Teacher.
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Marc Attinasi Encinitas, CA Father
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Richa Amar Los Angeles, CA
Brooklynn Cameron Scottsdale AZ Mom
David Cameron Scottsdale AZ Father / RE Entrepreneur
Bret Conover La Mesa, CA Artist
Ural Garrett Inglewood CA Project Manager / Content Curator
Karen Osborne Murrieta, CA Mother & Grandmother
Gabi Loeb Los Angeles, CA Father and Husband
Eileen Barish Santa Barbara, CA
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Erin Scanlon Brooklyn, New York
Marc Diana Davidson, NC CEO
Kenneth Peterson Buffalo, New York Father & Grandfather
michael back pittsburg pa retired
sandra back pittsburgh pa retired
sandra back pittsburgh pa retired
Tammy Steele Sammamish, Washington Voter and mom of 3
Rebekah Weldon Los Angeles, CA Concerned citizen
Laura Beiser Goodsell San Diego, CA Single Mom
Natalie Silver Chicago IL Daughter, Sister, Citizen
Jeffrey Pirrone Buffalo, NY Father of a boy and three girls
Jessica Wohlwend Woodland Hills, CA Voter
Andrew Wohlwend Woodland Hills, California Father of sons and daughters
Elva Adams Lagrangeville, NY
harvey santa barbara, CA Father
Shaila Sikand Seattle, WA
Brett Thacher Portland, Oregon
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Reginald Walton Phoenix, AZ Father, Husband, Pastor
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Halle Redman Los Angeles, CA
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1. **First Name Last Name** *

2. **City, State** *

3. **Title**

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August 31, 2018

Chairman Chuck Grassley
Committee on the Judiciary
United States Senate

Ranking Member Dianne Feinstein
Committee on the Judiciary
United States Senate

RE: Nomination of Brett Kavanaugh to the United States Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the Feminist Majority Foundation, a national organization dedicated to women's equality, reproductive health, and non-violence, we write to express strong opposition to the confirmation of Judge Brett Kavanaugh to serve as an Associate Justice of the U.S. Supreme Court.

Nominees to the U.S. Supreme Court must meet the highest standards of character and integrity. The decisions made by the Court impact almost every aspect of our daily lives, and the public must be secure in knowing that the nominee is willing to protect the rights of all people, not just the powerful, and uphold the rule of law. Judge Kavanaugh does not meet these requirements. His record shows hostility to reproductive rights and the Affordable Care Act, support for unchecked presidential power, and suggests that he would undermine civil rights and workplace fairness and promote the interests of corporations, the wealthy, and the powerful at the expense of everyday people, with damaging consequences for women, people of color, and other vulnerable communities.

Although the Feminist Majority Foundation submits this letter as part of Judge Kavanaugh's nomination hearing in the Senate Judiciary Committee, we would first like to note our opposition to the decision to proceed with the hearing at this time.

The Committee Should Delay the Nomination Hearing Until All Records are Reviewed

Judge Kavanaugh has been nominated to a lifetime appointment on our nation's highest court, yet neither the Senate Judiciary Committee nor the public has had access to the full record of his time as White House staff secretary to President George W. Bush. In discussing "what prior legal experience has been most useful" to him, Judge Kavanaugh himself acknowledged that the three years he spent as staff secretary were "the most

interesting and informative."[i] It is therefore irresponsible, and not in keeping with the Senate's constitutional duty to provide meaningful advice-and-consent, for this Committee to conduct a hearing without having reviewed the full range of records pertaining to this time.

As staff secretary to President Bush, Kavanaugh was not a "paper pusher," but rather he would have been a central figure in the George W. Bush White House who would have reviewed and prioritized almost every document to reach the President and played a substantive role in key policy debates.[ii] The records related to his service may therefore provide critical insight into his role in some of the Bush Administration's most controversial actions, including the Administration's use of torture after September 11.

These records may also help determine whether Judge Kavanaugh misled or lied to members of this Committee in 2006 when, during his confirmation hearing to serve as a federal appeals court judge, Kavanaugh testified that he had no involvement in, or knowledge of, the legal issues surrounding the Bush Administration's "War on Terror" policies and practices, including warrantless wiretapping, inhumane detainee treatment, and torture.[iii] Shortly after his confirmation, the Washington Post reported that Kavanaugh had participated in discussions over the legality of these very policies.[iv]

The question of whether a nominee to the U.S. Supreme Court purposefully misled the Committee on a prior occasion in order to obtain a lifetime appointment as a federal judge is not insignificant. It goes to the heart of Judge Kavanaugh's judgment and character. It is also a question that can be answered only after a thorough review of the record; assurances from Judge Kavanaugh's political allies should not be sufficient.

These are challenging times. Our President is the subject of a special investigation into foreign interference in the 2016 Presidential Election. At least five people associated with President Trump have been found guilty of, or have pled guilty to, various federal crimes, including former national security advisor Michael Flynn, former Trump policy advisor George Papadopoulos, former deputy campaign chairman Rick Gates, former campaign chairman Paul Manafort, and, most recently, the President's former attorney Michael Cohen. In addition, several current and former members of the Trump Administration have been under scrutiny for behavior the average American would consider inappropriate, including misuse of taxpayer money,[v] alleged swindling of business associates,[vi] domestic violence,[vii] and sexual harassment and misconduct.[viii]

Under these circumstances, it is more important than ever for the Senate to take its duty to provide advice and consent seriously, especially for a Supreme Court nominee who spent years as a political operative and whose writings suggest that he would shield the President from the rule of law. This nomination comes at a critical time for our democracy, and the Committee's actions should reflect that reality. The Committee should therefore undertake a complete review of Kavanaugh's entire record.

Thus far, though, the Committee Chair has not even requested documents related to the three years Kavanaugh spent as President Bush's staff secretary, and the Committee has received only a small fraction of the documents related to the more than five years Kavanaugh served in the White House. Many of the documents that have been produced were not reviewed and released by the politically neutral National Archives, as is the usual process;[ix] instead, they were handpicked by a partisan lawyer, who represents President George W. Bush (not the American people) and who once served as a deputy to Kavanaugh himself.[x] The Committee has received no explanation for why documents have been omitted and has been given no information on why other documents have been redacted. The American people deserve better. There is no reason for this Committee to rush forward with a nomination hearing without the full record.

A review of what we do know, however, leads the Feminist Majority Foundation to oppose the confirmation of Judge Kavanaugh.

Access to Abortion and Birth Control

The right to access a full range of reproductive healthcare services, including abortion and birth control, is central to the lives of millions of women in the United States. The availability of affordable modern contraception has contributed to tremendous gains in women's educational and economic advancement in the United States,[xi] and has had positive impacts on both infant and maternal health.[xii] Birth control has allowed women to participate more fully in the social and economic life of the nation and has given women the ability to more freely determine their destinies by allowing them greater control over whether and when to have a child. Similarly, access to safe, legal abortion has given women greater ability to make personal life and health decisions that are best for them, and often, their existing families.

Before the Supreme Court's landmark decision in *Roe v. Wade*, which decriminalized abortion throughout the country, illegal abortions were common. According to the Guttmacher Institute, in the 1950s and 1960s, estimates of the number of illegal abortions were as high as 1.2 million per year.[xiii] Although not all illegal abortions ended in death, the number of deaths from illegal abortion was high. In 1965, for example, illegal abortion accounted for 17 percent of all deaths attributed to pregnancy and childbirth that year.[xiv] That number, however, only includes those deaths that were officially reported as related to abortion; the real number is likely higher.[xv] Women forced to receive care clandestinely also suffered serious health consequences, and hospital admissions for incomplete abortion or infection were also quite common.[xvi] Women for whom pregnancy is a life-threatening health condition are also at grave risk when legal abortion is unavailable or restricted. Since *Roe*, however, the number of maternal deaths in the U.S. has plummeted.[xvii]

Despite the right to abortion, access to abortion is still severely restricted for many people,[xviii] and abortion rights are under constant threat in this country, putting women's lives, their economic security, and their health at risk. Poor women and women of color, for whom access to health care is already limited because of structural and other barriers, are disproportionately impacted by lack of abortion access.[xix]

In this climate, President Trump has consistently indicated that he would only nominate a Supreme Court justice who would overturn *Roe*. Brett Kavanaugh's record both on and off the bench clearly demonstrates that he could be the justice to do it. Just last year, Kavanaugh gave a speech at the American Enterprise Institute in which he strongly implied that *Roe* should be overturned. During the speech, Kavanaugh, while praising former Chief Justice William Rehnquist for "stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition," noted that the former Chief Justice had been unsuccessful in curtailing these rights in *Roe*.[xx] Other unenumerated rights, of course, include the right to use birth control and the right to marriage equality.

In his only case addressing abortion rights, *Garza v. Hargan*, Kavanaugh twice tried to block a young immigrant woman in Texas from obtaining an abortion.[xxi] Although the full D.C. Circuit Court of Appeals eventually allowed Jane Doe to have the abortion, Judge Kavanaugh would have continued to delay the procedure, threatening to push Jane Doe pass the 20-week limit on abortion in Texas. In his dissent, Kavanaugh claimed that the court had created a right "to obtain immediate abortion on demand,"[xxii] ignoring that Jane Doe had to jump through numerous hoops to access abortion—including a judicial order allowing her to consent to the abortion on her own—and that the government had unnecessarily delayed the procedure for weeks.

As a judge on the Court of Appeals, Kavanaugh is bound by *Roe*, even though he tried to undermine its promise. If he is confirmed as a Supreme Court justice, Kavanaugh would not be bound; he could provide the fifth vote to overturn *Roe*. But even if he did not overturn *Roe* outright, his record of hostility to abortion rights in *Garza* is a dark sign. Kavanaugh could rubber stamp so many abortion restrictions that *Roe* and the right to abortion would become meaningless.

If *Roe* were overturned, the right to privacy and personal liberty would be severely jeopardized, including the right to birth control. In particular, *Griswold v. Connecticut* and *Eisenstadt v. Baird*—two landmark Supreme Court cases that made birth control legal and accessible nationwide through the right to privacy—would be at stake, and Kavanaugh's record is hostile to birth control access. In *Priests for Life v. U.S. Department of Health and Human Services*, Judge Kavanaugh argued in dissent that an employer's religious beliefs should override an individual's right to access birth control,[xxiii] a position that would allow rampant discrimination against women.

The Affordable Care Act and Access to Health Care

The Affordable Care Act (ACA) has allowed millions of people to gain access to health insurance coverage, making critically-needed healthcare services more available and ensuring coverage for certain care. The ACA requires that insurers provide essential health benefits, including maternity and newborn care, mental health treatment, prescription drug coverage, preventive services, chronic disease management, pediatric care, and more. It has also ensured that

people with pre-existing conditions have access to affordable coverage and provides protections against discrimination in healthcare on the basis of race, color, national origin, sex, age, or disability.

The ACA has been particularly beneficial for women. After passage of the ACA, uninsured rates for women of color, who face numerous healthcare disparities, dropped dramatically.[xxiv] The ACA also prohibits charging women more for the same health plans as men and has stopped insurance companies from treating women as pre-existing conditions, ending the practice of charging women more or denying coverage for prior pregnancies, Cesarean sections, or domestic or sexual violence.

Despite these benefits to everyday people, the ACA has been under constant attack. During his election campaign, President Trump promised that he would repeal the ACA and criticized Chief Justice John Roberts for not striking down the law. In a 2015 tweet, Trump wrote: "If I win the presidency, my judicial appointments will do the right thing unlike Bush's appointee John Roberts on ObamaCare."[xxv]

As a federal appeals court judge, Brett Kavanaugh has twice dissented in decisions upholding the ACA.[xxvi] These decisions suggest that if he were confirmed, Kavanaugh would repeal or otherwise undermine the ACA, putting the health of millions of people at risk. One of Kavanaugh's former law clerks even wrote that Kavanaugh had provided a "roadmap" to the Supreme Court on finding the ACA unconstitutional.[xxvii]

Right now, a multi-state lawsuit challenging the constitutionality of the ACA and its protections for people with pre-existing conditions is making its way through the federal courts.[xxviii] The next Supreme Court justice may be the deciding vote on whether millions of people, including those with pre-existing conditions, continue to receive coverage and care.

Overturning the ACA would be disastrous for women's health, leave the LGBTQ community vulnerable to healthcare discrimination, and jeopardize treatment coverage for transgender individuals, people suffering from substance use disorder, as well as people living with HIV and other serious health conditions. Insurers could, once again, impose annual and lifetime caps on coverage, and healthcare would be out of reach for many, including those most in need of care.

Unchecked Presidential Power

Even as this hearing begins, the President of the United States continues to be the subject of a special investigation into Russia's interference in the 2016 Presidential Election. Though the President has tried to disparage the investigation and Special Counsel Robert Mueller, the special counsel investigation has resulted, so far, in more than 300 criminal counts against 33 people and three companies.[xxix]

No one is above the law, except maybe President Trump if Kavanaugh is confirmed. Judge Kavanaugh has previously written that presidents should not be subject to civil lawsuits,

criminal investigation, or indictment while in office.[xxx] Perhaps unsurprisingly, then, Kavanaugh has also suggested that *U.S. v. Nixon*—the Supreme Court case that forced President Nixon to turn over the Watergate tapes—was wrongly decided.[xxxi] In a 1998 article, Kavanaugh also wrote that a sitting president should have "absolute discretion" about whether and when to appoint a special counsel,[xxxii] and that Congress should allow the President to act when he believes "that a particular independent counsel is 'out to get him'."[xxxiii]

Kavanaugh's record raises huge red flags for the Mueller investigation, the rule of law, and the future of our democracy. His position is also stunning as Kavanaugh himself was a member of Kenneth Starr's independent counsel team when a Democratic president was under investigation. If confirmed, Kavanaugh would be in a position to deconstruct our system of checks and balances to create an unaccountable executive branch.

Civil Rights and Equitable Workplaces

The Supreme Court plays an essential role in helping to ensure fairness in the workplace, something that is critically important for women, people of color, people with disabilities, and LGBTQ individuals who have been historically marginalized in the public sphere. Kavanaugh's record, however, reflects hostility toward both workers' rights and basic civil rights. Throughout his career on the bench, he has consistently sided with employers over workers, putting the interests of corporations, the powerful, and the wealthy over the interests of everyday people.

Kavanaugh has repeatedly ruled against employees asserting claims of racial discrimination and has tried to make it more difficult for employees to have their cases heard in court.[xxxiv] In one case, he would have blocked an African-American women fired from her job from having her day in court,[xxxv] and in another, he would have prevented a black Muslim FBI agent of Jamaican descent from pursuing a retaliation claim.[xxxvi] Although Kavanaugh has, on occasion, recognized the availability of racial discrimination claims, including in a concurring opinion in which Kavanaugh noted that a single incident of a supervisor calling an employee the N-word could create a hostile environment,[xxxvii] his record suggests that Kavanaugh has adopted a narrow view of what constitutes racial discrimination: a view that does not reflect the reality of people's lives.

In a 1999 interview with the Christian Science Monitor, Judge Kavanaugh remarked: "I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of government."[xxxviii] The adoption of colorblindness theory, however, only hides the ways in which racism manifests in our institutions, systems, and structures. Far from creating a more just society, colorblindness theory erases the experiences of people of color and prevents implementation of the remedial measures that would affirm the dignity, worth, and constitutional and civil rights of all people. Such a perspective also suggests an inability to appreciate how racial discrimination intersects with sexism and other forms of discrimination.

Gun Violence

Gun violence is a deeply feminist issue. According to a 2016 research study, about 4.5 million women in the U.S. have had an intimate partner threaten them with a gun, and nearly 1 million have been shot, or shot at, by an intimate partner.[xxxix] Around 50 women per month in the U.S. are shot to death by an intimate partner, and domestic violence victims are five times more likely to be killed when their partners have a firearm.[xl] Women of color are at particular risk. Black women, for example, are twice as likely to be fatally shot by an intimate partner as white women.[xli] Overall, women in the U.S. are 11 times more likely to be murdered with a firearm than women in any of our peer nations.[xlii]

Mass shootings are also often linked to violence against women. In at least 54 percent of mass shootings between 2009 and 2016, the shooters killed intimate partners or other family members.[xliii] Reporting also shows a large number of mass shooters with a history of violence against women or girls, including the Virginia Tech shooter, the Isla Vista shooter, and the Pulse Nightclub shooter.[xliv]

Gun violence is a crisis in the United States, but Kavanaugh's record suggests an extreme view of the Second Amendment that would block common-sense gun laws designed to keep people safe. In the 2011 case *District of Columbia v. Heller*, a panel of three judges ruled 2-1 that a D.C. ban on assault weapons and high-capacity magazines was constitutional.[xlv] Judge Kavanaugh dissented, reasoning that there was "no meaningful or persuasive constitutional distinction" between assault weapons and handguns,[xlvi] the latter of which were found to be constitutionally protected in a 2008 Supreme Court case brought by the same plaintiff.

We are deeply concerned that Judge Kavanaugh does not appreciate a distinction between assault weapons and handguns. It is especially troubling given that in the 2008 *Heller* case, the Supreme Court cautioned that even though it had overturned D.C.'s handgun ban, the Second Amendment "is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[xlvii]

Sexual Harassment and Assault

The growing #MeToo movement in the U.S. has forced the country, once again, to reckon with our nation's high rates of sexual harassment and assault. Though research on the prevalence of sexual harassment in the workplace is scarce, a recent online survey found that 81 percent of women have experienced some form of sexual harassment in their lifetime.[xlviii] Of that number, 77 percent had experienced verbal harassment, 51 percent had experienced unwelcome sexual touching, and 27 percent had experienced a sexual assault.[xlix] Looking specifically at workers, the Equal Employment Opportunity Commission (EEOC) determined that as many as 85 percent of women have been harassed at work.[l]

Workplace sexual harassment can have multiple, cascading effects on women's economic advancement and also causes emotional and psychological distress. Most people do not report sexual harassment at work. Reviewing the available data, the EEOC determined that between 87 to 94 percent of individuals do not file a formal complaint.[li] These percentages may reflect the high levels of retaliation against those who do report. Up to 75 percent of employees who report sexual harassment face workplace retaliation, and many workers report that their claims were trivialized or that they faced hostility after speaking up.[lii]

The issue of workplace sexual harassment and assault are important in this context given Judge Kavanaugh's relationship to Judge Alex Kozinski, who left the U.S. Court of Appeals for the Ninth Circuit in disgrace in late 2017 after former clerks, law students, and a fellow judge made over a dozen allegations of sexual harassment against him.[liii] Those allegations included unwanted sexual touching, asking for sex, and asking clerks to watch pornography with him in chambers.[liv]

Kavanaugh, of course, clerked for Judge Kozinski and has reportedly remained close to him. Judge Kozinski's son even clerked for Kavanaugh in 2017-2018.[lv] The White House has claimed that Judge Kavanaugh "had never heard any allegations of sexual misconduct or harassment" by Kozinksi before the Washington Post reported on the allegations,[lvi] but many in the legal community have indicated that Kozinski's behavior was an open secret.[lvii] It is therefore extremely important for this Committee to ask, and for Judge Kavanaugh to speak fully on, exactly what he knew about Kozinski's behavior, whether he recommended people to clerk for Kozinski knowing of his behavior, and what, if anything, he has done to help the women who were harassed.

The Committee should also ask whether Judge Kavanaugh knew of, or was part of, Kozinski's "Easy Rider Gag List," which Kozinski used to share tasteless and sexually explicit "jokes" and material.[lviii] The "gag list," reportedly included law clerks, federal judges, attorneys, and journalists. Clearly, engaging in this type of conduct would show incredibly poor judgment and would not demonstrate the type of character required for a member of the highest court in the nation.

Conclusion

Now more than ever, the public needs a Supreme Court Justice who will uphold the Constitution and protect the rights of all people. Brett Kavanaugh is not that judge. His record shows not only that he is hostile to reproductive rights and the Affordable Care Act, but that he has a pattern of putting the concerns of corporations, the wealthy, and the powerful over the interests of everyday people, with damaging consequences for women, workers, people of color, and other vulnerable communities.

The Supreme Court has the ability to shape our rights, our laws, and our democracy for generations to come; we therefore need a justice who will uphold the rule of law, for everyone, and has demonstrated the willingness and ability to be an independent check on presidential

power. There is nothing in Brett Kavanaugh's record that indicates that he is the right nominee for this job. We urge you to oppose his confirmation.

Sincerely,

Eleanor Smeal
President

Gaylynn Burroughs
Director of Policy & Research

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September 20, 2018

Chairman Chuck Grassley
Committee on the Judiciary
United States Senate

Ranking Member Dianne Feinstein
Committee on the Judiciary
United States Senate

Dear Chairman Grassley and Ranking Member Feinstein:

The Feminist Majority Foundation calls on the Senate Judiciary Committee to postpone the hearing into the sexual assault allegations against Supreme Court nominee Brett Kavanaugh until a thorough, non-partisan, and trauma-informed FBI investigation takes place. A hearing is not a substitute for an investigation into these allegations; there is no reason not to provide a fair process to all parties, and to the American public.

The sexual assault allegations against Supreme Court nominee Brett Kavanaugh are both serious and credible. Professor Christine Blasey Ford exhibited enormous courage by coming forward with her story after her request for privacy and confidentiality was dishonored. As a result of this act of bravery, Dr. Blasey Ford has received death threats, her email and online identity have been hacked, and she has had to move herself and her family out of their home. Dr. Blasey Ford anticipated that she would receive this type of abusive treatment, which is why she asked that her initial letter not be made public. After her story was leaked, however, she came forward in order to provide the American public with her truth.

By calling her to testify before this Committee on Monday, September 24, the Chairman would be setting the stage for an attack on Dr. Blasey Ford's character and credibility without any independent investigation into what really occurred. Tipping the scales against Dr. Blasey Ford, the Chairman has also not provided time for the Committee to hear testimony from experts in sexual assault and gender-based violence, including experts who might shed light on how survivors process trauma and why they may not immediately report sexual assault.

In order to ensure a fair process for both Judge Kavanaugh and Dr. Blasey Ford, the Committee should also hear testimony from Mark Judge who Dr. Blasey Ford reports was present at the time of the assault against her. Judge has indicated that he will not appear before this Committee; but that decision should not rest with him. Not only should he appear, but he should first be interviewed as part of the impartial investigation into the allegations.

The Chairman, in his September 19, 2018 letter to Dr. Blasey Ford's attorneys, has suggested that Committee staff can conduct its own investigation into these very serious allegations. To our knowledge, however, Committee staff is not trained on how to interview survivors of sexual assault or investigate matters involving attempted rape or sexual abuse. Precisely because it is so important to get this right, the Chairman should request that an impartial, non-partisan, trauma-informed investigation take place and should not engage in a truncated hearing that is not designed to get at the truth and is biased against Dr. Blasey Ford.

No one has a right to a seat on the U.S. Supreme Court. Judge Kavanaugh has been nominated to a lifetime appointment on the highest court in our country. If confirmed, he will play a powerful role in shaping American jurisprudence and in determining the rights of every person in the United States. This is a job that requires great character and utmost integrity, and these allegations speak to the heart of those qualifications.

The Senate Judiciary Committee has the opportunity to insist upon a fair, thorough, and non-partisan process for considering Judge Kavanaugh's nomination in light of these very disturbing allegations. Dr. Blasey Ford is not asking for special treatment or undue consideration. She is asking for this Committee to recognize the severity of sexual assault and to engage in a process that is fair to all parties, yet Dr. Blasey Ford is not even being accorded the same minimal level of process that was extended to Anita Hill in 1991 when the FBI conducted an investigation into charges of sexual misconduct by now-Justice Clarence Thomas.

Since the time that Anita Hill testified before the Judiciary Committee, the anti-violence community and experts have learned a great deal about sexual assault and its prevalence. The Judiciary Committee must adopt fair processes for dealing with sexual assault and harassment when vetting nominations to the federal courts. Women, and survivors, deserve no less.

We implore the Chairman, Ranking Member, and Members of this Committee not to rush this process to meet arbitrary deadlines. Too much is at stake, including the integrity of the Court and this Committee. We ask that you postpone the September 24, 2018 hearing until a thorough, non-partisan, and trauma-informed FBI investigation can be completed and that you invite experts on sexual assault as well as other relevant witnesses to testify before this Committee once an investigation is complete.

Sincerely,

Eleanor Smeal
President

Gaylynn Burroughs
Director of Policy & Research

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Dear Senators Grassley and Feinstein:

We write as former attorneys in the U.S. Department of Justice's Office of Legal Counsel (OLC). It is the function of OLC to uphold the rule of law within the executive branch. It was a privilege to have had the opportunity to perform this role. From this perspective, we are troubled by Judge Brett Kavanaugh's apparent commitment to a version of the unitary executive theory of presidential power that holds that the President has total control of actions and decisions of any executive branch official, and that in many cases this control cannot be reviewed by a court of law nor regulated by Acts of the Congress. Judge Kavanaugh's opinions and law review articles produce this concern, and they are reinforced by remarks by Judge Kavanaugh that *United States v. Nixon*, 418 U.S. 684 (1974), was wrongly decided and should be overruled.

The *Nixon* case, of course, addressed whether the President was obligated to disclose audio tapes of specific Oval Office conversations in response to a criminal subpoena for them. The unanimous decision by the Supreme Court that Nixon was obligated to do so was a major defeat for the unitary executive theory, and it is Judge Kavanaugh's statement that the case was "wrongly decided" that prompts this letter. We urge the Senate Judiciary Committee to question Judge Kavanaugh about that remark and the *Nixon* decision, as well as more generally about the unitary executive theory. The remainder of this letter elaborates why the country should be vitally interested in what he says.

Nixon arose in the course of a Special Counsel investigation of alleged improprieties during the 1972 presidential contest between Richard Nixon and George McGovern. Criminal prosecutions of individuals who broke into the offices of the Democratic National Committee in the Watergate Complex generated evidence of the involvement of senior White House and other government officials in criminal activities and subsequent efforts to cover up that involvement. When the existence of an Oval Office taping system was revealed in congressional testimony, Special Counsel Archibald Cox obtained a grand jury subpoena for the recordings of specific conversations. Although the term "unitary executive" was not then in use, in negotiations with Cox, President Nixon's lawyers made a clear unitary executive argument against honoring the subpoena: The President has the final word on whether the subpoena is warranted, and he has decided it is not. (Letter from Charles Alan Wright, attorney for Richard M. Nixon, to Archibald Cox, quoted in Watergate Special Prosecution Task Force 91 (1975)).

When Cox disagreed and refused to abandon his efforts to obtain a court order enforcing the subpoena, Nixon ordered the Attorney General to fire Cox. Attorney General Richardson and his immediate successor, Deputy Attorney General Ruckelshaus, both resigned when ordered to do so. Finally, Solicitor General Bork fired Cox. These resignations and firing, which became known as the Saturday Night Massacre, produced a firestorm of public outcry. Nixon was compelled to quickly agree to the appointment of a replacement special prosecutor, Leon

Jaworski. The new Attorney General, William Saxbe, appointed Jaworski pursuant to new regulations that provided even greater independence from control than Archibald Cox had enjoyed. Jaworski successfully requested a court to issue a subpoena for additional recordings, renewing the controversy. Nixon's attorneys then continued Nixon's unitary executive claim by arguing that no federal court could issue the subpoena because the President had authority to control the actions of the Special Prosecutor, including his request for the subpoena. Nixon's lawyers claimed the disagreement between them was an "intra-branch" dispute, which the President wins because he holds the executive power, not a case or controversy between two adverse parties, as required by Article III of the Constitution. Therefore, Nixon's lawyers argued, the dispute was "nonjusticiable" in a court of law.

The Supreme Court unanimously rejected these unitary executive arguments and held that federal courts could indeed adjudicate whether the President was legally obligated to comply with a subpoena requested by the Special Counsel. The Court explained that Congress had vested the Attorney General, not the President, with the power to conduct the criminal litigation of the United States Government (*see* 28 U.S.C. § 516), and with the authority to appoint subordinate officers to assist him in the discharge of those duties. Acting pursuant to those congressional delegations, the Attorney General had delegated the authority to represent the United States in the Watergate matter to a Special Prosecutor "with unique authority and tenure," pursuant to a regulation that gave Jaworski "explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties." As long as that regulation was in place, the Court held, it had "the force of law," and therefore Jaworski was *not* subject to the direction of the Attorney General, let alone the President.

The Court then considered the President's substantive claim—that "executive privilege" gave him the power to refuse compliance with the subpoena. The Court held that the President's assertion of executive privilege could not overcome a valid subpoena for evidence issued in the context of a criminal proceeding.

Judge Kavanaugh's comments on *Nixon* are not entirely clear. At one point, he states:

> But maybe *Nixon* was wrongly decided-heresy though it is to say so. *Nixon* took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official. That was a huge step with implications to this day that most people do not appreciate sufficiently.

Attorney Client Privilege: Does It Pertain to the Government? The Washington Lawyer Jan./Feb. 1999, at 34, 39. At another point, he asks, "Should *United States v. Nixon* be overruled on the ground that the case was a nonjusticiable intrabranch dispute? Maybe so." *Id.* At a minimum, Judge Kavanaugh was expressing doubt about whether the Supreme Court was correct in its holding on justiciability. He may have been going further, however, and suggesting that the Court's ruling on the merits also was incorrect.

Even if Kavanaugh meant only to suggest that "maybe" the case was an "intrabranch dispute" that was nonjusticiable because it could be resolved by a directive from the President to Jaworski—a suggestion, consistent with the theory of the "unitary executive," that Congress may

not limit the President's power to direct all actions of Executive branch officials (or prosecutors, at a minimum), even in a case investigating his own possible wrongdoing—it would mean that the federal courts would lack jurisdiction to entertain the arguments of a Special Counsel who disagrees with the President as to how to conduct an investigation or prosecution of the President himself and his associates.

Nixon has come to occupy an important place in the pantheon of Supreme Court decisions. Judge Kavanaugh, in fact, has acknowledged that *Nixon* is a fine example of the Supreme Court performing its role of standing up to the political branches, though nothing in this acknowledgement addressed the reasoning or holding of *Nixon*. In holding that President Nixon was required to comply with a valid subpoena by turning over the Watergate Tapes, the Supreme Court rejected the unitary executive theory and ruled that the doctrine of executive privilege does not shield the President from a well-founded criminal investigation. The Court's opinion is based on the idea that, under the Constitution, the President is bound by the rule of law. As the Constitution itself puts the idea, it is the President's duty to "take care that the laws be faithfully executed" even when the law applies to the President personally.

Overruling or limiting *Nixon*'s holding on the ground that it is inconsistent with the unitary executive theory of presidential power would have dramatic practical consequences for the investigation currently being led by Special Counsel Robert Mueller. It would allow the President to ignore the Justice Department regulation that insulates the Special Counsel from removal except by the Attorney General for cause, and which grants that officer a certain degree of independence in decision-making (subject to some supervision by the Acting Attorney General, not the President). At its apex, the theory would allow the President to control every action taken by a Special Counsel. Thus, the President could prohibit the Special Counsel from pursuing an investigation or even compel him to cease prosecuting a case in which a grand jury has already issued an indictment. And of course it would make it impossible to obtain testimony or documents from the President relevant to the investigation—including for purposes of the *counterintelligence* aspects of the investigation that are designed to assess Russia's ongoing threat to the American electoral system and any possible "links" between Russia and individuals who were involved in the 2016 campaign (including the President himself). As a practical matter, it effectively could render the President immune from criminal prosecution and allow the President to shield co-conspirators from criminal liability.

Overruling *Nixon* would have serious practical ramifications for the constitutional system of checks and balances. The ultimate check against serious presidential misconduct is Congress's power of impeachment. To override the judgment of the American people and unseat the head of the executive branch is a monumental step. The Constitution is designed to make it one that is exceedingly difficult to take. It is inconceivable that Congress would deploy such an extraordinary power without a solid evidentiary basis for doing so, and an important source of such evidence would be lost if the Court were to overrule *Nixon*. Congress itself could issue subpoenas to the President for information or even testimony, but if *Nixon* were overruled, there would be no avenue for judicial enforcement of the subpoena were the President to refuse to comply.

Beyond the context of criminal investigations, rejecting *Nixon* and embracing a strong unitary executive theory has consequences for the federal government that are breathtaking. The President would possess the authority to supervise and control the functioning of all federal

officials outside Congress and the judiciary, which no statute could diminish nor any court review. If embraced, it means that all independent agencies are unconstitutional. Were the Supreme Court to adopt this theory, the Federal Reserve, the Federal Election Commission, the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, the Consumer Finance Protection Board, to name a few, would be unconstitutional.

We do not mean to suggest that it is improper to question or to criticize the Court's reasoning in *Nixon*. But rejecting the fundamental holding of *Nixon* is a different matter entirely, and that is what Judge Kavanaugh's comments seem to do, suggesting that the case was "wrongly decided" rather than flawed in its reasoning. If *Nixon* were to be overruled, whether on jurisdictional grounds or on the merits, it could render unattainable the ideal that no one, not even the President, is above the law. Also alarming is the strong unitary executive theory that is the apparent source of Judge Kavanaugh's concern about *Nixon*'s holding. It is beyond the scope of this letter to examine all of this theory's consequences, although we have described a few. In general, the theory tends to relieve the President from important statutory constraints and his actions from vital scrutiny. This, in turn, tends to make illusory the Constitution's promise that the President is bound to follow the law.

As former OLC lawyers, we are keenly aware that executive privilege is a critical component of the constitutional separation of powers. We would be deeply troubled by any Supreme Court nominee who did not show an appreciation for the role that executive privilege plays in ensuring that the President can successfully perform the vital functions that the Constitution commits to that office. We are also aware, however, that an overbroad formulation of executive privilege threatens our fundamental constitutional commitment to the rule of law. Judge Kavanaugh's comments on *Nixon* raise the latter concern.

We know that you take your constitutional advise-and-consent role very seriously. It is our belief that in performing this duty, you should ask Judge Kavanaugh to clarify his views on *Nixon* and the unitary executive theory. In this connection, we believe that a review of the relevant records during his tenure as Associate White House Counsel and as Staff Secretary may be critical to a full understanding of his views. A full review of those documents that are relevant and not subject to a legitimate claim of privilege will allow the Senate to perform its constitutional duty and press Judge Kavanaugh to clarify his views on a range of vital issues, including *Nixon* and the unitary executive theory.

Sincerely,

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Duke University School of Law*
Assistant Attorney General, OLC 1993-1996

Dawn E. Johnsen
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July 19, 2018

The Honorable Chuck Grassley, Chairman
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The Honorable Dianne Feinstein, Ranking Member
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Dear Chairman Grassley and Ranking Member Feinstein:

We are former students of Judge Kavanaugh's from Harvard Law School, where he has been teaching since 2008. Over the years, Judge Kavanaugh has taught law school classes on challenging topics, including Separation of Powers and an intensive study of the modern Supreme Court. We are members of the legal community at various stages of our careers, from current law students to seasoned practitioners. We also represent a broad spectrum of political and ideological beliefs, as well as perspectives on judicial philosophy. We may have differing views on political issues surrounding the confirmation process, but we all agree on one thing: Judge Kavanaugh is a rigorous thinker, a devoted teacher, and a gracious person.

Judge Kavanaugh was an inspiring professor and impressive intellect. His thoughtful explanations and analyses spoke to the breadth of his legal knowledge. He was also engaging and fair-minded. During classroom discussions, he displayed a keen interest in exploring all sides of a question. Judge Kavanaugh invited robust discussions and consistently encouraged his students to voice different viewpoints—even if others (or the judge himself) might disagree.

Both inside and outside the classroom, Judge Kavanaugh evinced a genuine warmth and interest in his students and their careers. He was exceptionally generous with his time, making himself available to meet with students not only to discuss the class, but also to assist with their scholarly writing or to offer career advice. In many instances, he has continued to provide advice and support long after the class ended by writing letters of recommendation and serving as a valued mentor. In our view, his genuine interest in helping young lawyers demonstrates a deep commitment to the legal community as a whole.

Overall, Judge Kavanaugh displayed an intellect and character that impressed us all.

Sincerely,

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Eliyahu Balsam '19
Thomas Basile '09
Robert Batista '18
Alex Bauer '17
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Zack Bluestone '16
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July 9, 2018

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The Honorable Dianne Feinstein, Ranking Member
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Dear Chairman Grassley and Ranking Member Feinstein:

Each of us has had the privilege of clerking for Judge Brett Kavanaugh on the United States Court of Appeals for the District of Columbia Circuit. We have gone different ways since then; among us are prosecutors, professors, state and federal public officials, and attorneys at private law firms, corporations, and non-profits. Our views on politics, on many of the important legal issues faced by the Supreme Court, and on judicial philosophy, are diverse. Our ranks include Republicans, Democrats, and Independents. But we are united in this: our admiration and fondness for Judge Kavanaugh run deep. For each of us – and this letter is signed by every single one of Judge Kavanaugh's clerks not prohibited by their current or pending employment from signing – it was a tremendous stroke of luck to work for and be mentored by a person of his strength of character, generosity of spirit, intellectual capacity, and unwavering care for his family, friends, colleagues, and us, his law clerks.

Judge Kavanaugh's qualifications to join the Supreme Court are beyond question. The product of Catholic elementary and high schools in Maryland, he was educated at Yale College and Yale Law School. He clerked for Supreme Court Justice Anthony Kennedy, who thereafter became a lifelong mentor for Judge Kavanaugh. He then devoted the vast majority of his legal career to public service, giving up a lucrative partnership at Kirkland & Ellis for a senior White House staff position. Judge Kavanaugh has taught courses at Harvard Law School, Yale Law School, and Georgetown University Law Center on the Supreme Court, constitutional interpretation, and the separation of powers. Finally, and most importantly, for the past twelve years he has served as a judge on the appellate court that most often confronts difficult legal questions akin to those decided by the Supreme Court.

It is in his role as a judge on the D.C. Circuit that we know Judge Kavanaugh best. During his time on the D.C. Circuit, Judge Kavanaugh has come to work every day dedicated to engaging in the hard work of judging. We never once saw him take a shortcut, treat a case as unimportant, or search for an easy answer. Instead, in each case, large or small, he masters every detail and rereads every precedent. He listens carefully to the views of his colleagues and clerks, even – indeed, especially – when they differ from his own. He drafts opinions painstakingly, writing and rewriting until he is satisfied each opinion is clear and well-reasoned, and can be understood not only by lawyers but by the parties and the public. We saw time and again that this work ethic flows

from a fundamental humility. Judge Kavanaugh never assumes he knows the answers in advance and never takes for granted that his view of the law will prevail.

Perhaps unsurprisingly, then, Judge Kavanaugh has been a role model to us personally as well as professionally. He is unfailingly warm and gracious with his colleagues no matter how strongly they disagree about a case, and he is well-liked and respected by judges and lawyers across the ideological spectrum as a result. He is grounded and kind. Judge Kavanaugh is a dedicated husband and father to two girls, Liza and Margaret, and an enthusiastic coach of both their youth basketball teams. He has a great sense of humor and an easy laugh. (Some of us are funny, most of us are not, and yet he laughs at all our jokes.) Judge Kavanaugh is an avid Nationals fan, and there is no better companion for a beer and a baseball game. And somehow, he always makes time for us, his law clerks. He makes it to every wedding, answers every career question, and gives unflinchingly honest advice. That advice often boils down to the same habits we saw him practice in chambers every day: Shoot straight, be careful and brave, work as hard as you possibly can, and then work a little harder.

These qualities have made Judge Kavanaugh a wonderful mentor, boss, and friend to all of us. With them, he would ably and conscientiously serve his country as a Supreme Court Justice.

Sincerely,

Amit Agarwal (2006-07)
Philip Alito (2012-13)
John Bash (2006-07)
Zina Bash (2007-08)
Rakim Brooks (2017-18)
Kathryn Cherry (2013-14)
Marguerite Colson (2015-16)
Will Dreher (2013-14)
Gregory Dubinsky (2012-13)
Bridget Fahey (2014-15)
Morgan Goodspeed (2012-13)
Gillian Grossman (2014-15)
Eric Hansford (2011-12)
Zac Hudson (2009-10)
Kim Jackson (2017-18)
Saritha Komatireddy (2009-10)
Clayton Kozinski (2017-18)
Travis Lenkner (2007-08)
Caroline Edsall Littleton (2011-12)
Julia Malkina (2011-12)
Roman Martinez (2008-09)
Jennifer Mascott (2006-07)
Luke McCloud (2013-14)
Christopher Michel (2013-14)
Sarah Pitlyk (2010-11)
Richard Re (2008-09)
Hagan Scotten (2010-11)
Indraneel Sur (2006-07)
Rebecca Taibleson (2010-11)
Caroline Van Zile (2012-13)
Justin Walker (2010-11)
Katie Wellington (2014-15)
Porter Wilkinson (2007-08)
Candice Wong (2008-09)

August 2, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

Like Judge Brett M. Kavanaugh, we are former law clerks to Associate Justice Anthony M. Kennedy, whose decades of judicial service have been an inspiration to us all. Though our views on politics, law, and the issues that come before the Supreme Court are diverse, we have come together to express our conviction that Judge Kavanaugh would be a fair-minded and conscientious successor to Justice Kennedy.

Judge Kavanaugh is supremely qualified to serve on the Supreme Court, having served for twelve years as a member of the U.S. Court of Appeals for the D.C. Circuit. Many of us have worked with Judge Kavanaugh, observed him in court, or encountered his speeches and articles. Much like Justice Kennedy, Judge Kavanaugh has made clear that he holds both the law and the principle of judicial independence in the highest regard.

If he is confirmed as a Supreme Court justice, we believe that Judge Kavanaugh would continue to serve his country with distinction—like the Justice for whom we clerked.

Respectfully,

Bertrand-Marc Allen
Law clerk to Justice Kennedy, OT 2003

David L. Anderson
Law clerk to Justice Kennedy, OT 1991

Randy Beck
Law clerk to Justice Kennedy, OT 1990

James F. Bennett
Law clerk to Justice Kennedy, OT 1999

Andrew Bentz
Law clerk to Justice Kennedy, OT 2014

Bradford A. Berenson
Law clerk to Justice Kennedy, OT 1992

Patrick J. Borchers
Law clerk to Judge Kennedy, 1986-87

Rachel Brand
Law clerk to Justice Kennedy, OT 2002

Christopher L. Callahan
Law clerk to Judge Kennedy, 1984-85

Adam H. Charnes
Law clerk to Justice Kennedy, OT 1992

Michael Chu
Law clerk to Justice Kennedy, OT 2007

Daniel C. Chung
Law clerk to Justice Kennedy, OT 1987

1969

Stephen Cowen
Law clerk to Justice Kennedy, OT 2007

Edward C. Dawson
Law clerk to Justice Kennedy, OT 2003

Grant M. Dixton
Law clerk to Justice Kennedy, OT 2000

Gregory Dubinsky
Law clerk to Justice Kennedy, OT 2013

Miles F. Ehrlich
Law clerk to Justice Kennedy, OT 1993

Gregg L. Engles
Law clerk to Judge Kennedy, 1982-83

Miguel A. Estrada
Law clerk to Justice Kennedy, OT 1987 & 1988

Ward Farnsworth
Law clerk to Justice Kennedy, OT 1995

Allen Ferrell
Law clerk to Justice Kennedy, OT 1996

Nathan A. Forrester
Law clerk to Justice Kennedy, OT 1993

Brett Gerry
Law clerk to Justice Kennedy, OT 2000

Donald L. R. Goodson
Law clerk to Justice Kennedy, OT 2017

Gillian Grossman
Law clerk to Justice Kennedy, OT 2015

Nick Harper
Law clerk to Justice Kennedy, OT 2017

Kathryn Haun
Law clerk to Justice Kennedy, OT 2004

Michael Hirshland
Law clerk to Justice Kennedy, OT 1994

Steven J. Horowitz
Law clerk to Justice Kennedy, OT 2010

Timothy G. Hoxie
Law clerk to Judge Kennedy, 1985-86

Thomas G. Hungar
Law clerk to Justice Kennedy, OT 1988

Robert E. Johnson
Law clerk to Justice Kennedy, OT 2010

Leo Katz
Law clerk to Judge Kennedy, 1982-83

Peter Keisler
Law clerk to Justice Kennedy, OT 1987 & 1988

Ashley Keller
Law clerk to Justice Kennedy, OT 2008

Scott A. Keller
Law clerk to Justice Kennedy, OT 2009

J. Clark Kelso
Law clerk to Judge Kennedy, 1983-84

Orin S. Kerr
Law clerk to Justice Kennedy, OT 2003

Kelly M. Klaus,
Law clerk to Justice Kennedy, OT 1995

Randy J. Kozel
Law clerk to Justice Kennedy, OT 2005

Matthew H. Lembke
Law clerk to Justice Kennedy, OT 1992

Travis Lenkner
Law clerk to Justice Kennedy, OT 2008

1970

Renée Lettow Lerner
Law clerk to Justice Kennedy, OT 1996

Katherine Moran Meeks
Law clerk to Justice Kennedy, OT 2013

Daniel Meron
Law clerk to Justice Kennedy, OT 1994

Kevin J. Miller,
Law clerk to Justice Kennedy, OT 2000

Milton A. Miller
Law clerk to Judge Kennedy, 1979-80

John Neiman
Law clerk to Justice Kennedy, OT 2001

Steve Nickelsburg
Law clerk to Justice Kennedy, OT 1999

Christopher R.J. Pace
Law clerk to Justice Kennedy, OT 1992

Eugene M. Paige
Law clerk to Justice Kennedy, OT 2000

Joshua Patashnik
Law clerk to Justice Kennedy, OT 2012

R. Hewitt Pate
Law clerk to Justice Kennedy, OT 1989

Krista Perry
Law clerk to Justice Kennedy, OT 2017

Jeffrey Pojanowski
Law clerk to Justice Kennedy, OT 2005

Richard M. Re
Law clerk to Justice Kennedy, OT 2010

C. Harker Rhodes IV
Law clerk to Justice Kennedy, OT 2015

J.C. Rozendaal
Law clerk to Justice Kennedy, OT 1998

Nicholas Quinn Rosenkranz
Law clerk to Justice Kennedy, OT 2001

Eric H. Schunk
Law clerk to Judge Kennedy, 1981-82

Michael E. Scoville
Law clerk to Justice Kennedy, OT 2004

Steven M. Shepard
Law clerk to Justice Kennedy, OT 2008

Igor V. Timofeyev
Law clerk to Justice Kennedy, OT 2002

Misha Tseytlin
Law clerk to Justice Kennedy, OT 2009

Caroline Van Zile
Law clerk to Justice Kennedy, OT 2014

Christopher J. Walker
Law clerk to Justice Kennedy, OT 2008

Justin Walker
Law clerk to Justice Kennedy, OT 2011

Lauren Willard
Law clerk to Justice Kennedy, OT 2012

Richard Willard
Law clerk to Judge Kennedy, 1975-76

Michael F. Williams
Law clerk to Justice Kennedy, OT 2002

Alexander J. Willscher
Law clerk to Justice Kennedy, OT 2001

Christopher S. Yoo
Law clerk to Justice Kennedy, OT 1997

August 28, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Re: Supreme Court Nomination of Brett Kavanaugh

Dear Chairman Grassley and Ranking Member Feinstein:

We write to you as former lawyers of the White House Counsel's Office who served alongside Judge Brett Kavanaugh during his time at the White House. Each of us worked directly with him and observed first-hand his professional and personal conduct. We do not necessarily agree with every substantive view he has expressed, as a White House lawyer or now a federal judge. But we all do agree that Judge Kavanaugh is superbly qualified -- in experience, intellect, character, and temperament -- to serve as Associate Justice of the Supreme Court of the United States. We urge the Senate to approve his nomination.

We offer three personal insights into Judge Kavanaugh's qualifications. First, we know that he is among the very finest candidates who could be nominated to serve on the Court at this time. Including with advice from members of your Committee, nearly all of us assisted President George W. Bush by searching across our nation to find the very best candidates for the federal judiciary, including the U.S. Supreme Court. Collectively, we researched and became acquainted with hundreds of worthy candidates from the generation of America's experienced legal professionals that includes Judge Kavanaugh. Having carefully studied this impressive pool of talent, we are confident that he is among the best the President could have chosen.

Second, we personally witnessed how Judge Kavanaugh performed his duties as Associate Counsel to the President and as Staff Secretary. He was extraordinarily skilled, diligent, and honorable, with a respectful temperament. He demonstrated balance, fairness, careful listening, personal decency and humility, and a gift for unpretentious personal interaction. He delivered his advice thoughtfully and with respectful consideration of the views of others. Despite the extraordinary pressure on the White House staff, particularly following the attacks of September 11, 2001, he projected calm, poise, and good humor. Beyond all that, we observed his good judgment and wisdom.

Third, we observed that Judge Kavanaugh properly understood his White House role and the role of the Presidency under the Constitution. The role of the Counsel's Office is to protect the interests and legal integrity of the Presidency of the United States. With this charge, he was known among his peers for his wise counsel and advocacy regarding the Presidency's institutional interests -- both enduring interests and those specific to the President we served – within its Constitutional bounds. At the same time, he honored the Constitutional roles, rights, and powers of the other branches of government and the people. We know that any fair review of his record in that Office will yield a favorable conclusion. We also know that Judge Kavanaugh fully appreciates that the Constitution assigns to an Article III judge different responsibilities.

We urge this Committee to report Judge Kavanaugh favorably to the full Senate for a prompt vote to confirm him as an Associate Justice.

Signed,

H. Christopher Bartolomucci

John B. Bellinger III

Bradford Berenson

Reginald J. Brown

Grant M. Dixton

Charles S. Duggan

Leslie Fahrenkopf Foley

Brett C. Gerry

Robert F. Hoyt

William Kelley

Richard D. Klingler

David G. Leitch

Ann Loughlin

Jennifer Brosnahan McIntyre

Ed McNally

Harriet Miers

Benjamin A. Powell

Kyle Sampson

Ted Ullyot

Helgi C. Walker

Raul F. Yanes

July 12, 2018

The Honorable Chuck Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We are all of the former women law clerks to Judge Brett Kavanaugh who are not precluded by our current or pending employment from signing this letter. We, along with the rest of our colleagues, have already informed the Committee that Judge Kavanaugh would capably serve this country as an Associate Justice of the Supreme Court of the United States. Nevertheless, we feel compelled to write separately to convey our uniformly positive experiences with the Judge as a boss on issues of gender and equality in the workplace.

We know all too well that women in the workplace still face challenges, inequality, and even harassment. Among other things, women do not enjoy a representative share of prestigious clerkships or high-profile legal positions. But this Committee, and the American public more broadly, should be aware of the important work Judge Kavanaugh has done to remedy those disparities. In our view, the Judge has been one of the strongest advocates in the federal judiciary for women lawyers.

Starting with the numbers, Judge Kavanaugh has hired 25 women and 23 men as law clerks, achieving rare gender parity. That includes one year in which the Judge hired four women law clerks—something we understand had never previously been done at the U.S. Court of Appeals for the D.C. Circuit. And he has sent 21 of those 25 women clerks—an impressive 84 percent—on to clerkships at the Supreme Court. During his White House remarks on July 9, 2018, Judge Kavanaugh said: "I look for the best." We are proud that so many of those hires have been talented women.

But the Judge's record of supporting women is as much qualitative as it is quantitative. Mentorship is critical to advancement in the legal profession, and the Judge is a dedicated mentor to all of his clerks, men and women alike. He has counseled us on our career options, provided honest and highly valued recommendations to prospective employers, and sometimes given a much-needed nudge to those of us who doubted whether we were qualified to chase our ambitions. It is not an exaggeration to say that we would not be the professors, prosecutors, public officials, and appellate advocates we are today without his enthusiastic encouragement and unwavering support.

As you likely know by now, Judge Kavanaugh has two daughters, Margaret and Liza. If they decide to follow in their dad's—and grandmother's—footsteps and become lawyers, they will enter a legal profession that is fairer and more equal because of Judge Kavanaugh.

Sincerely,

Zina Bash (2007-08)

Kathryn Cherry (2013-14)

Marguerite Colson (2015-16)

Bridget Fahey (2014-15)

Morgan Goodspeed (2012-13)

Gillian Grossman (2014-15)

Kim Jackson (2017-18)

Saritha Komatireddy (2009-10)

Caroline Edsall Littleton (2011-12)

Julia Malkina (2011-12)

Jennifer Mascott (2006-07)

Claire McCusker Murray (2009-2010)

Sarah Pitlyk (2010-11)

Rebecca Taibleson (2010-11)

Caroline Van Zile (2012-13)

Katie Wellington (2014-15)

Porter Wilkinson (2007-08)

Candice Wong (2008-09)

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www.lawprose.org

2 September 2018

Senate Judiciary Committee
c/o Senator John Cornyn
United States Senate
Hart Senate Office Building
Room 517
Washington, D.C. 20510

Re: In support of Judge Brett Kavanaugh's Nomination to the Supreme Court of the United States

Dear Members of the Judiciary Committee:

Judge Brett Kavanaugh is a superlatively qualified nominee for a Supreme Court justiceship. He is erudite, fair, thorough, circumspect, honest, collegial, and altogether admirable. The Committee is well aware of the enthusiastic support he has received from scholars on both the right and the left.

I write as his coauthor. Along with 11 other appellate judges, he and I coauthored *The Law of Judicial Precedent* (2016), a 910-page treatise about which *Harvard Law Review* says: "*The Law of Judicial Precedent* is the most comprehensive and authoritative text to date on the application and authority of judicial precedent in American courts. . . . The treatise is an invaluable resource for identifying the principles that govern which precedents apply in which courts and what weight those precedents have." (131 Harv. L. Rev. 543, 579 [2017].) Like all the other coauthors, Judge Kavanaugh drafted 14 sections of the book and heavily revised the entire text. With his penetrating scholarly acumen, he made extraordinary contributions to this monumental effort.

In putting together my roster of coauthors, I was careful to invite judges of various backgrounds and political persuasions. The only ironclad requisite was

that each must have a strong appreciation for the value of judicial precedent. Our coauthors included:

- Judge Thomas M. Reavley of the Fifth Circuit, appointed by President Jimmy Carter.
- Judge Diane P. Wood, appointed by President Bill Clinton.
- Judge Sandra L. Lynch, appointed by President Bill Clinton.
- Judge Carlos Bea, appointed by President George W. Bush.
- Judge Neil M. Gorsuch, appointed by President George W. Bush, and elevated last year to the U.S. Supreme Court.
- Chief Justice Rebecca White Berch of the Supreme Court of Arizona, now retired.

In his preface to *The Law of Judicial Precedent*, Justice Stephen Breyer said: "It is hard to imagine a team better suited to untangle the intricacies of the topic than the fine group of appellate judges and the distinguished law professor who have collaborated to produce the book."

Although I also cowrote two books with the late Justice Antonin Scalia, I might point out that he routinely called me a "big lib" because I'm on record as being progressive on many social issues. I mention this merely to emphasize that Judge Kavanaugh had not the slightest hesitation in coauthoring a legal treatise with a person holding such "liberal" views. I found Judge Kavanaugh to be even-handed and fair-minded throughout our three-year project—and as devoted as any other judge I've known to the doctrine of precedent. Again, I applaud his nomination and urge the committee, as well as the Senate as a whole, to act favorably and confirm.

Sincerely,

Bryan A. Garner
Editor in Chief, *Black's Law Dictionary*

Distinguished Research Professor of Law
Southern Methodist University

September 26, 2018

Senate Majority Leader Mitch McConnell
Senate Majority Whip John Cornyn
Senate Judiciary Committee Chair Chuck Grassley

Dear Senators,

We write as law professors who have significant experience teaching, researching, and writing about issues of gender violence and representing gender violence survivors in family, civil, and criminal courts. We write to express our profound concern about the plans for evaluating the allegations of Judge Kavanaugh's sexual misconduct that have been announced to date, especially in light of recently emerging claims. The Senate should seek to review all available evidence, including witness testimony relating to all of the allegations raised, in order to evaluate both the competing accounts of underlying events and the nominee's reflection on those accounts. The allegations should be fully and sensitively investigated by experts who are trained in trauma-informed interviewing techniques before the hearing is held. In this instance, as Dr. Ford has requested, the investigation should be performed by the FBI. There should be no rush in undertaking this important task. All those concerned both with the gravity of the allegations and the integrity of the Court and our systems of governance should prioritize investigation over politics. Particularly given the most recent information about additional allegations, it is incumbent upon the Committee to delay the hearings and a vote until a thorough investigation of all allegations is completed.

The Senate's approach to the allegations raised by Dr. Christine Blasey Ford, Deborah Ramirez, and now, Julie Swetnick, is deeply troubling. Public statements prejudging the credibility of witnesses and the outcome of the proceedings reflect the very type of biases that have no place in any investigation and that run counter to the purpose of these hearings. The attacks on the witnesses' credibility and integrity are reminiscent of outdated and discredited stereotypes that defy best practices developed through decades of research about fair and effective treatment of sexual violence survivors. Both criminal law and psychological research on the impact of trauma roundly reject the idea that sexual violence is restricted to forced sexual intercourse. Similarly, legislatures and courts have rejected for decades the outdated notion that allegations must be corroborated in order to be credible. In this matter, however, corroborating witnesses do exist, and the exclusion of these witnesses demonstrates that the process is not designed to assess the truth of the allegations.

The Committee's process undermines the very laws that Congress has claimed credit for passing. The Violence Against Women Act (VAWA), initially enacted nearly 25 years ago, aims to recognize the importance of upholding the dignity and safety of those who come forward to report that they were victims of sexual misconduct. Best practices reinforce the importance of fair process and meaningful justice for gender violence survivors. The rush to a hearing and a vote, without investigation, mirrors the miscarriage of justice in many domestic violence cases, where cases typically are rushed through what can best be described as "perfunctory justice."

We are additionally concerned about the selection of a prosecutor to question Dr. Ford. Questioning by a prosecutor fuels misguided ideas that the allegations raised should be proved "beyond a reasonable doubt." That standard of proof has no place here, since the liberty and equitable issues at stake in criminal cases are not at issue. We would expect the Committee to conduct its own questioning, as it has done with other nominees and throughout this process.

This is neither a criminal trial nor a civil proceeding. The focus should be on the nominee's intellect, demeanor, judicial temperament and moral conduct. Senators should be concerned with the nominee's judgment, insight, and capacity for reflection on the impact of a person's behavior on others. Senators should assess how the nominee engages with complex and emotionally charged social issues, such as those that may come before the court. All of these issues are implicated by the allegations made by Dr. Ford, Ms. Ramirez, and Ms. Swetnick, and the Senate should have a full understanding of the events underlying those allegations before it determines whether Judge Kavanaugh should be elevated to the Supreme Court.

Respectfully,*

Julie Goldscheid, Professor of Law, CUNY School of Law
Donna Coker, Professor of Law, University of Miami
Caroline Bettinger-Lopez, Professor of Clinical Law, University of Miami School of Law
Deborah M. Weissman, Reef C. Ivey II Distinguished Professor of Law, University of North Carolina School of Law
Leigh Goodmark, Professor of Law and Director, Gender Violence Clinic, University of Maryland Carey School of Law
Ruthann Robson, Professor of Law & University Distinguished Professor, City University of New York School of Law
Cynthia Soohoo, Professor of Law, CUNY School of Law
Donna Lee, Professor of Law, CUNY School of Law
Sarah Valentine, Professor of Law, CUNY School of Law
Mary Lynch, Kate Stoneman Chair in Law and Democracy, Director, Domestic Violence Prosecution Clinic, Albany Law School
Jill Engle, Professor of Clinical Law, Penn State Law
Julie Dahlstrom, Clinical Associate Professor, Boston University School of Law
Christine Butler, Practitioner in Residence, Suffolk University Law School
Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar, Clinical Professor of Law, Penn State Law - University Park
Brenda Smith, Professor, American University, Washington College of Law
Sarah Boonin, Clinical Professor of Law, Suffolk University Law School
Deena Hurwitz, Director, Atrocity Prevention Legal Training Project, Benjamin N. Cardozo School of Law
Marcy Karin, Jack and Lovell Olender Professor of Law, University of the District of Columbia David A. Clarke School of Law
Ruth Stone, Ms., Retired clinical law professor
Kathryn Stanchi, Jack E. Feinberg Professor of Litigation, Temple University School of Law
Kelly Weisberg, Professor of Law, Hastings College of Law, Univ. of Calif.
Robert Solomon, Clinical Professor of Law, University of California, Irvine

Diane Klein, Professor of Law, University of La Verne College of Law
Kit Kinports, Professor of Law and Polisher Family Distinguished Faculty Scholar, Penn State Law (University Park)
Kristina Campbell, Jack & Lovell Olender Professor of Law, UDC David A. Clarke School of Law
Wendi Warren H. Binford, Professor of Law & Director, Clinical Law Program, Willamette University
Merle Weiner, Philip H. Knight Professor of Law, University of Oregon
Barbara Woodhouse, LQC Lamar Professor of Law, Emory University School of Law
Paula Galowitz, Clinical Professor of Law Emerita, New York University School of Law
Ashley Binetti, Dash/Muse Fellow, Georgetown University Law Center, Human Rights Institute
Sarah Rogerson, Clinical Professor of Law, Albany Law School
Mary Helen McNeal, Professor of Law, Syracuse University College of Law
Lindsay Harris, Assistant Professor of Law, University of the District of Columbia Law
Denise Gilman, Clinical Professor, University of Texas Law School
Susan Hazeldean, Assistant Professor of Law, Brooklyn Law School
Courtney Cross, Assistant Professor of Clinical Legal Instruction, University of Alabama School of Law
Phyllis Goldfarb, Jacob Burns Foundation Professor Emerita of Clinical Law, George Washington University Law School
Josh Gupta-Kagan, Associate Professor, University of South Carolina School of Law
Jeffrey Baker, Associate Clinical Professor of Law, Pepperdine University School of Law
Laila Hlass, Professor of Practice, Tulane University, School of Law
Erica Schommer, Clinical Associate Professor of Law, St. Mary's University School of Law
Johanna Bond, Professor of Law, Washington and Lee University
Patrick Parenteau, Professor of Law, Vermont Law School
Elissa Steglich, Clinical Professor, University of Texas School of Law
Bridget Crawford, James D. Hopkins Professor of Law, Elisabeth Haub School of Law at Pace University
Stephanie Goldenhersh, Assistant Director for the Family Practice/Senior Clinical Instructor, Harvard Legal Aid Bureau
Rebecca Zietlow, Charles W. Fornoff Professor of Law and Values, University of Toledo College of Law
Melissa Breger, Professor of Law, Albany Law School
Sally Frank, Professor of Law, Drake University
Katherine Gallagher, Visiting Clinical Professor of Law, CUNY School of Law
Robert Seibel, Distinguished Visiting Prof. (ret.), California Western School of Law
Jessica Emerson, Director, Human Trafficking Prevention Project, University of Baltimore School of Law
Lisa Davis, Associate Professor of Law, CUNY Law School
Julie Saffren, Lecturer, Domestic Violence, Santa Clara University School of Law
Elizabeth MacDowell, Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas
Natalie Nanasi, Assistant Professor, SMU Dedman School of Law
Carolyn Blum, Clinical Professor of Law Emerita, Berkeley Law
Janet Calvo, Professor, CUNY School of Law

Dina Haynes, Professor of Law, New England Law|Boston
Margaret Flint, Professor of Law, Elisabeth Haub School of Law, Pace University
Nermeen Arastu, Associate Professor, CUNY School of Law
Laurie Kohn, Associate Professor of Law, The George Washington Law School
Sabi Ardalan, Assistant Clinical Professor, Harvard Law School
Kelly Browe-Olson, Director of Clinical Programs, UA Little Rock
Melanie DeRousse, Clinical Associate Professor of Law, University of Kansas School of Law
Michelle Madden Dempsey, Harold Reuschlein Scholar Chair and Professor of Law, Villanova University Charles Widger School of Law
Mariela Olivares, Associate Professor of Law, Howard University School of Law
Cynthia Fountaine, Professor of Law, Southern Illinois University School of Law
Erin Buzuvis, Professor, Western New England University School of Law
D'lorah Hughed, Director of Externships, University of California, Irvine
Wendy Seiden, Clinical Law Professor, Family Violence Clinic, Chapman Fowler School of Law
Mary Gundrum, Director, Immigrant Children's Justice Clinic, Florida International University, College of Law
Briana Beltran, Clinical Teaching Fellow, Cornell Law School
Rachel Lopez, Associate Professor of Law, Drexel University, Kline School of Law
Cynthia Bowman, Professor of Law, Cornell Law School
Ruth Colker, Distinguished University Professor, Moritz College of Law
David Cohen, Professor of Law, Drexel University Thomas R. Kline School of Law
Anna Mastroianni, Professor, University of Washington School of Law
Alicia Kelly, Professor, Widener University Delaware Law School
Deborah Epstein, Professor of Law, Georgetown
Erin Collins, Assistant Professor of Law, University of Richmond School of Law
Amy Applegate, Clinical Professor of Law, Indiana University Maurer School of Law
Cynthia Hawkins, Professor of Law, Stetson University College of Law
Felice Batlan, Professor of Law, Chicago-Kent College of Law
Kris McDaniel-Miccio, Professor of Law, University of Denver Sturm College of Law
Shirley Lin, Acting Assistant Professor of Law, New York University School of Law
Theresa L. (Terry) Wright, Professor/Director of Externships, Willamette University (formerly at Lewis and Clark School of Law)
Kimberly Jordan, Clinical Professor of Law, Moritz College of Law, The Ohio State University
Amy Dillard, Associate Professor of Law, University of Baltimore School of Law
Joan Howarth, Distinguished Visiting Professor, Boyd School of Law, UNLV
Marcia McCormick, Professor of Law and Women's and Gender Studies, Saint Louis University School of Law
Elizabeth McCormick, Associate Clinical Professor of Law, University of Tulsa College of Law
Katherine Puzone, Associate Professor of Law, Juvenile Defense Clinic, Barry University School of Law
Marie Failinger, Professor of Law, Mitchell Hamline School of Law
Stephanie Willbanks, Professor of Law, Vermont Law School
Laura Padilla, Professor of Law, California Western School of Law
Beth Posner, Clinical Associate Professor of Law, University of North Carolina School of Law
Arlene Kanter, Professor of Law, Syracuse University

Joan Meier, Professor of Law, George Washington University Law School
Ann Bartow, Professor of Law, University of New Hampshire School of Law
Ilene Klein, Clinical Law Professor, New England Law/Boston
Naomi Cahn, Professor, George Washington University Law School
Allison Korn, Assistant Dean for Experiential Education, UCLA School of Law
Erin Jacobsen, Managing Attorney/Assistant Professor, Vermont Law School
Gowri Ramachandran, Professor of Law, Southwestern Law School
Daria Fisher Page, Clinical Associate Professor, University of Iowa College of Law
Angelique EagleWoman, Visiting Professor, Mitchell Hamline School of Law
Eric Sirota, Clinical Teaching Fellow, Michigan Law School
Florence Roisman, William F. Harvey Professor of Law and Chancellor's Professor, Indiana University Robert H. McKinney School of Law
Doris Brogan, Professor of Law, Harold Reuschlein Leadership Chair, Villanova University Charles Widger School of Law
Merrick Rossein, Professor, CUNY School of Law
Kalyani Robbins, Professor of Law, Florida Internation University College of Law
Seema Mohapatra, Associate Professor of Law, Indiana University Robert H. McKinney School of Law
Macarena Saez, Faculty Director, Center for Human Rights & Humanitarian law, American University Washington College of Law
Suellyn Scarnecchia, Clinical Professor of Law, University of Michigan
Cyra Choudhury, Professor of Law, FIU College of Law
Martha Albertson Fineman, Robert W Woodruff Professor of Law, Emory University
Ann Cammett, Sr. Associate Dean of Academic Affairs and Professor of Law, CUNY School of Law
Sally Goldfarb, Professor, Rutgers Law School
Margaret Johnson, Professor of Law, Co-Director, Center on Applied Feminism, University of Baltimore School of Law
Shawn Boyne, Professor of Law, IU Robert H. McKinney School of Law
Lynn Daggett, Smithmoore P. Myers Chair and Professor, Gonzaga Law School
Elizabeth Schneider, Rose L. Hoffer Professor of Law, Brooklyn Law School
Bridgette Carr, Clinical Professor of Law and Director Human Trafficking Clinic, University of Michigan Law School
Richard Humphrey, Legal Research Instructor, Indiana Univ. McKinney School of Law
Anette Sikka, Assistant Professor, University of Illinois Springfield
Beverly Balos, Clinical Professor of Law Emerita, University of Minnesota
Margaret Ivey, Clinical Professor of Law, University of Richmond School of Law
Pamela A. Vesilind, Visiting Assistant Professor of Law, Vermont Law School
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*The parties listed here have signed in their individual capacities.

cc:
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Sen. Orrin Hatch
Sen. Patrick Leahy
Sen. Lindsey Graham
Sen. Dick Durbin
Sen. Sheldon Whitehouse
Sen. Michael Lee
Sen. Amy Klobuchar
Sen. Ted Cruz
Sen. Christopher Coons
Sen. Ben Sasse
Sen. Richard Blumenthal
Sen. Jeff Flake
Sen. Mazie Hirono
Sen. Mike Crapo
Sen. Cory Booker
Sen. Thom Tillis
Sen. Kamala Harris
Sen. John Kennedy

July 9, 2018

The Honorable Mitch McConnell
Majority Leader
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Charles E. Schumer
Minority Leader
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Dear Majority Leader McConnell, Minority Leader Schumer, Chairman Grassley and Ranking Member Feinstein:

We are classmates and fellow alumni of Judge Brett M. Kavanaugh from Georgetown Prep, a Jesuit high school in the Washington, D.C. area. At Georgetown Prep, as at all Jesuit high schools around the world, young men are instilled with the belief that they should strive to be "men for others." We represent a broad spectrum of achievements, vocations, political beliefs, family histories and personal lifestyles. We unite in our common belief that Judge Brett M. Kavanaugh is a good man, a brilliant jurist, and is eminently qualified to serve as an Associate Justice on the U.S. Supreme Court.

Brett was a team captain and multi-sport athlete, and an active participant in our student body. He continued his academic achievements at Yale University, both as an undergraduate and a law student. Whether as a clerk for judges in both the Third and the Ninth Circuits, a clerk for U.S. Supreme Court Associate Justice Anthony M. Kennedy, a U.S. Solicitor General Fellow, or a U.S. Justice Department lawyer, Brett's defining characteristics were his sharp intellectual ability, affable nature, and a practical and fair approach devoid of partisan purpose. These were the same traits that made him stand out at Georgetown Prep, and distinguished him on the U.S. Court of Appeals for the D.C. Circuit. He is a devoted son, husband, father and friend and despite his great achievements, he remains the same grounded and approachable person that we met in High School.

Whether it is his long history of accomplishments in public service, volunteering at local civic organizations, serving meals to the less fortunate, or coaching our kids' basketball teams, Brett has remained a "man for others" through his actions and not mere words. He has consistently demonstrated his dedication to the premise that the pursuit of helping people, and not a political objective, fulfills the promise of human

potential and governmental purpose. This, we respectfully suggest, should be the touchstone of the inquiry that you must now conduct.

The nomination process of a Supreme Court Justice has particular significance in our nation's history, and this one is no exception. Although some may use the confirmation process as a rallying cry for advancing deeply and honestly held beliefs for many groups in our country, we earnestly ask you to rise above the passions and examine who Brett Kavanaugh is and whether his juridical ability, extensive experience and many accomplishments in public service qualify him to the position of an Associate Justice. Given our diverse backgrounds and beliefs, we acknowledge that not all of us may agree with each of his conclusions or decisions, nor with the positions that various groups may espouse during his confirmation process. Nevertheless, we are united in the belief that Brett will discharge his duty in the same manner he always has: impartially, justly and with intellectual honesty and consistency.

We, his classmates and fellow alumni, are confident that you will conclude what we already have known for approximately 35 years because of his character and intellect: Brett M. Kavanaugh is an excellent jurist who is singularly qualified to be an Associate Justice on the U.S. Supreme Court. We respectfully request that you promptly and fully consider his nomination as an Associate Justice to the U.S. Supreme Court.

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MATTHEW H. MEAD
GOVERNOR

THE STATE OF WYOMING

2323 Carey Avenue
CHEYENNE, WY 82002

Office of the Governor

July 26, 2018

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Schumer
Democratic Leader
United States Senate
Washington, D.C. 20510

RE: Nomination of Judge Brett M. Kavanaugh

Dear Leader McConnell and Leader Schumer,

The Republican Governors Association recently submitted a letter to you supporting Judge Brett M. Kavanaugh's nomination to the Supreme Court of the United States. I joined that letter, and offer this letter as additional support for Judge Kavanaugh's nomination.

Judge Kavanaugh embodies the qualities we need in an independent, thoughtful judiciary. He maintains the highest standards. He brings broad experience in both the public and private sector. During his tenure on the United States Court of Appeals for the D.C. Circuit, Judge Kavanaugh has written nearly 300 opinions establishing himself as a staunch defender of the Constitution and the rule of law.

Judge Kavanaugh will be an effective and fair member of the United States Supreme Court. I ask the United States Senate to timely complete the confirmation process.

Sincerely,

Matthew H. Mead
Governor

MHM:mc

cc: The Honorable Chuck Grassley, Chairman, U.S. Senate Committee on the Judiciary
The Honorable Dianne Feinstein, Ranking Member, U.S. Senate Committee on the Judiciary
The Honorable Mike Enzi, U.S. Senate
The Honorable John Barrasso, U.S. Senate
The Honorable Liz Cheney, U.S. House of Representatives

PHONE: (307) 777-7434

FAX: (307) 632-3909

LISA GRAVES [redacted]

September 10, 2018

Chairman Charles Grassley
Ranking Member Diane Feinstein
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: The Nomination of Judge Brett Kavanaugh

Dear Chairman Grassley and Ranking Member Feinstein:

I write to provide information to the United States Senate Committee on the Judiciary about the nomination of Judge Brett Kavanaugh for a lifetime position on the U.S. Supreme Court.

I request that the Committee fully investigate Judge Kavanaugh's testimony to the Committee that is contradicted by documentary evidence in public records from his tenure in the White House.

As described in the attached article, I believe that Judge Kavanaugh lied to this Committee repeatedly about his knowledge of confidential materials that were stolen from this Committee, from the U.S. Senate. That includes confidential research I prepared for Senator Patrick Leahy when he was the Ranking Member of this Committee, along with the memos, draft statements, letters, talking points, emails, and other material of my peers working on this Committee.

A full investigation with full access to relevant evidence of communications between Mr. Kavanaugh and those named and implicated in the Senate Sergeant at Arm's investigation is essential to protect the integrity of the courts and the Senate's advice and consent responsibilities under Article II, section 2, of the U.S. Constitution.

I believe Judge Kavanaugh misled Members of this Committee in the hearings on his nomination to the U.S. Court of Appeals for the D.C. Circuit. Take, for example, this exchange from 2004:

CHAIRMAN HATCH: Now, this is an important question. **Did Mr. Miranda ever share, reference, or provide you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee?**

BRETT KAVANAUGH. **No, I was not aware of that matter ever until I learned of it in the media late last year.**

This past week, the Committee and the American people learned for the first time that there is strong evidence that this is not true, including this communication excerpted below:

From: Manuel Miranda (Manuel_Miranda@judiciary.senate.gov)
To: Brett Kavanaugh [and two others working on nominations for the administration]
Re: help requested

"I would ask that no action be taken by any of your offices on this for now except as I request. It is important to the recipients of this email that and up your chains of authority only. As I mentioned on Friday, **Senator Leahy's staff has distributed a 'confidential' letter to Dem counsel on Thursday** from [name redacted] who served as the attorney for the 'Jane Doe' in some or several of the Texas bypass cases. According to either the letter or the Leahy staff Ms. [redacted in 2018] sent this letter in the strictest confidence because she is up for partner and believes she will be fired if it is publicized. Several members of her firm are supporters of the [Justice Priscilla] Owen nomination. **Leahy's staff is only sharing it with Democratic counsel.** However, we might expect this letter to be used like the Brenda Folkey letter in the Pickering nomination at a moment when we are unable to respond."

Miranda asserts that he purportedly has not seen the letter while describing its contents and actually quoting from it about Justice Owen's "appalling insensitivity" to pregnant minors seeking an abortion and providing more details.

Notably, Judge Kavanaugh has told his Committee that it was normal for him to get information about Democratic strategies and questions on nominees, as if this were a legislative matter. But, as he knows fully and this Committee knows full well, the battles over the appointment of judges have been pitched battles. No Democratic staffer would have shared information about a confidential letter distributed only to Democratic counsel about a nominee like Justice Owen, who the Democratic Senators on the Senate Judiciary Committee unanimously and strongly opposed. Judge Kavanaugh's statements on this too are misleading and contrary to reality.

There is more in the limited record that is available to the Committee that contains similar information, including an email from Miranda to Kavanaugh that includes **talking points** cut and pasted from my research for Senator Leahy regarding the Senate precedent for obtaining records from the Executive Branch of the writings of nominees to the judiciary and the Justice Department. The record thus far warrants a full investigation into this very serious matter.

In addition, as Senator Leahy stated at the hearing last week, another email relates to Miranda's request to meet with Kavanaugh to give him confidential **paper files** about the Ranking Member of this Committee and then-Senator Joseph Biden. Judge Kavanaugh denied receiving such files.

The Senate's own Sergeant at Arms wrote in its investigative report to this Committee that Miranda admitted that he had a paper file folder of the most important Democratic staffer documents, but he told him that he "lost" it. The Sergeant at Arms also noted that **Miranda "refused to give investigators the names of his White House legislative contacts."**

Only in connection with the nomination in the past few weeks has this Committee begin to see how closely in contact Miranda was with Kavanaugh, even attending special retreat with him and C. Boyden Gray to strategize about judicial nominations.

And, the Sergeant at Arms report makes clear that Miranda gave a set of the confidential files of Democratic staffers to C. Boyden Gray's group, the Committee for Justice, to Sean Rushton. The Sergeant at Arms noted in his report that **Gray and Rushton refused to respond to its request** during the 2003-2004 investigation which was dependent on "voluntary cooperation," that is no subpoenas regarding witnesses or evidence. It also noted that other GOP staff had some of the Democratic files. Other emails before this Committee mention spying and moles.

I believe it would be utterly irresponsible for this Committee or the Senate to schedule a vote on Judge Kavanaugh's nomination until these matters are fully investigated. I believe the partial record shows that he lied under to this Committee and the people of the United States.

A lifetime appointment to our Nation's highest court is too important to rush through, especially under these circumstances. And no one is entitled to such an appointment. Our nation needs fair courts and fair judges, and I believe that Judge Kavanaugh's record of advancing his partisan agenda and his dishonest testimony to this Committee on the confidential material stolen from the Senate's own servers render him unworthy of elevation to a higher court or any court.

Thank you for considering my views.

Sincerely,

Lisa Graves

Lisa Graves

August 29, 2018

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

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We are writing to supply information about Judge Brett Kavanaugh and his work with students at Harvard Law School.

Judge Kavanaugh reached out to the Harvard Law School chapter of the Black Law Students Association (BLSA) in 2017 to express interest in planning a clerkship event for our members. On March 27, the Judge participated in a panel—jointly with Judge Paul Watford of the Ninth Circuit Court of Appeals—to provide information to BLSA students about the clerkship hiring process. While the event was marketed for first year students, all three class years were represented.

Judge Kavanaugh explained that one of his priorities is to encourage more students of color to apply for judicial clerkships. Several recent reports have indicated that minority law students are significantly underrepresented in clerkship positions in the Federal Judiciary. The Judge provided his insights and advice on how students should navigate the entire process, including: developing a list of judges, handling interviews, and succeeding as a law clerk. But most critically, he continually reiterated the value and importance of clerkships.

The Judge not only graciously offered his time for that panel, but also has continued to mentor numerous Harvard students whom he has taught or worked with in a number of capacities.

Please note that this letter is not a statement from BLSA as an organization. The students who have signed below write to express appreciation for the Judge's enthusiasm on this issue and hope that his efforts will be taken into consideration.

Sincerely,

The following members of Harvard BLSA in their individual capacity:

[redacted]

Bradley Pough
HLS '18

2000

Hussein Elbakri
HLS '18

[redacted]

Brett Johnson
HLS '18

William Smith
HLS '18

Abraham Williamson
HLS '18

September 17, 2018

To the United States Congress:

We, of the Holton Arms Class of 1984, are writing on behalf of our friend and classmate, Dr. Christine Blasey Ford, to attest to her honesty, integrity, and intelligence; and to contend that her decision to provide information pertaining to a sexual assault is not a partisan act. It is an act of civic duty and the experience she described in her letter needs to be seriously considered. We represent all political parties and we support Christine bringing this matter forward.

Christine has had to weigh the personal cost of sharing her experience against her own conscience. We recognize that this has been an extraordinarily difficult decision and admire her courage for being willing to speak her truth when it would have been easier to stay silent.

As sexual assault violates a woman's most fundamental rights, it must be considered a failure of character at any age—regardless of the subsequent accomplishments and power attained by the offender. It should not be dismissed as youthful bad judgment, however aberrant it may be.

In light of Christine's experience, we hold our elected officials responsible for conducting a more thorough and comprehensive review of this Supreme Court nominee. Having taken this courageous step, Christine deserves your due consideration on this serious matter.

We stand with our friend Dr. Christine Blasey Ford and admire her honesty and resolve on behalf of our nation.

Respectfully,

Allyson Abrams Bergman
Robin Bostrom
Ana Coyne
Amy Englehardt
Andrea K. Evers
Holly Huelsman Fuller
Sandra Engle Gichner
Daphne Holt
Jenny Yerrick Martin
Francine Laden
Kim Litle
Monica McLean
Samantha Semerad Guerry
Estela M. Radan
Martha Mispireta Shannon
Lisa Shapiro
Laura Simms Smith
Kendra South
Dana Stewart
Julia Kogan Tanner
M. Sydney Trattner
Virginia White
Stacey Kavounis Wilson

IACP
125 Years 1893 - 2018
International Association of Chiefs of Police

44 Canal Center Plaza, Suite 200 | Alexandria, VA 22314, USA | 703.836.6767 or 1.800.THEIACP | www.theIACP.org

August 31, 2018

The Honorable Chuck Grassley
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Dianne Feinstein
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of the International Association of Chiefs of Police (IACP), I am pleased to inform you of our support for the nomination of Judge Brett M. Kavanaugh to be the next Associate Justice on the United States Supreme Court.

As you know, the IACP is the world's largest association of law enforcement leaders, with more than 30,000 members in 152 countries. Throughout its 125-year history, the IACP has been committed to advancing the law enforcement profession and promoting public safety. It is for this reason, that when the IACP chooses to endorse an individual, we do not take it lightly, and take into careful consideration their background, experience, and previous opinions issued as they relate to law enforcement and criminal justice issues.

Throughout his career, Judge Kavanaugh has consistently demonstrated a firm understanding of, and a deep appreciation for, the challenges and complexities confronting our nation's law enforcement officers. During his 12 years with the U.S. Court of Appeals for the D.C. Circuit, Judge Kavanaugh has clearly displayed his profound dedication to ensuring that our communities are safe and that the interests of justice are served.

The IACP believes that Judge Kavanaugh's years of experience, his expertise, and unwavering dedication to the rule of law are evidence of his outstanding qualifications to serve as the next Associate Justice of the United States Supreme Court. The IACP urges the Judiciary Committee and the members of the United States Senate to confirm Judge Kavanaugh's nomination.

Thank you for your attention to this matter. Please let me know how the IACP may be of further assistance in this vitally important process.

Sincerely,

Louis M. Dekmar
President

President
Chief Louis M. Dekmar
LaGrange, GA, Police Department

Immediate Past President
Chief Donald W. De Lucca
Doral, FL, Police Department

First Vice President
Chief Paul M. Cell
Monmouth State University, NJ, Police Department

Second Vice President
Chief Steven R. Casstevens
Buffalo Grove, IL, Police Department

Third Vice President
Chief Cynthia E. Renaud
Santa Monica, CA, Police Department

Fourth Vice President
Chief Dwight E. Henninger
Vail, CO, Police Department

Vice President at Large
Chief Richard E. Smith
Wakefield, MA, Police Department

Vice President at Large
Chief Wade Carpenter
Park City, UT, Police Department

International Vice President
Assistant Commissioner Joe Oliver
Royal Canadian Mounted Police Canada

Vice President-Treasurer
Chief Ken A. Walker
West University Place, TX, Police Department

General Chair Division of State Associations of Chiefs of Police
Chief Timothy Lowery
Florissant, MO, Police Department

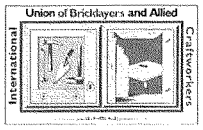
General Chair Division of State and Provincial Police
Colonel Craig Price
South Dakota Highway Patrol

General Chair of the Midsize Agencies Division
Chief David B. Rausch
Knoxville, TN, Police Department

Parliamentarian
Michael A. Caldwell
Delong, Caldwell, Bridgers, Fitzpatrick & Benjamin, LLC, Dunwoody, GA

Executive Director / Chief Executive Officer
Vincent Talucci
Alexandria, VA

Deputy Executive Director / Chief Operating Officer
Terrence M. Cunningham
Alexandria, VA



International Union of Bricklayers and Allied Craftworkers

James Boland
President

September 21, 2018

Dear Senator:

On behalf of the International Union of Bricklayers and Allied Craftworkers and our approximately 70,000 members in the United States, I am writing to express our strong opposition to the nomination of Judge Brett Kavanaugh for Associate Justice of Supreme Court of the United States. Throughout his career, Judge Kavanaugh has demonstrated a strong bias toward protecting the rich and powerful, and diminishing the rights of workers, consumers, and those at the margins of our society. There is every indication that, should he assume this position, he would continue down this path at a time when we can least afford it.

As a Union, we are particularly concerned with Judge Kavanaugh's apparent disdain for the rights of workers. This disdain should be extremely concerning to anyone who cares about the plight of workers in America. In the decades following World War II, the United States enjoyed a strong middle-class and an economy that allowed both employers and workers to share in the benefits of growth in productivity. It was no coincidence that during these years, American union density was at its peak.

Sadly, those days are gone. Today, the United States has vast inequality in income and wealth. And that inequality is growing every day. Unsurprisingly, this rise in inequality corresponds with a sharp decline in union density. This shift is no accident; it is the direct result of policy choices made by anti-worker politicians and activist judges and an aggressive effort by the ultra-rich and corporate interests to rig the system to protect their interests at the expense of the rest of us. Throughout his career, Judge Kavanaugh has vigorously pursued an anti-worker agenda that has made him the poster child of this elitist agenda.

There is no shortage of cases from which to draw this conclusion, but one of the worst examples of Judge Kavanaugh's anti-worker bias was in a case involving a trainer who was killed on the job by a killer whale at SeaWorld in Florida.[1] The Occupational Safety and Health Administration (OSHA) investigated and found that SeaWorld was well aware of the threat posed to workers—in fact it was the third trainer death involving that particular whale. OSHA fined SeaWorld, finding that the theme park had willfully endangered its employees. An Administrative Law Judge upheld OSHA's fine, and on appeal the United States Court of Appeals for the District of Columbia Circuit—the powerful appellate court on which Judge Kavanaugh currently sits—also upheld the decision. But Judge Kavanaugh would not have done so; he wrote a dissent arguing that it was "paternalistic"[2] to expect the theme park to take actions to provide a safe workplace. Judge Kavanaugh essentially took the position that the employer bore no responsibility; the employees assumed the risk by taking the job. This opinion exemplifies Judge

[1] *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014).
[2] *Id.* at 1217.

Kavanaugh's extreme and outdated ideology that harkens back to the days when mining companies argued against child labor laws because the children "voluntarily" chose to work in dangerous mines

Unfortunately, this is not the only example of Kavanaugh's anti-worker animus. He has routinely attacked National Labor Relations Board decisions when they have protected the rights of workers. He once voted, despite clear Supreme Court precedent to the contrary, that undocumented immigrants could not be considered "employees" under the National Labor Relations Act (NLRA), advancing a legal theory under which undocumented immigrants could potentially be excluded not only from the NLRA but from laws guaranteeing other basic labor protections such as the minimum wage or overtime pay.[3] He has made it easier for employers to avoid their obligations under collective bargaining agreements,[4] he has voted to silence the voice of workers in disputes,[5] and he has voted to protect union busters who work to prevent workers from joining together to protect their rights in the workplace.[6]

In our view, Kavanaugh's extreme anti-worker bias is reason enough to oppose his confirmation. However, in taking a broader view of his potential impact as a member of the nation's highest court, there are many other good reasons to oppose his confirmation. His radical ideology threatens to upend established law and precedent and turn back the clock on women's reproductive rights, civil rights, consumer rights, environmental protections, and other rights that provide essential protections to ordinary Americans and serve as the bedrock for our society today. Perhaps most acutely troubling, given the current officeholder, Kavanaugh's extreme views on holding the President responsible for violating the law are disturbing.

Moreover, the serious allegations regarding his personal behavior present additional cause for concern. Any credible accusation leveled against Judge Kavanaugh should be investigated by the proper authorities. Further, we urge the Chairman and Ranking Member to ensure that all members of the Committee have a reasonable opportunity to collect and weigh all the relevant evidence before proceeding with the nomination.

Lastly, the process for consideration of this nomination has been irresponsible, to say the least. Judge Kavanaugh has been nominated for a lifetime position on the highest court in the land. Yet the nomination is being rushed through in a way that does not allow for thoughtful deliberation. The decision to conceal thousands of pages of documents relevant to Judge Kavanaugh's public service demonstrates an intentional effort to thwart the kind of transparency the Senate and the public should expect when considering an appointment that will have a profound impact on generations to come.

For these reasons, we urge you to vote against the confirmation of Judge Kavanaugh. Americans deserve better representation.

Sincerely,

James Boland
President

---

[3] *Agri Processor Co. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008).
[4] *Island Architectural Woodwork, Inc. v. NLRB*, 892 F.3d 362 (D.C. Cir. 2018).
[5] *Verizon New England Inc. v. NLRB*, 826 F.3d 480 (D.C. Cir. 2016).
[6] *NLRB v. CNN Am., Inc.*, 865 F.3d 740 (D.C. Cir. 2017).

2005

Iowa House Republican Caucus

August 20, 2018

The Honorable Charles Grassley
Chairman
United States Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C. 20510
chuck_grassley@grassley.senate.gov

The Honorable Dianne Feinstein
Ranking Member
United States Judiciary Committee
331 Hart Senate Office Building
Washington, D.C. 20510
senator@feinstein.senate.gov

Dear Senators Grassley and Feinstein:

As members of the Iowa House of Representatives, we would encourage all members of the United States Senate to confirm Judge Brett Kavanaugh in a respectful and efficient manner.

Senators Grassley and Ernst know better than most how important it is for elected officials to listen to the people they represent. That's why we have spent the past several months knocking on doors to talk with Iowans. What we consistently hear is that they have grown tired of the obstructionism that they constantly see from Washington DC. Iowans expect Congress to do its work and address the priorities of the people that elected them.

You can begin restoring the trust of these folks by quickly confirming Judge Brett Kavanaugh as our next Justice to the Supreme Court.

Americans deserve a Supreme Court Justice who is fair and has a deep respect for the rule of law. Most importantly, they deserve someone who interprets our Constitution the way it is written, rather than performing mental gymnastics to reach a pre-determined outcome based on personal preference. Judge Kavanaugh exhibits these important qualities which makes him clearly qualified to serve.

Judge Kavanaugh's educational, professional, and personal achievements are unmatched. He earned his B.A. from Yale College, graduating with honors, and went on to earn his law degree from Yale Law School. Following graduation, he clerked for several judges, most notably Justice Anthony Kennedy, and held a number of legal roles in both the public and private sectors. He was appointed to the United State Court of Appeals in 2006.

Judge Kavanaugh is also widely respected in the judicial community and by members of both political parties. When first nominated to the Court of Appeals, he was confirmed with bipartisan support and his writings have been cited by numerous judges and other legal professionals.

While some may not agree with every position he has taken during his long legal career, there is near universal agreement that he is highly qualified to serve on the Supreme Court.

Americans are tired of gridlock. Show your constituents that you are capable of doing what they sent you to Washington to do, and quickly confirm Judge Brett Kavanaugh as our next Justice on the Supreme Court.

Respectfully,

Representative Linda Upmeyer
Speaker of the House

Representative Chris Hagenow
Majority Leader

Representative Rob Bacon
Representative Chip Baltimore
Representative Clel Baudler
Representative Terry Baxter
Representative Michael Bergan
Representative Brian Best
Representative Jane Bloomingdale
Representative Jacob Bossmann
Representative Gary Carlson
Representative Dave Deyoe
Representative Cecil Dolecheck
Representative Dean Fisher
Representative Joel Fry
Representative Tedd Gassmann
Representative Pat Grassley
Representative Stan Gustafson
Representative Kristi Hager
Representative Mary Ann Hanusa
Representative Greg Heartsill
Representative Dave Heaton
Representative Lee Hein
Representative Jake Highfill
Representative Ashley Hinson
Representative Steve Holt
Representative Chuck Holz
Representative Dan Huseman
Representative Jon Jacobsen

Representative Megan Jones
Representative Bobby Kaufmann
Representative David Kerr
Representative Jarad Klein
Representative Kevin Koester
Representative John Landon
Representative Shannon Lundgren
Representative Dave Maxwell
Representative Andy McKean
Representative Gary Mohr
Representative Norlin Mommsen
Representative Tom Moore
Representative Ross Paustian
Representative Dawn Pettengill
Representative Walt Rogers
Representative Sandy Salmon
Representative Mike Sexton
Representative Larry Sheets
Representative David Sieck
Representative Rob Taylor
Representative Guy Vander Linden
Representative Ralph Watts
Representative Matt Windschitl
Representative John Wills
Representative Gary Worthan
Representative Louie Zumbach

cc: President Donald Trump
Vice President Mike Pence

BRAD ZAUN
STATE SENATOR
Twentieth District
Statehouse: (515) 281-3371

HOME ADDRESS
7032 Holcomb Ave.
Urbandale, IA 50322
brad.zaun@legis.iowa.gov

The Senate
State of Iowa
Eighty-seventh General Assembly
STATEHOUSE
Des Moines, Iowa 50319

COMMITTEES

Judiciary, Chair
Labor and Business Relations, Vice Chair
Commerce
State Government

August 17, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Chairman Grassley:

During our work in the Iowa Senate, we consistently focus on laws that will expand and protect freedom for the people of Iowa. We spend a lot of time working on the language and the policy, making sure we get it just right, as do lawmakers all across the United States. When laws are challenged in our country, they can make their way as high as the Supreme Court. In those instances, the judges who preside over these cases determine the constitutionality of the laws passed by the people's elected representatives. This role is why Supreme Court justices are so important and why we are supporting President Trump's nominee to the United States Supreme Court, Brett Kavanaugh.

We firmly believe the role of a judge in our government is to interpret the law as it is written. Judge Kavanaugh has a long record of doing just that and interpreting the Constitution as it was originally intended. He is supremely qualified for this appointment, dedicating most of his life to public service. He has served for over a decade as a federal judge and spent a number of years as Associate Independent Counsel, Associate White House Counsel, and Staff Secretary to President George W. Bush. He has over 300 published opinions, often cited by judges across the country and even supported by the Supreme Court.

In 1990 Judge Kavanaugh graduated from Yale Law School. Later he would become a law clerk to Justice Kennedy, serve as a Bristow Fellow in the Office of the Solicitor General at the U.S. Department of Justice and become a Samuel Williston Lecturer in Law at Harvard Law School.

Judge Kavanaugh has spent many years working to improve the lives of others and working to protect the rights of private citizens, while strictly interpreting the laws and our Constitution as

they were written. He will be an advocate for freedom for the people of the United States and an outstanding addition to the Supreme Court.

Signed,

Senator Brad Zaun, Senate Judiciary Chairman
Senator Dan Dawson, Senate Judiciary Vice Chair
Senator Jack Whitver, Senate Majority Leader
Senator Charles Schneider, Senate President
Senator Jerry Behn
Senator Rick Bertrand
Senator Michael Breitbach
Senator Waylon Brown
Senator Jim Carlin
Senator Jake Chapman
Senator Mark Chelgren
Senator Mark Costello
Senator Jeff Edler
Senator Randy Feenstra
Senator Julian Garrett
Senator Tom Greene
Senator Dennis Guth
Senator Craig Johnson
Senator Tim Kapucian
Senator Tim Kraayenbrink
Senator Mark Lofgren
Senator Ken Rozenboom
Senator Jason Schultz
Senator Mark Segebart
Senator Tom Shipley
Senator Amy Sinclair
Senator Roby Smith
Senator Annette Sweeney
Senator Dan Zumbach

September 14, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We are women who have known Brett Kavanaugh for more than 35 years and knew him while he attended high school between 1979 and 1983. For the entire time we have known Brett Kavanaugh, he has behaved honorably and treated women with respect. We strongly believe it is important to convey this information to the Committee at this time.

Brett attended Georgetown Prep, an all-boys high school in Rockville, Maryland. He was an outstanding student and athlete with a wide circle of friends. Almost all of us attended all-girls high schools in the area. We knew Brett well through social events, sports, church, and various other activities. Many of us have remained close friends with him and his family over the years. Through the more than 35 years we have known him, Brett has stood out for his friendship, character, and integrity. In particular, he has always treated women with decency and respect. That was true when he was in high school, and it has remained true to this day.

The signers of this letter hold a broad range of political views. Many of us are not lawyers, but we know Brett Kavanaugh as a person. And he has always been a good person.

Sincerely,

Jennifer Slye Aniskovich
Elena Flores Aria
Raphael Bastian
Alice Richardson Boyle
Mary (Ginge) Koones Cabrera
Elizabeth M. Calhoun
Missy Bigelow Carr
Sharon Crouch Clark
Citsi Conway
Sibyl Smith Curtis
Karima Davis
Jo Anne Desjardins

2010

Julie DeVol
Colleen Treacy Dickerson
Nikki Deoudes Diess
Meg Williams Dietrick
Renate Dolphin
Lisa Natoli Draddy
Jane Marie Dunigan
Paula Duke Ebel
Nora Haley Ellison
Maura Fitzgerald
Susan Fitzgerald
Ann Fowler
Debbie H. Fulmer
Janet Gwozdz Gaffney
Genny Richards Gilday
Alexa Lilly Gilmore
Mary Beth Conway Greene
Mary Ellen Greene
Ellen Reese Hawkins
Lisa Molina Heaps
Melissa Hennessey
Virginia Hume
Beccy Moran Jackson
Jennifer Bartlett Jones
Maura Kane
Lori Weinrich Kaplan
Kelly Leonard
Maura M. Lindsay
Monica Mastal
Suzanne Matan
Meghan McCaleb
Stephanie Conway McGill
Stephanie Doolan McGrail
Ana Molina
Bridget Morris
Heather Murphy
Mary Ruppe Nash
Mary Nordberg O'Connor
Rachel Buchanan O'Hare
Lisa O'Neill
Karen Odyniec
Lisa Odyniec
Elizabeth (Betsy) Manfuso Pothier
Mae Joyce Rhoten
Grace Ronan
Alice Kelly Scanlon
Kellie Foster Schnidel
Kara Sheehan
Betsy Sheehy
Denise Gottron Sinay
Kristin Treacy
Cindy Urgo
Megan Williams

September 26, 2018

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We are men and women who knew Brett Kavanaugh well in high school. We have seen reports today that Julie Swetnick, who says she graduated from Gaithersburg High School, submitted a declaration to the Committee alleging that Brett participated in horrific conduct during high school, including targeting girls for gang rape. Nonsense. We never witnessed any behavior that even approaches what is described in this allegation. It is reprehensible.

In the extensive amount of time we collectively spent with Brett, we do not recall having ever met someone named Julie Swetnick. Nor did we ever observe Brett engaging in any conduct resembling that described in Ms. Swetnick's declaration.

Brett Kavanaugh is a good man. He has always treated women with respect and decency. He is a man of honor, integrity, and compassion. These shameful attacks must end. This process is a disgrace and is harming good people.

Russell Aaronson
Daniel Anastasi
Steve Barnes
Patrick Beranek
Michael Bidwill
Michael Boland
David Brigati
Missy Bigelow Carr
Sharon Crouch Clark
Steve Combs
Citsi Conway
Mark Daly
DeLancey Davis
Julie DeVol
Meg Williams Dietrick
Paula Duke Ebel
Michael Fegan
Maura Fitzgerald
Susan Fitzgerald
Jim Foley
Timothy Gaudette
James Gavin
William Geimer
Mary Beth Greene
Mary Ellen Greene
Daniel Hanley
Melissa Hennessy
Beccy Moran Jackson
Brian H. Johnston
Maura Kane
Kevin Kane
Thomas Kane
Amarie Kappaz
George M. Kappaz
Timothy Kirlin
Kelly Leonard
Maura M. Lindsay
John F. Loome, IV
Suzanne Matan
Meghan McCaleb

2012

Scott McCaleb
Bernard McCarthy, Jr.
Michael R. McCarthy
Stephanie McGill
Stephanie McGrail
Byron J. Mitchell
Sean Murphy
Paul G. Murray
Douglas D. Olson
John F. Ostronic
Elizabeth (Betsy) Manfuso Pothier
Matthew Quinn
Mark A. Quinn
Mae Joyce Rhoten
Mark Richardson
L. Maurice Rowe, IV
Stephen Royston
Alice Kelley Scanlon
James Sullivan
Cynthia Urgo
Donald Urgo, Jr
Patrick T. Waters
Megan Williams
Jodi Yeager

2013

The Office of Secretary of State

Brian P. Kemp
SECRETARY OF STATE

August 2, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Diane Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Grassley and Senator Feinstein,

I wrote to you earlier this year in support of then Justice Britt Grant, now Judge Britt Grant on the Court of Appeals for the Eleventh Circuit. Today, I write to urge your confirmation of one of her mentors, Judge Brett Kavanaugh, to the Supreme Court of the United States.

Judge Kavanaugh's nomination continues President Trump's track record of appointing excellent judges who will interpret the law as it is written, not based on their particular policy preferences. In remarks before George Mason University's Antonin Scalia Law School in June of 2016, Judge Kavanaugh shows that he has a clear understanding of the proper role of a judge:

> The judge's job is interpret the law, not to make the law or make policy. So read the words of the statute as written. Read the text of the Constitution as written, mindful of history and tradition. Don't make up new constitutional rights that are not in the text of the Constitution. Don't shy away from enforcing constitutional rights that are in the text of the Constitution.

This understanding, coupled with Judge Kavanaugh's impressive credentials, compels the Senate's bipartisan support of his nomination.

During his time on the Court of Appeals for the D.C. Circuit, the "Second Highest Court in the Land," Judge Kavanaugh earned distinction as a thought leader in American jurisprudence. Over a dozen times, the Supreme Court has fully endorsed his opinions, including several dissenting opinions, which ultimately became the law of the land. Judge Kavanaugh's opinions are

thoughtful, clearly written, and cited by distinguished members of the bench around the country. He recognizes that judicial opinions, in addition to being legally and logically accurate, must be readable and understandable to individuals to individuals from all walks of life.

Judge Kavanaugh's impeccable legal credentials cannot be overstated. After graduating from Yale Law School where he carefully honed his legal writing as an editor on the Notes Committee of the *Yale Law Journal*, Judge Kavanaugh clerked for Justice Anthony Kennedy on the U.S. Supreme Court. Currently, he teaches aspiring legal scholars at Harvard Law School, where he was hired by none other than Justice Elena Kagan. It is impossible to fully outline all of his professional accomplishments, but simply put, Judge Kavanaugh's record demonstrates the requisite intellectual horsepower, writing ability, work ethic, and collegiality to serve us well on the Supreme Court.

Additionally, Judge Kavanaugh exhibits all of the personal qualities that we must demand from our Supreme Court justices. He prioritizes his faith and family, raising two school-aged children with his wife, Ashley, and stands as a pillar in his community. In all circumstances, he exudes civility and respect for others. He is a man of unquestionable integrity and values.

Throughout his career, Judge Kavanaugh has built consensus, decided cases based on fact and law with no regard for his personal preferences, and shown enduring respect for the text, structure, and authority of our Constitution. I strongly urge Judge Kavanaugh's timely confirmation to serve on the Supreme Court of the United States. As always, I am at your service.

Sincerely,

Brian P. Kemp

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Michael L. Rowan*
Scott M. Hartinger*
Timothy C. Price**
Kathleen M. Dumais*
Thomas M. DeGonia, II
Andrea M. Conroy*
Margaret A. Feehan
Kathleen L. Wright*
Colleen Coffman
Donald J. Carswell, Jr.
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EQKMR&H

August 24, 2018

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Re: Nomination of Brett Kavanaugh to the United States Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein:

I am pleased to be writing for the second time to the Senate Judiciary Committee in support of a judicial nomination of Brett Kavanaugh, this time for the United States Supreme Court. My letter to Senator Spector of May 9, 2005 concerning Judge Kavanaugh's appointment to the DC Circuit is attached. All of my comments in that letter have been amply borne out.

Judge Kavanaugh has now served in one of the most important courts of the land with distinction, fairness and compassion. His copious opinions reflect a jurist fully aware of his dual role as an arbiter of the law and, as well, a resolver of problems that beset real live individuals, be they victims, defendants, pro se litigants, or federal and state employees. Judge Kavanaugh has a well earned reputation for literate and precise writing, as well as for courtesy to lawyers and litigants appearing before him.

Judge Kavanaugh continues to be a model Washingtonian. He coaches youth sports teams for his parish and participates in multiple moot courts and lectures at local colleges and law schools. He makes it his business to give back to his profession and to his city.

Judge Kavanaugh is a moderate who is not wed to any orthodoxy other than impartial justice, and the rule of law. The proof of that is now spread across twelve years of the Federal Reporter.

I would be happy to supply any particulars or other information which your Committee might need. Thank you for your consideration of this letter.

Very truly yours,

Paul F. Kemp

Enclosure

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Paul F. Kemp

301-217-5664 [redacted]

May 9, 2005

VIA FACSIMILE & FIRST CLASS MAIL

The Honorable Arlen Spector
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

RE: Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the District of Columbia

Dear Chairman Spector:

I am pleased to write in enthusiastic support of the nomination of Brett Kavanaugh, Esq., to the D.C. Circuit. Brett's legal background at Yale, Yale Law School, two federal circuit clerkships, and a clerkship with Justice Kennedy, needs no further comment. His career at Kirkland and Ellis, at the Whitewater Special Prosecutor's Office, and at the White House, all bespeak the highest integrity and professional accomplishment. I am a Fellow of the American College of Trial Attorneys, a former prosecutor and former Deputy Federal Defender, the current President of the Bar Association of Montgomery County, Maryland, and a lifelong Democrat. I consider myself a moderate, and cannot conceive of a more highly qualified candidate than Brett.

Several personal notes about Mr. Kavanaugh. For years as a prosecutor and in private practice in Washington and Montgomery County, Maryland, I worked with Brett's mother, Martha Kavanaugh. Her first career had been as a teacher at McKinley Tech High School in Northeast Washington. Martha later became a lawyer, and then a judge in Montgomery County, but has remained devoted to the inner city of Washington. She instilled in her son, Brett, the same devotion to our hometown, Washington, D.C., and its residents, which exists in him to this day.

Despite coming to Venable recently, I have remained active on the Criminal Justice Act panel in the federal courts in Maryland and the Fourth Circuit because of my love for the work. Recently, about four years ago, I had to withdraw from representing a criminal appellant in that Circuit, and called Mr. Kavanaugh to see if he could undertake this case on a *pro bono* basis. He readily agreed, without any regard to compensation or personal gain. His later White House appointment necessitated him giving the case to other counsel, but that episode exemplifies Mr. Kavanaugh's hunger for fairness, justice, and moderation, regardless of economic status of the client.

VENABLE LLP

In sum, like Justice Kennedy, Mr. Kavanaugh works at the highest intellectual level and is interested in the resolution of cases only on the merits, and in accordance with the established rule of law. Mr. Kavanaugh will be a judge of whom all Washingtonians, and all Americans, can be proud.

I would be pleased to supply any further information which your Committee might desire in support of Mr. Kavanaugh's nomination. Thank you for your review of this letter.

Very truly yours,

Paul F. Kemp

Paul F. Kemp

PFK:csl

COLLEGE OF LAW

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The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

August 10, 2018

Dear Senators Grassley and Feinstein:

As professors of constitutional law with special interest in separation of powers law and executive-legislative relations, we wanted to bring to your attention a particular area of concern we have about the pending nomination of Judge Brett Kavanaugh to the United States Supreme Court. Judge Kavanaugh, as you know, served in the George W. Bush Administration first in the Office of White House Counsel and then as Staff Secretary. The period of his service coincides with an unprecedented proliferation of presidential signing statements to accompany legislation President Bush signed into law, which often articulated utterly unfounded assertions of presidential power as possible limitations on the enforcement of such statutes.

The two of us led a study of Bush signing statements issued between 2001 and 2006, which documented their extraordinary content and volume.[1] In 2009, one of us published a summary of some our findings:[2]

> In his first six years in office, President George W. Bush raised nearly 1400 constitutional objections to roughly 1000 statutory provisions, over three times the total of his 42 predecessors combined. . . . [T]he Bush objections were frequently based on no legal authority whatever and had nothing to do with any plausible version of the public interest. . . .

---

[1] Neil J. Kinkopf and Peter M. Shane, Signed Under Protest: A Database of Presidential Signing Statements, 2001-2006 (2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022202.
[2] PETER M. SHANE, MADISON'S NIGHTMARE: EXECUTIVE POWER AND THE THREAT TO AMERICAN DEMOCRACY 135-140 (2009).

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Many of President Bush's constitutional objections fall within areas about which Presidents are typically protective. Of the nearly 1400 objections lodged in signing statements between 2001 and 2006, 84 mention potential interference with commander-in-chief powers, 144 mention interference with his constitutional authorities regarding diplomacy and foreign affairs, and another 183 point to alleged violations of the President's constitutional authorities to withhold or control access to information to protect foreign relations or national security, sometimes mentioning also his power to protect executive branch deliberative processes or the performance of the executive's constitutional duties.

Even in these traditional contexts, however, the substance of the President's objections is often extreme and hypertechnical. For example, one provision alleged to raise issues regarding executive privilege was a legal requirement in the Intelligence Authorization Act for Fiscal Year 2002 that certain reports to congressional intelligence committees must be in writing and include an executive summary. Similarly, the President found a violation of his foreign affairs powers in provisions of the so-called "Syria Accountability and Lebanese Sovereignty Restoration Act of 2003" that required him to take certain actions against Syria unless "the President either determines and certifies to the Congress that the Government of Syria has taken specific actions, or determines that it is in the national security interest of the United States to waive such requirements and reports the reasons for that determination to the Congress." In other words, Congress violates the Constitution – according to President Bush – when it requires him either to perform an act or not perform it, at his sole discretion. . . .

Going beyond these somewhat astonishing claims in areas of traditional presidential concern, there are hundreds in wholly novel areas. For example, the President objected to 214 legally imposed reporting requirements as interfering with his constitutional authority to recommend measures to Congress. Apparently, President Bush believes that the President's entitlement to speak his mind to Congress entails a prohibition on Congress demanding any other reports or recommendations from the executive branch. This is an historically baseless argument. As our original Secretary of the Treasury, Alexander Hamilton – the most presidentialist of the framers – clearly found himself as responsible for filing reports with Congress as to the President. Any constitutional infirmity in the requirement of executive reports to Congress is entirely a figment of the contemporary presidentialist imagination.

In his first six years in office, President George W. Bush lodged 346 objections based on Congress's alleged interference with the President's control over the "unitary executive." Many of these assertions seem to be merely "piling on" with regard to other, narrower objections. . . .Beyond these merely cumulative "unitary executive" objections, some invocations of the

unitary executive appear to be distinctively rooted in the Bush Administration's imagined authority to direct personally the discretionary activity of every member of the executive branch on any subject, regardless of what the law prescribes.

For example, one statutory provision to which the President objected on "unitary executive grounds" is Section 115 of a 2002 "Act to Provide for Improvement of Federal Education Research, Statistics, Evaluation, Information, and Dissemination and for Other Purposes." The act creates an Institute of Education Sciences within the Department of Education, to be run by a Director and a board. Section 115 requires the Director to propose Institute priorities for Board approval. The President of the United States, of course, has no inherent constitutional power over education. Yet, executive branch lawyers seem to imagine that it somehow violates the separation of powers either to allow the Director to recommend priorities or for the Board to decide on those priorities, without presidential intervention. In a similar vein is a "unitary executive" objection to a statutory provision requiring the Secretary of Agriculture to consider, in preparing his annual budget, the recommendations of an advisory committee on specialty crops. Although the law does not require the Secretary actually to implement those recommendations, but merely to take them into account, the President implicitly believes that he has inherent authority to forbid subordinates from giving any weight whatever to public policy input from any source other than the White House.

The assertions of presidential entitlement in many of these statements is nothing short of breathtaking. The prospect that a Supreme Court Justice might advance the theory, for example, that Congress has no constitutional authority to require reports from the executive branch of government over presidential objection is positively frightening. You and your colleagues, along with the American people, deserve to know what role Judge Kavanaugh had in constructing these arguments.

As it happens, our follow-up study covering the remaining years of the Bush Administration showed a decided slowdown in the issuance of these statements after 2006.[3] A number of factors might be responsible for the decrease, including the change in party control of Congress. Recognizing, however, that Judge Kavanaugh left the White House for the D.C. Circuit in 2006 raises the disturbing possibility that he may have had critical responsibility for generating such constitutionally audacious claims.

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[3] Neil J. Kinkopf and Peter M. Shane, Signed Under Protest: A Database of Presidential Signing Statements, 2001-2009 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485715.

We strongly urge the Senate Judiciary Committee, under your leadership, to get to the bottom of this matter. Whether Judge Kavanaugh originated these theories and stands by them today are critically important questions. Adoption of the baseless constitutional views of presidential authority that so many of these statements embody would utterly destabilize our system of checks and balances, at great cost to Congress and to the nation. No issue is more important.

Sincerely,

Neil J. Kinkopf
Professor of Law
Georgia State University College of Law[4]

Peter M. Shane
Jacob E. Davis and Jacob E. Davis II
Chair in Law
Ohio State University Moritz
College of Law

[4] Our institutional affiliations are provided solely for purposes of identification. The views we express are entirely our own and are offered in our personal capacity only.

August 27, 2018

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20501

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Re: Nomination of Brett M. Kavanaugh

Dear Chairman Grassley and Ranking Member Feinstein:

We write to express our support for the nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

We all worked with Brett when he was a partner at Kirkland & Ellis in the late 1990s and early 2000s. We saw first hand that he consistently displayed a keen intellect, sound judgment, exceptional analytical ability, and the highest level of integrity in representing our clients. Beyond that, we learned that Brett is an unfailingly fair-minded, kind, and modest person, that he has a great, self-deprecating sense of humor, and that he was always an amiable colleague. We are all proud to have worked with him.

Although we hold a broad range of political views, we all believe that Brett is well suited by his talent, collegial demeanor, and integrity to be an outstanding justice on the Supreme Court. We strongly support his nomination and urge his confirmation by the Senate.

Sincerely,

Eugene F. Assaf	Daniel F. Attridge	James F. Basile
Jeffrey Bossert Clark	Stuart C. Drake	James P. Gillespie
John S. Irving	Jay P. Lefkowitz	Jack S. Levin

2024

Jennifer Levy	Patrick F. Philbin	Craig S. Primis
R. Timothy Stephenson	Karen N. Walker	Edward W. Warren
Thomas D. Yannucci		

Lambda Legal
making the case for equality

September 18, 2018

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: 61 LGBT Organizations Demand Kavanaugh Hearing be Postponed to Allow a Full Investigation into the Detailed Allegations from Professor Ford

Dear Chairman Grassley and Ranking Member Feinstein:

We, the undersigned 61 national, state and local advocacy organizations, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and everyone living with HIV, write to urge the Senate Judiciary Committee to postpone the upcoming hearing on the confirmation of Brett M. Kavanaugh to a seat on the United States Supreme Court so that a fair and appropriate investigation can take place regarding the detailed and credible allegations of sexual assault made by Professor Christine Blasey Ford. Scheduling a hearing on Monday allows no time for any such investigation to occur, undermining the credibility of the entire exercise. Moving ahead on such an artificially expedited schedule will do lasting and irreparable damage to the legitimacy of not only the United States Senate but the Supreme Court as well.

In addition to the substantive concerns cited in our July 31, 2018 letter, these new charges are serious and potentially disqualifying for any person being considered for a position of authority and trust. This is particularly so for someone nominated to serve on the nation's highest court, thus making the need for a fair and independent investigation even more critical.

Nearly twenty-seven years ago, Professor Anita Hill was vilified for coming forward to tell her story. But even she was given a fuller hearing than what is currently being contemplated here. This is simply unacceptable. We urge the Senate not to repeat the grave mistakes of the past when it comes to addressing serious allegations of sexual misconduct by a nominee to the Supreme Court.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information. You can reach us through Sharon McGowan, Chief Strategy Officer and Legal Director for Lambda Legal, at smcgowan@lambdalegal.org.

Lambda Legal
making the case for equality

Very truly yours,

Lambda Legal
AIDS United
Alaskans Together for Equality
Athlete Ally
Basic Rights Oregon
BiNet USA
Bisexual Organizing Project (BOP)
Boston Bisexual Women's Network
Bradbury-Sullivan LGBT Community Center
CenterLink: The Community of LGBT Centers
Colorado LGBTQ+ Chamber of Commerce
Equality Alabama
Equality California
Equality Federation
Equality Florida
Equality Illinois
EqualityMaine
Equality Michigan
Equality New Mexico
Equality North Carolina
Equality Ohio
Equality Pennsylvania
Equality South Dakota
Equality Texas
Equality Utah
Fairness Campaign – Kentucky
Fairness West Virginia
Family Equality Council
FilmDis
FORGE, Inc.
FreeState Justice
Garden State Equality
Genders & Sexualities Alliance Network (GSA Network)
Georgia Equality
GLAAD
Kansas City Center for Inclusion
Louisiana Trans Advocates
MassEquality
Mazzoni Center
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Equality Action Team (NEAT)
National Latina Institute for Reproductive Health

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National LGBTQ Task Force Action Fund
National Health Law Program
One Colorado
One Iowa
OutCenter of Southwest Michigan
OutFront Minnesota
Outserve – SLDN
PROMO
SAGE
Sexuality Information and Education Council of the United States (SIECUS)
Southern Arizona Gender Alliance
The LGBT Bar Association and Foundation of Greater New York (LeGaL)
Transgender Law Center
TransOhio
Trans Youth Equality Foundation
URGE: Unite for Reproductive & Gender Equity
Whitman-Walker Health

Lambda Legal
making the case for equality

July 31, 2018

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington D.C. 20510

RE: 63 National, State and Local LGBT Groups Oppose Confirmation of Judge Brett Kavanaugh to the Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned national, state and local advocacy organizations, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and people living with HIV, oppose the nomination of Judge Brett Kavanaugh to be an Associate Justice on the United States Supreme Court. After a comprehensive review of Judge Kavanaugh's publicly available record, we have concluded that his views on civil rights issues are fundamentally at odds with securing equality, liberty, justice and dignity under the law for all people, including LGBT people and people living with HIV. Our letter of opposition is based on what is currently known about Judge Kavanaugh's public record, and the American people have a right to know about his entire record as a White House official and in other political roles, and to have meaningful answers to questions about his views on core personal freedoms and protections that millions of people take for granted.

Every Supreme Court vacancy is significant, but the stakes for the LGBT community could not be higher in deciding who will replace Justice Kennedy—who served as the deciding vote in numerous landmark decisions affecting LGBT people. It is not an exaggeration to say that key protections that enable LGBT individuals to participate as equal members of our society are at stake. Judge Kavanaugh's record demonstrates that if he were confirmed to the Supreme Court, he would provide the fifth and decisive vote to undermine many of our core rights and legal protections. In case after case, he has ruled against individuals and in favor of the wealthy and the powerful. Judge Kavanaugh has not served as a neutral and fair-minded jurist. He has instead been a narrow-minded ideologue who cannot be trusted with the grave responsibility of administering impartial and equal justice under the law.

While we have serious concerns with many aspects of Judge Kavanaugh's record, we wish to call to your attention five areas of Judge Kavanaugh's record and philosophy that are of particular concern to our organizations and our constituents, and that raise questions of grave consequence to LGBT people living with HIV and anyone who cares about these communities: (1) We are deeply concerned about

Judge Kavanaugh's philosophy regarding fundamental rights. Judge Kavanaugh believes that unenumerated fundamental rights must be tethered narrowly to "tradition," an approach that inherently favors those who historically have enjoyed power and privilege and that would erode or eliminate significant protections for LGBT people. (2) We have serious concerns that Judge Kavanaugh would support a novel and radical approach to religious freedom, discarding the longstanding doctrinal framework that has rejected attempts to invoke religious liberty to justify violations of anti-discrimination laws. Judge Kavanaugh has demonstrated that he is willing to provide a sweeping license to discriminate to religious adherents at the expense of LGBT civil rights protections. (3) We are deeply concerned that Judge Kavanaugh will gut critical health care protections—including protections against being denied health coverage for preexisting conditions, which would gravely threaten the health of people living with HIV and transgender people, among other vulnerable groups. (4) We are deeply concerned by Judge Kavanaugh's extreme views about the limits of executive privilege and the proper amount of deference owed to the President; and (5) because LGBT people and people living with HIV live in poverty at disproportionately high rates, we are deeply concerned that Judge Kavanaugh's propensity for supporting the interests of the rich and powerful will harm the economic well-being of our and other economically vulnerable communities.

- **Personal Liberty**: Judge Kavanaugh's approach to questions of personal liberty is not only inconsistent with, but would seek to drastically roll back, protections for personal liberty that have been essential to the ability of LGBT people to live authentically, to protect their families, and to make deeply personal decisions about their identity without fear of government penalty or interference. By way of example, Judge Kavanaugh recently gave a presentation to the American Enterprise Institute in which he voiced strong agreement with the efforts of former Chief Justice Rehnquist[1] to restrict the fundamental right to privacy and autonomy. Kavanaugh noted that that despite Rehnquist's inability to convince the court to rule otherwise in *Roe* and *Casey*, that Rehnquist has been successful in "stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition," thereby directly rejecting Justice Kennedy's recognition that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Judge Kavanaugh noted that Rehnquist's dissent in *Roe*, which would have denied women the freedom to choose whether to carry a pregnancy to term, was premised on the number of then-existing laws prohibiting abortion, an approach that would effectively negate the Constitution as a check on states' denial of constitutional freedoms.[2] Mr. Kavanaugh

[1] Judge Brett Kavanaugh: *Constitutional statesmanship of Chief Justice William Rehnquist*, AMERICAN ENTERPRISE INSTITUTE, available at https://www.youtube.com/watch?v=2_8Hv4Mes_c (33:39-36:10). In addition to Chief Justice Rehnquist's dissent in *Roe v. Wade*, 410 U.S. 113 (1973), Judge Kavanaugh's first "judicial hero" voted in favor of the holding that Georgia's sodomy statute did not violate the fundamental rights of same-sex couples in *Bowers v. Hardwick*, 478 U.S. 186 (1986); dissented from the holding that a Colorado amendment prohibiting local nondiscrimination protections for gay and bisexual people violated the equal protection clause in *Romer v. Evans*, 517 U.S. 620 (1996); dissented from the decision that HIV is a disability under the ADA and that the "direct threat" provision of the ADA must be based on objective evidence in *Bragdon v. Abbott*, 524 U.S. 624 (1998); dissented from the holding that a Texas statute making it crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional in *Lawrence v. Texas*, 539 U.S. 558 (2003); and authored the opinion in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), holding that the Boy Scouts could exclude an openly gay man without even evaluating the compelling interests at stake in the case.

[2] "The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in

has also demonstrated his antipathy towards a person's control over their own body in other ways. As part of a three-judge panel in a case involving a young immigrant woman seeking an abortion while held in custody, Mr. Kavanaugh vacated a Temporary Restraining Order that was issued by the D.C. Federal District Court allowing the plaintiff's abortion to proceed.[3] Judge Kavanaugh's decision delayed the abortion by requiring the pregnant immigrant to be placed in a sponsor's custody.[4] Abortion restrictions in Texas limit the amount of time within which a person may seek the procedure. Judge Kavanaugh's ruling requiring the plaintiff to be turned over to a sponsor would have permitted the Office of Refugee Settlement to delay the procedure which would have led to limitations on her access to the procedure and would have limited the providers available to perform it.[5] After the D.C. Circuit reversed on appeal, Judge Kavanaugh wrote a sharply worded dissent that claimed the government was creating a 'new right" for immigrants in custody "to obtain immediate abortion on demand" for "unlawful immigrant minors."[6] If applied to other fundamental personal freedoms, his analysis would permit the government to impose severe burdens on those rights, even to the point of rendering their exercise impossible or futile. LGBT people have fought long and hard for judicial recognition of their personal freedoms under the law, to enter into consensual adult intimate relationships, to marry, and to raise children. Nothing in Judge Kavanaugh's record suggests that he would protect LGBT people against even serious incursions upon those rights.

When judges like Judge Kavanaugh invoke "tradition" as a reason to turn back challenges to discriminatory laws, they turn a blind eye to the fact that many traditions deeply rooted in our history reflect longstanding patterns of discrimination based on gender, sexual orientation, gender identity, national origin, and race. That approach—which the Supreme Court long ago rejected--stands in stark opposition to the principles embodied in case law that has developed over the last 50 years – case law that guarantees the right to contraception and a woman's freedom to choose and secures other protections enshrined in such landmark cases as *Roe v. Wade*, *Planned Parenthood v. Casey*, *Romer v. Evans*, and *Lawrence v. Texas*. Judge Kavanaugh has openly declared his animosity to those principles and his desire to turn back the clock, which poses a clear and present danger to the fundamental rights of LGBT people, women and all vulnerable minorities.

These are not abstract issues. There are cases that will likely come before the Supreme Court soon that will ask the Court to consider the issues affecting the fundamental liberty of LGBT people, such as challenges to state laws that seek to undermine the equality of same-sex married couples or to federal policies that infringe upon the autonomy and privacy rights of transgender

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the traditions and conscience of our people as to be ranked as fundamental,'" *Roe v. Wade*, 410 U.S. 113, 174, 93 S. Ct. 705, 737, (1973), holding modified by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992).

[3] *Garza v. Hargan*, No. 17-5236, 2017 WL 4707112 (D.C. Cir. Oct. 19, 2017).

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

[5] Leah Litman, *Liberals and the Powerless Should Worry About a Kavanaugh Court*, NEW YORK TIMES (July 10, 2018), *available at* https://www.nytimes.com/2018/07/10/opinion/brett-kavanaugh-supreme-court.html.

[6] *Id.*

people, such as challenges to the President's policy banning military service by transgender men and women. For this reason, we are gravely concerned that Judge Kavanaugh's narrow and backward-looking approach to fundamental rights will do deep and lasting damage to LGBT people's lives, and to other communities for whom "history" and "tradition" provide no protection against the deprivation of liberty.

- **License to Discriminate**: We have serious concerns that Judge Kavanaugh will support a radical new view of religious exemptions from generally applicable laws that will undermine longstanding doctrine and erode our nation's commitment to protecting civil rights. Judge Kavanaugh has demonstrated that he is willing to provide a sweeping license to discriminate to religious adherents that construes even enforcement of the most basic protections for women and others as an undue burden on religious beliefs. For example, in *Priests for Life v. U.S. Department of Health and Human Services*, Judge Kavanaugh wrote a dissent in response to the D.C. Circuit Court's denial of a petition challenging the Affordable Care Act's requirement that religious organizations must submit a form to their insurer if they want to object to providing contraceptive coverage for their employees. The organizations argued that completing the form impermissibly burdened their religious rights under the Religious Freedom Restoration Act (RFRA).[7] Judge Kavanaugh argued in his dissent that the filing of the form substantially burdened the adherents' exercise of religion because they believed that doing so amounted to a requirement that they take action contrary to their beliefs. The majority criticized the dissent as advocating for a "potentially sweeping, new RFRA prerogative for religious adherents to make substantial-burden claims based on sincere but erroneous assertions about how federal law works." Judge Kavanaugh's belief that courts should accept, without question, any claim by a religious organization that a government requirement substantially burdens their sincere religious beliefs demonstrates his willingness to inappropriately extend RFRA and religious exemptions in ways that will undercut LGBT protections.

  Judge Kavanaugh's view that the courts must show unquestioning deference to religious adherents' claims that government requirements substantially burden their beliefs raises significant concerns that he will undermine state and local nondiscrimination laws by allowing religious adherents to use RFRA and the First Amendment as a license to discriminate against LGBT people. This is especially disconcerting considering the kinds of cases that are likely to come before the Supreme Court in the wake of the Supreme Court's decision to reverse *Masterpiece Cakeshop*.[8] In addition, cases addressing the scope of RFRA with regard to sexual orientation and gender identity are percolating in the lower courts and will likely end up before the Supreme Court soon as well.[9]

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[7] *Priests for Life v. U.S. Department of Health and Human Services*, 808 F.3d 1 (D.C. Cir. 2015).

[8] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

[9] The Sixth Circuit recently held that requiring an employer to comply with Title VII did not substantially burden his religious practice of operating his business. *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) (the defendant has filed a petition for certiorari on a narrower question of whether "sex" in Title VII's prohibition on discrimination "because of…sex," meant "gender identity" and included "transgender status" when Congress enacted Title VII and whether *Price Waterhouse v. Hopkins* prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity).

- **Health Care Protections and Preexisting Conditions**: Access to health care is an issue of profound importance to LGBT people and people living with HIV. Prior to passage of the Affordable Care Act (ACA), transgender people and people living with HIV were routinely refused health insurance based on preexisting conditions. Based on Judge Kavanaugh's record there is every reason to believe he would use his position on the Court to overturn critical health care protections. Judge Kavanaugh's outright hostility towards the ACA has been evident in multiple decisions involving the fate of this law.[10] Judge Kavanaugh has been especially critical of the individual mandate. In one case, he referred to the mandate as "unprecedented on the federal level in American history" and referred to it as a significant expansion of congressional authority.[11] Judge Kavanaugh has also repeatedly expressed his opinion that Congress did not have the authority to implement the individual mandate,[12] and has asserted that the individual mandate is inextricably linked with the provisions protecting consumers with preexisting conditions from being denied health care coverage altogether or charged more for their care.[13]

  With the elimination by Congress in 2017 of the penalty imposed for the individual mandate,[14] it is clear that Judge Kavanaugh's supporters know they can count on him to strike down those protections as unconstitutional when the opportunity arises – which may happen sooner rather than later, thanks to the Justice Department's endorsement of a challenge to the ACA filed by 19 individual states seeking to strike down the protections for preexisting conditions.[15]

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[10] In a 2011 case in which the D.C. Circuit upheld the Affordable Care Act ("ACA"), Judge Kavanaugh wrote a dissent arguing that it was premature for the Court to rule on the constitutionality of the law. Judge Kavanaugh filed a similar dissent after the D.C. Circuit refused to rehear a separate challenge to the constitutionality of the ACA. *Sissel v. U.S. Department of Health and Human Services*, 799 F.3d 1035 (D.C. Cir. 2015).

[11] *See supra* note 9.

[12] *See supra* note 1 (Judge Kavanaugh praising the fact that the 2012 NFIB ACA case held that the Commerce Clause did not give Congress authority to enforce the individual mandate); Brett M. Kavanaugh, *The Administrative State After the Health Care Cases* (Nov. 17, 2012), *available at* https://www.youtube.com/watch?v=zRImAIbJOt8 (speech in front of the Federalist Society where Judge Kavanaugh said the individual mandate was "unprecedented" as "Congress has never used the Commerce Clause power to force people to purchase goods or services); Brett M. Kavanaugh, *The Joseph Story Distinguished Lecture* (Oct. 25, 2017), THE HERITAGE FOUNDATION, *available at* https://www.heritage.org/josephstory2017 (10/25/17 : 33:50 – 36:27) (criticizing *NFIB v. Sebelius* for using the canon of constitutional avoidance (he wanted them to strike it down as unconstitutional).

[13] Jane Norman, *Judges Ponder Privatized Social Safety Net Health Care Law Arguments*, CONGRESSIONAL QUARTERLY HEALTHBEAT (Sept. 23, 2011). ("During oral argument, Judge Kavanaugh pointed out that the individual mandate was part of a larger scheme, since it was tied to guaranteed issue – a requirement in the law that people be allowed to enroll regardless of pre-existing conditions – and community rating, which means the same premiums are assessed regardless of health condition.")

[14] H.R. 1, 115th Congress (2017-2018) available at https://www.congress.gov/bill/115th-congress/house-bill/1.

[15] *Texas v. United States*, No. 4:18-cv-00167 (N.D. Tex.) The lawsuit was filed in the Northern District of Texas and has been assigned to Judge Reed O'Connor who has issued three nationwide injunctions adversely effecting LGBT people: Judge O'Connor issued a nationwide injunction that prohibited same-sex couples from enjoying equal access to the Family and Medical Leave Act following the *Obergefell v. Hodges* decision, issued a nationwide injunction halting the enforcement of President Obama's Title IX guidance on transgender students, and a nationwide injunction halting the Office of Civil Rights from enforcement of the nondiscrimination regulations of the Affordable Care Act. Most recently, O'Connor presided over a case that resulted in a significant revision of the Federal Bureau of Prison's Transgender Offender Manual that eliminated key provisions clarifying that transgender people should be classified and housed in accordance with their gender identity.

If the protections against denying coverage for preexisting conditions are struck down, an estimated 52 million people will lose their health coverage.[16] The elimination of coverage would be dire for LGBT people and people living with HIV. LGBT people are more than twice as likely to be uninsured as non-LGBT people, and there has been a significant decrease in the uninsurance rates following the passage of the ACA for people living with HIV.[17]

- **Presidential Power**: We are deeply concerned that Judge Kavanaugh's excessive deference to presidential authority would have serious consequences for LGBT people and people living with HIV. Judge Kavanaugh has argued that sitting Presidents should not be subject to civil or criminal investigation or process while in office, that a president should be able to dismiss any counsel "out to get him," and that the president need not follow a law if he thinks the law is unconstitutional. In Judge Kavanaugh's words:

    - "To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch – at least unless the President deems the law unconstitutional in which event the President can decline to follow the statute until a final court order says otherwise."[18]

  It is important to note that questions about the limits of executive privilege and the proper amount of deference owed to the President are issues related to matters far beyond the Special Counsel's purview - these questions are at the heart of every challenge to arbitrary presidential action ranging from the separation of children from their families at the border to the declaration of a ban on military service by transgender people.

- **Kavanaugh Will Side with the Rich and Powerful**: LGBT people across the country live in poverty at disproportionately high rates, especially LGBT people of color – and particularly transgender and gender non-conforming people of color.[19] LGBT people depend on longstanding protections for employees and consumers. Judge Kavanaugh has repeatedly voted against workers and consumers and in favor of the rich and powerful. For example, in *PHH Corporation*

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[16] *See* Gary Claxton et al. *Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA* (Dec. 12, 2016), KAISER FAMILY FOUNDATION, *available at* https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca/ (according to this 2016 analysis, approximately 52 million Americans under the age of 65 could find their health insurance at risk because of a wide range of preexisting conditions).

[17] *See* Kellen Baker et al, *The Senate Health Care Bill would Be Devastating for LGBTQ People*, CENTER FOR AMERICAN PROGRESS (July 6, 2017), *available at* https://www.americanprogress.org/issues/lgbt/news/2017/07/06/435452/senate-health-care-bill-devastating-lgbtq-people/.

[18] Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907 (2014), *available at* https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4554&context=ndlr.

[19] Lourdes Ashley Hunter, Ashe McGovern, and Carla Sutherland, eds., *Intersecting Injustice: Addressing LGBTQ Poverty and Economic Justice for All: A national Call to Action* (New York: Social Justice Sexuality Project, Graduate Center, City University of New York, 2018).

v. Consumer Financial Protection Bureau, Judge Kavanaugh wrote an opinion holding that the leadership structure of the Consumer Financial Protection Bureau—an agency tasked with regulating consumer financial projects or services such as payday lending services—was unconstitutional because Congress decided that the president could only fire its director for cause (a holding which was subsequently reversed).[20] Judge Kavanaugh also wrote a dissent in *SeaWorld of Fla., LLC v. Perez* in which he argued that the Department of Labor does not have the authority to regulate and protect employees who interact with killer whales at SeaWorld.[21] Judge Kavanaugh's dissent fails to address the fact that there were *three* previous deaths involving the same whale, and his dissent demonstrates the low regard Mr. Kavanaugh holds for worker protections. Judge Kavanaugh also seems to hold employee privacy rights in low regard. After the D.C. Circuit majority invalidated a random drug testing program for U.S. Forest Service employees based on the fact that their preexisting policy had been successful without such testing, Judge Kavanaugh wrote a dissent in favor of instituting the invasive testing.[22]

Judge Kavanaugh's record demonstrates he will side with employers over employees when important questions arise regarding the scope of laws prohibiting employment discrimination. With three petitions for *certiorari* currently pending before the Supreme Court that address the scope of employment protections for LGBT people under Title VII, Senators must ensure that a new justice would rule fairly on these momentous issues, and Judge Kavanaugh's record does not meet that test.

Our letter of opposition is based on what is known from Judge Kavanaugh's currently available public record, as outlined above. But the American people have a right to know about his entire record as a White House official and in other political roles and to have meaningful answers to questions about his views on core personal freedoms and protections that millions of people take for granted. LGBT Americans, people living with HIV, and other at-risk communities rely upon the Constitution's guarantees of equality, liberty, dignity and justice under the law for their ability to participate fully in society and make major life decisions, and they are entitled to know whether a new justice would protect those guarantees.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sharon McGowan, Chief Strategy Officer and Legal Director for Lambda Legal, at smcgowan@lambdalegal.org or Sasha Buchert, Federal Judicial Nominations Lead and Staff Attorney for Lambda Legal, at sbuchert@lambdalegal.org.

Very truly yours,

Lambda Legal
AIDS United
Alaskans Together for Equality

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[20] *PHH Corporation v. Consumer Financial Protection Bureau*, 839 F.3d 1 (Oct. 11, 2016).

[21] *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014).

[22] *Nat'l Fed'n of Fed. Employees-IAM v. Vilsack*, 681 F.3d 483 (D.C. Cir. 2012).

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Athlete Ally
Basic Rights Oregon
BiNet USA
Bisexual Organizing Project (BOP)
Boston Bisexual Women's Network
Bradbury-Sullivan LGBT Community Center
CenterLink: The Community of LGBT Centers
Colorado LGBTQ+ Chamber of Commerce
Equality Alabama
Equality California
Equality Federation
Equality Florida
Equality Illinois
EqualityMaine
Equality Michigan
Equality New Mexico
Equality North Carolina
Equality Ohio
Equality Pennsylvania
Equality South Dakota
Equality Texas
Equality Utah
Fairness Campaign – Kentucky
Fairness West Virginia
Family Equality Council
FilmDis
FORGE, Inc.
FreeState Justice
Garden State Equality
Genders & Sexualities Alliance Network (GSA Network)
Georgia Equality
GLAAD
Kansas City Center for Inclusion
Louisiana Trans Advocates
MassEquality
Mazzoni Center
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Equality Action Team (NEAT)
National Latina Institute for Reproductive Health
National LGBTQ Task Force Action Fund
National Health Law Program
One Colorado
One Iowa

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OutCenter of Southwest Michigan
OutFront Minnesota
Outserve – SLDN
PROMO
SAGE
Sexuality Information and Education Council of the United States (SIECUS)
Southern Arizona Gender Alliance
The LGBT Bar Association and Foundation of Greater New York (LeGaL)
The Trevor Project
Transgender Law Center
TransOhio
Trans Youth Equality Foundation
URGE: Unite for Reproductive & Gender Equity
Whitman-Walker Health
#StillBisexual

cc: United States Senate Judiciary Committee Members

LATINOJUSTICE
COMMITTED TO JUSTICE AND [illegible] PRLDEF

6 August 2018

Hon. Chuck Grassley, Chair
Hon. Dianne Feinstein, Ranking Member
United State Senate
Senate Judiciary Committee
Dirksen Senate Office Building, Rm. 224
50 Constitution Avenue NE
Washington, DC 20002

RE: The Nomination of Judge Brett Kavanaugh to the United States Supreme Court

Dear Senators Grassley and Feinstein,

President Trump's nomination of Judge Brett Kavanaugh to the Supreme Court is a matter of grave concern for the nation's Latinx population. The President has made it clear that he will only nominate judges prepared to criminalize the right to an abortion and the Federalist Society, of which Judge Kavanaugh is a member, has noted that this nominee is especially poised to make that happen. For LatinoJustice PRLDEF, this alone is enough to make us pause. But a broader review of Judge Kavanaugh's record on the bench – all that we have available at this time of the early stages of his vetting – confirms what we suspected and accordingly we cannot support his nomination to the U.S. Supreme Court.

Judge Kavanaugh's jurisprudence is anti-immigrant, anti-worker, and pro-law enforcement. His most notable decision affecting both immigrants' rights and women's rights, *Garza v. Hargan*, limited a young undocumented woman's right to choose, demonstrating that he would lend strong support to Trump's anti-immigrant agenda.[1]

Judge Kavanaugh has repeatedly been reluctant to recognize racial animus when considering cases. He is more concerned with deference to precedent or agency decisions than protecting Latinx individuals from racial discrimination. In *Ortiz-Diaz v. U.S.*, while Judge Kavanaugh noted evidence of racial and national origin discrimination against a Latino employee, he ultimately concurred with the majority opinion in that case dismissing the claims because of Circuit precedent.[2] He concluded that, "cases hold that lateral transfers to different positions or

[1] *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017).
[2] *Ortiz-Diaz v. United States HUD*, 831 F.3d 488 (D.C. Cir. 2016).

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posts with the same pay and benefits are ordinarily not changes in the "terms, conditions, or privileges" of employment."[3] He wrote the, "concurrence simply to note [his] skepticism about those cases"[4] Thus, even though he believed that "a forced lateral transfer — or the denial of a requested lateral transfer — on the basis of race is actionable under Title VII... Based on [circuit] precedents," he joined the majority opinion.[5] In 2017, despite concerns that it would negatively impact Latinxs, Judge Kavanagh upheld an FCC regulation that allowed broadcasters to transmit emergency alerts in English only.[6] In *In re Charges of Judicial Misconduct* Judge Kavanaugh once again undermined the severity of racial animus.[7] In *In re Charges of Judicial Misconduct*, a judge repeatedly disparaged Black and Latinx people while on the bench. The defendant appealed his conviction claiming that the judge was biased, as evidenced by her comments on the bench. Despite the judge's comments that "racial groups like African Americans and Hispanics are predisposed to crime" and that "a lot of Hispanic people [are] involved in drug trafficking," This quintessential racial stereotyping employed by a sitting federal judge continues to feed the vilification of the nation's largest racial / ethnic minority – and all of it with no objective basis. Judge Kavanaugh joined the opinion which ultimately could not "find that such a view indicates improper bias or misconduct."[8] These are just some examples of the ways in which Judge Kavanaugh's refusal to condemn racism has had a direct impact on the ability of Latinxs to immigrate to, work, and live freely in this country.

I. Judge Kavanaugh's jurisprudence on immigration and labor

Judge Kavanaugh does not believe that the constitutionally guaranteed right to an abortion should be extended to undocumented immigrants. In *Garza v. Hargan*, Judge Kavanaugh dissented claiming that the majority had invented a "new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand."[9] Kavanaugh ultimately rested his opinion on the idea that the transfer of a minor into custody before having an abortion is not an undue burden. However, throughout the opinion, Judge Kavanaugh repeatedly stressed that the plaintiff was "unlawful" and that "[h]er home country does not allow elective abortions," implying that these facts may mean she has no right to an abortion as an undocumented immigrant.[10] In response to this dissent Judge Millett wrote that, "the mere act of entry into the United States without documentation does not mean that an immigrant's body is no longer her or his own. Nor can the sanction for unlawful entry be forcing a child to have a baby."[11] Judge Millett's concurring opinion highlights the underlying tone of Judge Kavanaugh's opinion which is that minors and

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[3] *Id.* at 494.
[4] *Id.*
[5] *Id.*
[6] *Multicultural Media Telecom & Internet Council v. FCC*, 873 F.3d 932, 935 (D.C. Cir. 2017).
[7] 769 F.3d 762 (2014).
[8] *Id.* at 773.
[9] 874 F.3d 735, 752 (D.C. Cir. 2017).
[10] *Id.* at 752-53.
[11] *Id.* at 737-38.

undocumented immigrants are not entitled to the same constitutional protections as adult U.S. citizens.

Judge Kavanaugh does not believe that labor protections should cover undocumented immigrants. As the lone dissenter in *Agri Processor Co. v. NLRB*, Judge Kavanaugh wrote that he "would hold that an illegal immigrant worker is not an "employee" under the NLRA for the simple reason that, ever since 1986, an illegal immigrant worker is not a lawful "employee" in the United States."[12] In *Agri Processor v. NLRB*, Judge Kavanaugh ultimately argued that a union election should be invalidated because it was 'tainted' by votes from undocumented immigrants.[13]

Judge Kavanaugh often rules for big businesses in civil rights employment cases.[14] Angela B. Cornell, clinical professor of law at the Labor Law Clinic at Cornell University notes that Judge Kavanaugh "would be trouble for the interests of workplace health and safety" if appointed to the Supreme Court.[15] He routinely dismisses cases finding that the alleged facts are not enough to prove racial, ethnic, or age discrimination.[16] He has even gone as far as to say that discrimination is acceptable in some cases. For example, In *Miller v. Clinton*, Judge Kavanaugh dissented and claimed that the" State Department Basic Authorities Act, as amended in 1994, authorized the State Department to mandate retirement at age 65 for workers such as Miller." [17] In his view, whether or not the State Department has the ability to discriminate based on age "is not a close call."[18]

II. Judge Kavanaugh's jurisprudence on voting rights

In *South Carolina v. United States,* Judge Kavanaugh upheld South Carolina's voter ID law ("Act R54") that required citizens to show photo ID cards in order to vote or to "state the reason for not having obtained" a photo ID. [19] The Obama administration believed that the law "could disenfranchise tens of thousands of minority voters, who were more likely than whites to lack such IDs."[20] However, Judge Kavanaugh found that the law did not have a discriminatory, retrogressive effect. In particular, he was unwilling to invalidate the law because other, more regressive, policies had been upheld in the past. He found that comparing "South Carolina's Act R54 to some other States' voter ID laws—as well as to the Carter–Baker Report's proposed voter ID reforms—strongly buttresses the conclusion that South Carolina's law has neither a

[12] *Agri Processor Co. v. NLRB,* 514 F.3d 1, 10 (2008).
[13] *Id.*
[14] Casey Quinlan, *In Brett Kavanaugh, workers have a justice who will always side with big business*, (July 11, 2018), https://thinkprogress.org/brett-kavanaugh-sides-with-big-business-not-workers-right-1dcb8c63f619/.
[15] *Id.*
[16] *See Vatel v. All. of Auto. Mfrs.*, 627 F.3d 1245, 1249 (D.C. Cir. 2011) (arguing that hiring someone of a diverse background made it unlikely that racial animus motivated the dismissal. "when the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to [that person] an invidious motivation that would be inconsistent with the decision to hire"); *Stewart v. St. Elizabeths Hosp.*, 589 F.3d 1305, 1308 (D.C. Cir. 2010); *Baloch v. Kempthorne*, 550 F.3d 1191, 1195 (D.C. Cir. 2008). In each of these cases Kavanaugh viewed the evidence provided by the plaintiffs to be insufficient to prove discrimination.
[17] *Miller v. Clinton*, 687 F.3d 1332 (2012).
[18] *Id.*
[19] *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).
[20] https://www.nytimes.com/2018/07/13/opinion/sunday/voting-rights-voter-id-kavanaugh.html

discriminatory effect nor a discriminatory purpose. South Carolina's new voter ID law is significantly more friendly to voters without qualifying photo IDs than several other contemporary state laws that have passed legal muster."[21] In *South Carolina v. United* States, Judge Kavanaugh also revealed his willingness to accept the government's stated interests as legitimate. He wrote that "South Carolina's goals of preventing voter fraud and increasing electoral confidence are legitimate; those interests cannot be deemed pretextual merely because of an absence of recorded incidents of in-person voter fraud in South Carolina."[22]

This case is particularly troubling from a Latinx voting rights perspective. Early in his administration President Trump established the Presidential Advisory Commission on Election Integrity, ostensibly to document and provide solutions to the so-called voter fraud that could only explain, in his view, the fact that he lost the popular vote in the 2016 election. LatinoJustice along with the Mexican-American Legal Defense Fund intervened in a suit initiated by the NAACP Legal Defense Fund that challenged the legitimacy of the Commission.[23] The legal defense funds argued that the Commission was the product of the President's intent to discriminate against African-American and Latino voters and that there was no voter fraud to speak of. Eventually, the President dismantled the Commission. The lesson here is that if Judge Kavanaugh concludes that documentation of voter fraud is unnecessary to justify discriminatory legislation undertaken to allegedly curb it, as he did in the South Carolina case above, then he is revealing, once again, that he is prepared to do the President's bidding if he ascends to the Supreme Court.

III. Judge Kavanaugh's jurisprudence on criminal justice and policing

In *Wesby v. D.C.*, Judge Kavanaugh argued for an expansive understanding of qualified immunity.[24] His understanding of qualified immunity for police officers would grant law enforcement wide latitude to act without consequences. He argued that "regardless of whether the officers had probable cause, they are entitled to qualified immunity because they at least *reasonably could have believed* that they had probable cause."[25] "Therefore, in suits alleging a lack of probable cause to arrest, officers are not liable if they *arguably* had probable cause—that is, if the officer *reasonably could have believed* that there was probable cause to arrest."[26] In short, police officers need not rely on objective elements of probable cause – they merely have to think it's there. Ultimately, Judge Kavanaugh's pro-law enforcement views will negatively impact Latinxs as they encounter excessive and aggressive police tactics.

IV. Conclusion

The Supreme Court has always played a vital in protecting civil rights. Throughout history Americans have worked tirelessly to ensure that all Americans have equal opportunities to protect

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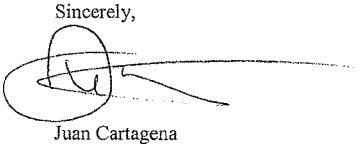
[21] *South Carolina v. United States*, 898 F. Supp. 2d 30, 48 (D.D.C. 2012).
[22] *Id.* at 44.
[23] *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018).
[24] *Wesby v. D.C.*, 816 F.3d 96 (D.C. Cir. 2016).
[25] *Id.* at 105.
[26] *Id.* at 106.

their bodies, their livelihoods, and their ability to live and work in this country. The Supreme Court represents the last line of defense for this country's most cherished rights, and for our democracy's very stability. The President's selection of Judge Kavanaugh to replace Justice Kennedy may well destroy many of the civil rights victories that have been won in the last half a century. If confirmed, Brett Kavanaugh would be deciding what our Constitution means and how it will affect our lives. His judicial record reveals that he could very well have a devastating impact on voting rights, labor protections, immigrants' rights, reproductive rights, and criminal justice reform. Replacing Justice Kennedy with this nominee — especially during a time in which our system of checks and balances is needed more than ever — would have a lasting and devastating impact on the balance of the Court, and on our country's most long-held and fought-for values. LatinoJustice PRLDEF demands that confirmation is given only to a nominee with a demonstrated commitment to civil rights and to our nation's highest constitutional values and liberties.

Sincerely,



Juan Cartagena
President & General Counsel
LatinoJustice PRLDEF

cc: Members of the U.S. Senate Judiciary Committee

The Honorable Chuck Grassley
Chairman, U.S. Senate Judiciary Committee
CC: Members of the United States Senate

The Honorable Dianne Feinstein
Ranking Member, U.S. Senate Judiciary Committee

Dear Senators Grassley and Feinstein,

We write as law professors who care deeply about the Constitution, the judiciary, and the future of the Supreme Court. After careful review of the available record, which is only partial and incomplete due to the Chairman's decision not to requisition all relevant material from the National Archives, we urge you to oppose the confirmation of Judge Brett Kavanaugh to the United States Supreme Court.

Appointing a Supreme Court Justice is of paramount national importance. The nine justices on our Court have the awesome power to shape our government, our laws, and future for generations to come. Nearly every aspect of our daily lives, the rights and opportunities we enjoy as Americans, are influenced by the Court.

Our Constitution sets out the process for appointing a justice: the President has the task of appointing a nominee while the Senate plays the equally important role of ensuring that the nominee has the right qualifications and temperament for a lifetime seat on the Court. The Senate is not intended to be a rubber-stamp for the President's nominee. Rather, it has an obligation to take an active role in exercising its power to provide "advice and consent" on the President's nominations. Each Senator must ensure that the nominee will interpret our laws fairly, with an open mind, and with a vision that enables the country to continue the progress made over the decades, not take us backward.

The appointment of Brett Kavanaugh to fill Justice Kennedy's seat on the Supreme Court may well be the most important appointment in recent history. The Court is closely divided on a number of issues such as voting rights, health care, the role of agencies in protecting health and safety, civil rights, and reproductive justice. Given the current composition and ages of the eight sitting justices, confirming Judge Kavanaugh could cement a bloc of five justices who will be able to consistently tilt the Court toward the ultraconservative side of the constitutional spectrum for at least the next quarter century and probably more.

The key question facing the Senate and American people with this nomination is whether to allow the Court to continue on its present course of eroding key constitutional rights and legal protections for decades, or insist on a nominee sensitive to equal rights, social justice, and to the needs of contemporary society. The stakes in this nomination debate could not be higher.

Brett Kavanaugh is not that nominee. His record on the D.C. Circuit reveals a predisposition to decide cases in order to achieve results that threaten fundamental rights and in some cases the very lives of Americans. The President made it clear early on that he had two litmus tests for Supreme court nominees: that they will undermine access to healthcare under the Affordable Care Act ("ACA"), and will overturn or eviscerate *Roe v. Wade*. Kavanaugh made it to the President's Supreme Court short list because he met these criteria. Notably, as one of his former law clerks wrote, Kavanaugh's dissent in *Seven-Sky v. Holder* provided a 'roadmap' for those who sought to rule the ACA unconstitutional.

Several key observations about Judge Kavanaugh's record are set out below.

Judge Kavanaugh's judicial philosophy reflects a backward-looking view of the Constitution. In 2014, Kavanaugh stated that, "from the beginning, the most important aspect of constitutional interpretation was…what were the precise words of the constitutional text."[1] This philosophy is often portrayed as a benign

[1] Judge Brett Kavanaugh, Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution 1916 (2014) (transcript available at https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4554&context=ndlr).

and even laudable loyalty to the Founders' intent; it is not. Rather, it is a pretext for an agenda-driven approach to the law that seeks to advance ultraconservative political goals, and has been used to deny constitutional rights and protections for many vulnerable communities and to challenge the civil rights progress of the past decades.

Kavanaugh's writings suggest that he would shelter the President from the rule of law. In a 2008 law review article,[2] Kavanaugh wrote that "criminal investigations and prosecutions of the President," should be deferred while he is in office, and that "the indictment and trial of a sitting President…would ill serve the public interest." Earlier, he made comments suggesting that the unanimous Supreme Court ruling in *U.S. v. Nixon*, which forced President Nixon to turn over the Watergate documents, was wrongly decided.[3] He also wrote that Congress should allow the President to act when he believes "that a particular independent counsel is 'out to get him.'"[4] The risk of these views to the Mueller investigation, which must be allowed to continue for the sake of our national security and the future of our democracy, cannot be overstated.

Kavanaugh would undermine affordable health care. Kavanaugh's record on the D.C. Circuit, where he twice dissented[5] from decisions upholding the Affordable Care Act, is clear: he is hostile to the ACA and as a Supreme Court justice would vote to strip health care from millions of people, including the tens of millions with preexisting conditions. This is no hypothetical scenario: a multi-state lawsuit challenging the ACA is working its way through the federal court system today,[6] and the next appointee to the Court will likely participate in deciding it.

Kavanaugh would overturn and gut *Roe v. Wade*. Judge Kavanaugh is hostile to individuals' reproductive rights. He tried to block a young woman from accessing abortion care in *Garza v. Hargan,*[7] the widely-known "Jane Doe" case. He would have put numerous obstacles in the woman's path as she sought to exercise her right to obtain an abortion. The ruling by Kavanaugh's panel was, as we all know, overturned by the full D.C. Circuit.

Kavanaugh would undermine protections for clean air and water. Kavanaugh's record shows he has repeatedly ruled in favor of polluters and against the Environmental Protection Agency, in cases that affect the health and safety of the environment.[8] In *EME Homer City Generation, LP v. EPA*, Kavanaugh voted to overturn clean air protections and allow businesses to increase air pollution.[9] According to a Washington Post article, the regulations would have saved 13,000 premature deaths, 19,000 hospital visits, and 1.8 million days of missed work or school per year.

Kavanaugh would restrict regulatory agencies' ability to enforce laws to protect the public. Kavanaugh's hostility to health and safety regulations extends beyond environmental protections. Writing for the panel majority in *PHH Corp. v. Consumer Financial Protection Bureau*, where he ruled that the CFPB was unconstitutional, Kavanaugh stated that "independent agencies pose a significant threat to individual liberty."[10]

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[2] Brett M. Kavanaugh, *Separation of Powers during the Forty-Forth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1461 (2008).
[3] Mark Sherman, *Kavanaugh: Watergate Tapes Decision May Have Been Wrong*, Associated Press (Jul. 22, 2018), https://apnews.com/3eg46b76d344dab8257add92ab6365.
[4] Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Geo. L.J. 2134, 2151 (1998).
[5] *Seven Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *Sissel v. US Dept. of Health and Human Services*, 799 F.3d 1035 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).
[6] Complaint for Declaratory and Injunctive Relief, *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex. Feb. 26, 2018).
[7] *Garza v. Hargan*, 874 F.3d 735, 752, 755 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing the court was creating "a new right" for immigrants in custody "to obtain immediate abortion on demand.").
[8] *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (Kavanaugh, J., dissenting); *Tex v. EPA*, 726 F.3d 180 (D.C. Cir. 2013) (Kavanaugh, J., dissenting); *Coal. For Responsible Regulation Inc. v. EPA*, 2012 U.S. App. LEXIS 25997 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting) (stressing that a broad interpretation of 'air pollutant' will impose significantly higher costs on businesses).
[9] *EME Homer City Generation, L.P., v. EPA*, 696 F.3d 7 (2012).
[10] *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 6 (D.C. Cir. 2016).

Here too, the full court overruled him. Agencies such as the CFPB, the SEC, the NLRB, and the OSHRC play critical roles in upholding the rights of consumers, workers, and investors; Kavanaugh would be hostile to the protection of these rights.

Kavanaugh would side with powerful corporate interests over workers, consumers, and the rights of all. Kavanaugh's opposition to health, safety, environmental and consumer protections speaks volumes about his attitude toward the rights of everyday people. His rulings in cases involving the rights of employees facing mistreatment by corporate employers, including allegations of racial discrimination, are equally troubling. Notably, Kavanaugh also has repeatedly denied claims of racial discrimination in the workplace.[11] As a Supreme Court justice, he could contribute to a legacy of rulings that would turn back the clock on a century of progress toward better working conditions and better employment opportunities for all people.

We urge you to conduct a thorough review of Kavanaugh's record. We strongly believe that once you have done so you will conclude, as we have, that Judge Kavanaugh's vision of the Constitution and the law is wrong for our country. He should not be confirmed by the Senate.

Sincerely,
The Undersigned

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[11] *Jackson v. Gonzales*, 496 F.3d (D.C. Cir. 2007) (denying Title VII claim by an African-American employee who alleged race discrimination after being refused a promotion by the Federal Bureau of Prisons); *Howard v. Office of the Chief Admin. Officer*, 720 F.3d 939 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) (arguing a black woman who was fired from her position as House of Representatives deputy budget director should not have been able to pursue her claims of race discrimination and retaliation).

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The Leadership Conference

September 3, 2018

OPPOSE THE CONFIRMATION OF BRETT KAVANAUGH TO THE SUPREME COURT OF THE UNITED STATES

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, and more than 180 undersigned organizations, we write to express our strong opposition to the confirmation of Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

The fact that President Trump is now an unindicted co-conspirator to federal crimes committed to influence the outcome of the 2016 presidential election calls into question the legitimacy of his nomination of Judge Kavanaugh to the Supreme Court. The Supreme Court will likely be called on to resolve issues related to the extent to which President Trump can be investigated, subpoenaed, indicted, or prosecuted, and Judge Kavanaugh's longstanding advocacy for presidential immunity from criminal or civil liability renders him incapable of being impartial in such matters. As Ranking Member Feinstein observed at the August 23, 2018 Senate Judiciary Committee meeting: "History will not look kindly on rushing through a Supreme Court nominee chosen by a president facing significant legal liability and seeking to obstruct a criminal investigation of his wrongdoing." Judge Kavanaugh's hearing should not go forward.

Furthermore, there should be no hearing for Judge Kavanaugh until all of his Bush White House records are turned over to the Senate and the American people. Defying decades of Senate tradition and precedent, Senate Judiciary Committee Chairman Grassley has rejected bipartisan cooperation, disregarded the neutral review role historically played by the National Archives, and established a corrupt records review process led by a partisan lawyer who once served as Judge Kavanaugh's deputy in the Bush White House. Indeed, the National Archives has noted that such a process "has never happened before" and that the documents released by Chairman Grassley thus far "do not represent the National Archives."[1] As a result, the Senate and the American people have had access to only a fraction of Judge Kavanaugh's White House records, and virtually none of his records from his service as the White House Staff Secretary for President George W. Bush. When Justice Elena Kagan was nominated to the Supreme Court in 2010, by contrast, over 99 percent of her Clinton White House records were made public. As Chairman Grassley stated on June 15, 2010 with respect to the nomination of Elena Kagan to the Supreme Court: "In order for the Senate to fulfill its constitutional responsibility of advise and consent, we must get all of her documents from the Clinton Library and have enough time to analyze them so we can determine whether she should be a Justice."[2] Chairman Grassley has adopted a partisan and troubling double standard.

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[1] https://www.archives.gov/news/articles/archives-staff-release-records-related-to-judge-kavanaugh.
[2] https://www.congress.gov/congressional-record/2010/06/15/senate-section/article/S4928-1.

The chairman's politicized, heavy-handed decision to request none of Judge Kavanaugh's Staff Secretary records is particularly galling, given that Judge Kavanaugh himself has said that his three years as Staff Secretary have affected his work as a judge. In a 2016 interview with *Marquette Lawyer*, Judge Kavanaugh stated: "People sometimes ask what prior legal experience has been most useful for me as a judge. And I say, 'I certainly draw on all of them,' but I also say that my five-and-a-half years at the White House and especially my three years as staff secretary for President George W. Bush were the most interesting and informative for me."[3]

The Supreme Court is the final arbiter of our laws and Constitution, and its rulings dramatically impact our rights and freedoms. Every Supreme Court vacancy is significant, but the stakes could not be higher in deciding who will replace Justice Kennedy – who served as the deciding vote in nearly all the momentous cases of the past dozen years. Critical civil and human rights issues hang in the balance, including access to health care for millions of Americans, the ability of women to control their own bodies, voting rights, labor rights, economic security, rights of immigrants and persons with disabilities, LGBTQ equality, equal opportunity and affirmative action, environmental protections, and whether the judiciary will serve as a constitutional check on a reckless president.

Judge Kavanaugh's 12-year record on the U.S. Court of Appeals for the D.C. Circuit, as well as his known writings, speeches, and legal career, demonstrate that if he were confirmed to the Supreme Court, he would be the fifth and decisive vote to undermine many of our core rights and legal protections. In case after case, he has ruled against individuals and the environment in favor of corporations, the wealthy, and the powerful. He has advanced extreme legal theories to overturn longstanding precedent to diminish the power of federal agencies to help people. And he has demonstrated an expansive view of presidential power that includes his belief that presidents should not be subject to civil suits or criminal investigations while in office despite what misconduct may have occurred. Many of our organizations opposed Judge Kavanaugh's nomination to the D.C. Circuit,[4] and our fears and concerns have been realized. Judge Kavanaugh has not served as a neutral and fair-minded jurist. He has served as a conservative ideologue who lacks the impartiality and independence necessary to sit on the highest court in the land.

Moreover, Judge Kavanaugh's nomination to the Supreme Court was the product of a deeply flawed and biased process in which President Trump outsourced his constitutional duties to two right-wing special interest groups: the Federalist Society and Heritage Foundation. These extremist organizations pre-approved candidates, including Judge Kavanaugh, based on the dangerous and unprecedented litmus tests that President Trump put forward as a presidential candidate. In a 2016 presidential debate, he said that his Supreme Court appointees would vote to overturn *Roe v. Wade*. He said: "If we put another two or perhaps three justices on, that is really what will happen. That will happen automatically in my opinion. Because I am putting pro-life justices on the Court."[5] He also indicated he had a litmus test on the Affordable Care Act, stating in a February 2016 interview: "We're going to have a very strong test.... I'm disappointed in Roberts because he gave us Obamacare, he had two chances to end Obamacare, he should have ended it by every single measurement and he didn't do it, so that was a very disappointing one."[6] Judge Kavanaugh has passed these litmus tests, or he wouldn't have been nominated. If confirmed, he would vote to undermine women's control over their own bodies and sabotage accessible health coverage for millions of people, disproportionately impacting women, people of color, people with disabilities, and low-income families.

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[3] https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2016-fall/2016-fall-p08.pdf.
[4] *See, e.g.*, https://civilrights.org/opposition-to-kavanaughs-confirmation-to-the-dc-circuit/.
[5] https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063.
[6] https://www.wgbh.org/news/2016/02/08/news/donald-trump-litmus-tests-supreme-court-justices-less-taxes-big-business-0.

The confirmation process for Judge Kavanaugh should not be rushed to fulfill a campaign promise or to reward elite Washington, D.C. interest groups or donors. Each individual Senator has an obligation to independently review his entire record, a significant portion of which has not yet been disclosed. It is a dereliction of Senators' constitutional duty to simply allow one's political party to determine approval of such an impactful appointment before that record is public and reviewed. The American people are represented in this crucial process in the Senate. The independent vetting that Supreme Court candidates receive has long been rigorous and this should be no exception. Justice Kennedy himself was not the first nominee to the seat he is vacating. Two nominees before him failed because of the Senate's role, and the nation was better for it.

Sought to Undermine Access to Health Care: Access to health care is a civil and human rights issue of profound importance. Based on his known record and the process by which he was selected, if confirmed to the Supreme Court, there's every reason to believe Judge Kavanaugh would be a vote to overturn and gut critical health care protections. As a D.C. Circuit judge, he has written dissenting opinions in three cases that could have undermined the Affordable Care Act ("ACA") and jeopardized access to health care. In *Seven-Sky v. Holder*,[7] which upheld the ACA's requirement that individuals purchase health insurance as within Congress's authority under the Commerce Clause, Judge Kavanaugh maintained, in dissent, that the court did not yet have jurisdiction to hear the case. In his view, the Anti-Injunction Act limited the court's ability to hear the case until the taxpayer first paid the disputed tax and then brought suit for a refund. Using hyperbolic language, he labeled the individual mandate as "unprecedented on the federal level in American history" and a "significant expansion" of congressional authority.[8] Of particular alarm was his suggestion that "the President might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional."[9]

In *Priests for Life v. U.S. Department of Health and Human Services*,[10] the D.C. Circuit rejected a challenge to the ACA's accommodation to the birth control benefit, which allows certain religiously-affiliated non-profit employers to opt out of providing birth control coverage directly to their workers by submitting a one-page form notifying their insurer or the federal government of their objections. When a qualifying employer opts out, the accommodation guarantees employees receive contraceptive coverage separately from their insurer. These objecting employers argued that the mere submission of the opt-out form rendered the organizations "complicit" in providing contraceptive coverage and thus impermissibly burdened their religious rights under the Religious Freedom Restoration Act ("RFRA"). The challengers sought rehearing en banc, and the D.C. Circuit denied it. Dissenting to the denial, Judge Kavanaugh maintained that objecting employers should have prevailed on their RFRA claim. He asserted that the filing of the form substantially burdened the organizations' exercise of religion because they were required, in order to avoid financial penalties, to take an action contrary to their sincere religious beliefs and courts "may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiff's religious beliefs – including about complicity in wrongdoing."[11] Judge Kavanaugh's view that courts ought to accept, without question, any claim by a religious organization that a government requirement substantially burdens a sincerely held religious belief and their free exercise of religion, raises serious concerns about his willingness to allow religious beliefs to be used as a license to discriminate and deny essential health care.

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[7] 661 F.3d 1 (D.C. Cir. 2011), *abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).
[8] *Id.* at 51-52 (Kavanaugh, J., dissenting).
[9] *Id.* at 50 (Kavanaugh, J., dissenting).
[10] 808 F.3d 1 (D.C. Cir. 2015).
[11] *Id.* at 18 (Kavanaugh, J., dissenting).

In *Sissel v. U.S. Department of Health and Human Services*,[12] Judge Kavanaugh authored another dissent from the D.C. Circuit's denial to rehear a case challenging the constitutionality of the ACA en banc. The *Sissel* court had rejected the claim that the ACA was unconstitutional because it was a revenue-raising bill, but failed to originate in the House of Representatives as required under the Origination Clause. Although Judge Kavanaugh acknowledged that the law's passage did not violate the Origination Clause, he nonetheless argued for the full D.C. Circuit to rehear the case because of the allegedly faulty reasoning in the panel decision. As a rehearing of the case would have prolonged the uncertainty surrounding the ACA's constitutional status, thereby hindering its implementation, Judge Kavanaugh's position in *Sissel* – one that the Supreme Court did not adopt, as it declined to hear the case – provides further evidence of his skepticism of the ACA.

Hostile to Women's Reproductive Freedom: Judge Kavanaugh's hostility towards women's reproductive rights was demonstrated by his rulings in the recent high-profile case, *Garza v. Hargan*.[13] In this case, Judge Kavanaugh was a member of a three-judge panel that sided with the Trump administration and blocked Jane Doe, a 17-year-old immigrant woman, from getting an abortion. Judge Kavanaugh issued an order delaying Jane Doe's abortion under the guise of finding her a sponsor, and held that this did not unduly burden her right to an abortion.[14] Four days later, the D.C. Circuit reheard the case en banc and reversed the panel decision, ruling that Jane Doe was entitled to seek an abortion without delay. Judge Kavanaugh dissented, arguing that the en banc majority had "badly erred," and adopting the language of anti-abortion extremists, stated that the majority decision had effectively given Jane Doe and others like her a new right "to obtain immediate abortion on demand." As one of the judges in the majority pointed out in criticizing Judge Kavanaugh's dissent: "Abortion on demand? Hardly.... Unless Judge Kavanaugh's dissenting opinion means the demands of the Constitution and Texas law."[15]

Judge Kavanaugh has also revealed his anti-abortion views off the bench. In a speech last year to the conservative American Enterprise Institute, he praised Chief Justice Rehnquist's opinion in *Washington v. Glucksberg*[16] for "stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition," stating that Chief Justice Rehnquist accomplished in *Glucksberg* what he was unable to in *Roe v. Wade*.[17] Such unenumerated rights include not only the right to an abortion but also the right to use contraception and the right to marriage equality. Judge Kavanaugh's apparent skepticism of those rights is disturbing.

A recent op-ed from one of Judge Kavanaugh's former law clerks, Sarah Pitlyk, who now works at an extreme anti-abortion organization, also sheds light on his anti-abortion ideology. She wrote: "As social conservatives know from bitter experience, a judicial record is the best – really, the only – accurate predictor of a prospective justice's philosophy on the issues that matter most to us. On the vital issues of protecting religious liberty and enforcing restrictions on abortion, no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh. On these issues, as on so many others, he has fought for his principles and stood firm against pressure. He would do the same on the Supreme Court."[18] This is additional confirmation that Judge Kavanaugh passed President Trump's *Roe v. Wade* litmus test. Ms. Pitlyk also made clear that Judge Kavanaugh passed the anti-ACA litmus test too. She wrote: "Although he ultimately determined that a challenge to Obamacare had to be brought

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[12] 799 F.3d 1035 (D.C. Cir. 2015).
[13] 874 F.3d 735 (D.C. Cir. 2017) (en banc).
[14] No. 17-5236, 2017 WL 4707112 (D.C. Cir. Oct. 19, 2017).
[15] *Id.* at 738 (Millett, J., concurring).
[16] 521 U.S. 702 (1997).
[17] http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.
[18] https://www.nationalreview.com/2018/07/judge-brett-kavanaughs-impeccable-record-of-constitutional-conservatism/.

later, he left no doubt about where he stood. No other contender on President Trump's list is on record so vigorously criticizing the law."[19]

Restricted Voting Rights: In two voting rights cases, Judge Kavanaugh has demonstrated his lack of commitment to racial justice. In 2012, in *South Carolina v. United States*,[20] Judge Kavanaugh wrote an opinion for a three-judge panel upholding a South Carolina voter ID law that was objected to by the U.S. Department of Justice because of the significant racial disparities in the law's photo ID requirement. Journalist Ari Berman wrote an article entitled "63,756 Reasons Racism Is Still Alive in South Carolina," explaining: "That's the number of minority registered voters who could be blocked from the polls by the state's new voter ID law."[21] Perhaps even more troubling than Judge Kavanaugh's opinion in this case was his refusal to acknowledge the importance of Section 5 of the Voting Rights Act. In a notable concurrence, Judge Bates – a fellow Republican appointee – wrote that "one cannot doubt the vital function that Section 5 of the Voting Rights Act played here. Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive… [T]he history of [the South Carolina law] demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws."[22] The fact that Judge Bates felt compelled to write a separate concurrence to make this basic point about the Voting Rights Act highlights the significance of Judge Kavanaugh's refusal to include it in his opinion for the court. This is a clear and dangerous signal about Judge Kavanaugh's views on voting rights and racial justice in America, and it strongly suggests he would be a reliable fifth vote to continue the Supreme Court's diminishment of the landmark Voting Rights Act.

Judge Kavanaugh worked against the interests of minority voters as an attorney as well. In the case *Rice v. Cayetano*,[23] he co-authored, along with conservative firebrands Robert Bork and Roger Clegg, a Supreme Court brief arguing that Hawaii violated the Constitution by permitting only Native Hawaiians to vote in elections for the Office of Hawaiian Affairs, a state agency charged with working for the betterment of Native Hawaiians. Although the Supreme Court sided with Judge Kavanaugh in this case, Justice Stevens wrote an eloquent dissent and said the voting provision at issue should be permissible because "there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs, and to preserve a distinct and vibrant culture that is as much a part of this Nation's heritage as any."[24]

In addition to filing a brief in *Rice v. Cayetano*, Judge Kavanaugh also wrote a *Wall Street Journal* op-ed in 1999 about this case in which he revealed a lack of understanding about the rights of indigenous peoples. Rather than recognizing, as does the Annex to the U.N. Declaration on the Rights of Indigenous Peoples, that "indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources,"[25] Judge Kavanaugh made partisan allegations about the Clinton Administration Justice Department's motives for filing a brief in support of Hawaii. He wrote: "As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency."[26] He also wrote: "The Supreme Court

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[19] *Id.*
[20] 898 F. Supp. 2d 30 (D.D.C. 2012).
[21] https://www.thenation.com/article/63756-reasons-why-racism-is-still-alive-in-south-carolina/.
[22] 898 F. Supp. 2d 30, 53-54 (D.D.C. 2012) (Bates, J., concurring).
[23] 528 U.S. 495 (2000).
[24] *Id.* at 529 (Stevens, J., dissenting).
[25] http://www.un-documents.net/a61r295.htm.
[26] Brett Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL ST. J., Sept. 27, 1999.

ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe."[27] When viewed against the history of U.S. injustice against Native Hawaiians, Judge Kavanaugh's cynical and partisan comments are alarming.

Opposed Equal Opportunity and Affirmative Action: In a 1999 *Christian Science Monitor* interview, Judge Kavanaugh said that *Rice v. Cayetano* "is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of government."[28] Judge Kavanaugh's embrace of the right-wing fallacy of colorblindness in America is a strong indication he would be hostile to critical civil rights protections and to equal opportunity programs that advance diversity or remedy past discrimination. When he worked in the White House, he was involved in the Bush administration's 2003 decision to file briefs asking the Supreme Court to strike down the University of Michigan's equal opportunity admissions policies, which used race as one factor among many. In a January 15, 2003 email, Judge Kavanaugh wrote: "The Michigan program is unconstitutional because race-neutral programs should be employed…"[29] The Supreme Court rejected that position with respect to the University of Michigan law school and ruled that because good-faith efforts had been made to utilize race-neutral alternatives, its admissions process was narrowly tailored and passed constitutional muster.

Dismissive of Discrimination Claims: Judge Kavanaugh's ideological bias can also be seen in his rulings in employment discrimination cases, where he has dissented and voted to dismiss claims that a majority of his D.C. Circuit colleagues found to be meritorious. In *Howard v. Office of the Chief Administrative Officer of the U.S. House of Representatives*,[30] Judge Kavanaugh dissented from a majority decision which held that under the Congressional Accountability Act ("CAA"), an African-American woman fired from her position as House of Representatives deputy budget director could pursue claims of racial discrimination and retaliation in federal court. Judge Kavanaugh dissented, arguing that the Speech or Debate Clause of the Constitution prohibited the employee from moving forward with her claims, and he would have dismissed her case. Judge Kavanaugh's interpretation of this constitutional provision would bar workers in Congressional offices and throughout the legislative branch from pursuing most CAA claims in federal court, including many sexual harassment, discrimination, and retaliation claims, leaving the inadequate and secret CAA administrative process as their only recourse. Especially in light of recent scandals in Congress about the treatment of staff, the potential consequences of Judge Kavanaugh's dissent warrants serious inquiry.

In *Miller v. Clinton*,[31] the majority held that the State Department violated the Age Discrimination in Employment Act ("ADEA") when it imposed a mandatory retirement age and fired an employee when he turned 65. The State Department argued that it was exempt from the ADEA in light of a separate federal law (the Basic Authorities Act) that permits U.S. citizens employed abroad to be excepted from U.S. anti-discrimination laws. The majority disagreed and held that there was "nothing in the Basic Authorities Act that abrogates the ADEA's broad proscription against personnel actions that discriminate on the basis of age" and that "the necessary consequence of the Department's position is that it is also free from any statutory bar against terminating an employee like Miller solely on account of his disability or race or religion or sex."[32] Judge Kavanaugh dissented, arguing that the Basic Authorities Act trumps existing anti-discrimination laws. His willingness to embrace such a broad exemption from anti-discrimination

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[27] *Id.*
[28] Warren Richey, *New Case may clarify court's stand on race*, CHRIST. SCI. MON., Oct. 6, 1999.
[29] http://civilrightsdocs.info/pdf/judicial-nominations/2018/SCOTUSdocs/Pages%20from%2008-09-18%20GWB%20Document%20Production%20%28Set%201%2C%20Pages%2010%2C001-20%2C000%29.pdf.
[30] 720 F.3d 939 (D.C. Cir. 2013).
[31] 687 F.3d 1332 (D.C. Cir. 2012).
[32] *Id.* at 1335.

laws is troubling. So too was his accusation that the majority was "stacking the deck with inapposite interpretive presumptions, and raising the specter of rampant race, sex, and religious discrimination."[33]

And in *Rattigan v. Holder*,[34] the majority ruled that an African-American FBI agent could pursue a case of improper retaliation for filing a discrimination claim where the agency began a security investigation against him, as long as he did so without questioning unreviewable decisions by the FBI security division. Judge Kavanaugh dissented and said the entire claim must be dismissed, despite the majority's warning that this was not required by precedent and that the courts should preserve "to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation."[35] Judge Kavanaugh's dissents in these three cases embrace positions that carve out federal employees from the protections of federal employment discrimination laws or limit their ability to enforce such rights.

Hostile to Workers' Rights: Judge Kavanaugh has a pattern of ruling against workers and employees in other types of workplace cases as well, such as workplace safety, worker privacy, and union disputes. For example, in *SeaWorld of Fla., LLC v. Perez*,[36] Judge Kavanaugh dissented from a majority opinion upholding a safety citation against SeaWorld following the death of a trainer who was working with a killer whale, which had killed three trainers previously. While the majority deferred to the Occupational Safety and Health Review Commission's finding that SeaWorld had insufficiently limited the trainers' physical contact with the whales, Judge Kavanaugh strongly disagreed and questioned the role of the government in determining appropriate levels of risk for workers. He wrote: "When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves – that the risk of significant physical injury is simply too great even for eager and willing participants?"[37] According to David Michaels, a former Occupational Safety and Health Act Assistant Secretary: "In his dissent in the SeaWorld decision, Judge Kavanaugh made the perverse and erroneous assertion that the law allows SeaWorld trainers to willingly accept the risk of violent death as part of their job. He clearly has little regard for workers who face deadly hazards at the workplace."[38]

In *National Labor Relations Board v. CNN America, Inc.*,[39] Judge Kavanaugh dissented in part from Chief Judge Garland's majority opinion upholding a National Labor Relations Board ("NLRB") order that CNN recognize and bargain with a worker's union and finding that CNN violated the National Labor Relations Act ("NLRA") by discriminating against union members in hiring. Judge Kavanaugh dissented from the finding that CNN was a successor employer, and his position would have completely absolved CNN of any liability for failing to abide by the collective bargaining agreement.

Judge Kavanaugh also dissented in *National Federation of Federal Employees v. Vilsack*,[40] where the D.C. Circuit majority invalidated a random drug testing program for U.S. Forest Service employees at Job Corps Civilian Conservation centers. The majority, which included another Republican-appointed judge, observed that there was no evidence of any difficulty maintaining a zero-tolerance drug policy during the 14 years before the random drug testing policy was adopted, and that the primary administrator of the Job Corps, the Department of Labor, had no such policy. Judge Kavanaugh dissented and tried to deal a major blow to employee privacy rights. The majority criticized Judge Kavanaugh, noting: "Our dissenting colleague paints with a broad brush without regard to precedent from the Supreme Court, and

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[33] *Id.* at 1357 (Kavanaugh, J., dissenting).
[34] 689 F.3d 764 (D.C. Cir. 2012).
[35] *Id.* at 770 (internal quotations and citation omitted).
[36] 748 F.3d 1202 (D.C. Cir. 2014).
[37] *Id.* at 1217 (Kavanaugh, J., dissenting).
[38] http://jordanbarab.com/confinedspace/2018/07/10/kavanaugh-threat-to-osha-workers/.
[39] 865 F.3d 740 (D.C. Cir. 2017).
[40] 681 F.3d 483 (D.C. Cir. 2012).

this court, on the particularity of the Fourth Amendment inquiry" with respect to such drug testing programs.[41]

In *American Federation of Government Employees, AFL-CIO v. Gates*,[42] Judge Kavanaugh authored the majority opinion that reversed the lower court's partial blocking of Department of Defense regulations, which had found that many of the Pentagon's regulations would "entirely eviscerate collective bargaining." Judge Kavanaugh disagreed. Judge Tatel dissented in part, noting that Judge Kavanaugh's majority opinion would allow the Secretary of Defense to "abolish collective bargaining altogether – a position with which even the Secretary disagrees."[43]

Disregard for Disability Rights: In 2007, Judge Kavanaugh wrote a decision that undermined the rights and autonomy of people with disabilities. In *Doe ex rel. Tarlow v. District of Columbia*,[44] he reversed a district court ruling that had stopped city officials from authorizing elective surgeries on people with intellectual disabilities without any consideration of their wishes. Judge Kavanaugh rejected the district court's finding that an individual who lacks the capacity to make medical decisions may nevertheless be capable of expressing a choice or preference regarding medical treatment; he claimed that this idea "does not make logical sense"[45] and that the District's actions did not violate the due process rights of the individuals subjected to the surgeries. He also overruled the district court's holding that the individual's 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. Judge Kavanaugh has been opposed by 104 national, state, and local disability rights organizations, who recently wrote: "Our review of Judge Kavanaugh's record indicates that his confirmation would place at risk access to health care and civil rights protections for people with disabilities, opportunities for people with disabilities to make choices about their own lives, and the ability of executive branch agencies to interpret and enforce the law."[46]

Anti-Immigrant Views: In his ruling discussed above in *Garza v. Hargan* (involving Jane Doe's right to an abortion) and in cases discussed below, Judge Kavanaugh has demonstrated hostility to the rights of immigrants. He has been described by a Breitbart writer as someone with an "America First" approach who would "share President Trump's views on immigration."[47]

In *Agri Processor v. National Labor Relations Board*,[48] a company refused to engage in collective bargaining with workers who had voted to unionize, on the basis that many of the workers were undocumented immigrants. The D.C. Circuit rejected this claim, based on the plain language of the NLRA and applicable Supreme Court precedent. But Judge Kavanaugh dissented, asserting that a federal immigration law had implicitly amended at least part of the NLRA. The majority rejected that argument and stated that "not only is there no clear indication that Congress intended IRCA implicitly to amend the NLRA, but all available evidence actually points in the opposite direction."[49] The majority stated that Judge Kavanaugh's dissent would lead to an "absurd result."[50] Former U.S. Department of Labor official

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[41] *Id.* at 489 n.5.
[42] 486 F.3d 1316 (D.C. Cir. 2007).
[43] *Id.* at 1331 (Tatel, J., dissenting in part).
[44] 489 F.3d 376 (D.C. Cir. 2007).
[45] *Id.* at 382.
[46] http://www.bazelon.org/wp-content/uploads/2018/08/Kavanaugh-letter-SJC-cc-full-Senate.pdf.
[47] https://www.breitbart.com/big-government/2018/07/04/america-first-scotus-choice-judge-brett-kavanaugh-applies-trumps-economic-patriotism-to-the-law/.
[48] 514 F.3d 1 (D.C. Cir. 2008).
[49] *Id.* at 4.
[50] *Id.* at 7.

Sharon Block has noted that his *Agri Processor* dissent is significant because "it reflects a broader trend in Kavanaugh's record of being unsympathetic to the plight of immigrants."[51]

In another immigration case, *Fogo de Chao Inc. v. Department of Homeland Security,*[52] a company challenged DHS's refusal to grant temporary visas to foreign workers with specialized cultural knowledge relating to Brazilian-style cooking, even though such visas had been granted in the past. The majority sided with the restaurant and its workers, and remanded the case for further consideration. Judge Kavanaugh dissented, leaving the majority to express "puzzlement" and to question whether Judge Kavanaugh embraced "woodenly excluding any and all knowledge or skills acquired by an employee solely because those skills and knowledge were learned from family or community rather than in-company trainers."[53]

Troubling Views on Presidential Power: Judge Kavanaugh has expressed extreme and disturbing views about presidential power. Despite being a lead author and prosecutor on Kenneth Starr's independent counsel team when it was a Democratic president under investigation, he now believes that presidents should not be subject to civil lawsuits or criminal investigations while in office. In a 2009 law review article, Judge Kavanaugh wrote that "we should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions" and "the country loses when the President's focus is distracted by the burdens of civil litigation or criminal investigation and possible prosecution."[54] Had this been the law in the 1970s, the Supreme Court would not have had the opportunity to rule on the Watergate tapes case in *United States v. Nixon*, and President Nixon would never have resigned from office. Tellingly, Judge Kavanaugh has expressed the view that the unanimous *United States v. Nixon* was "wrongly decided."[55] In a 2016 panel discussion, Judge Kavanaugh was asked if he could think of a case that deserves to be overturned. He responded: "Yes" and then named the 1988 Supreme Court ruling, *Morrison v. Olson*, which upheld the law authorizing independent counsels. Judge Kavanaugh stated: "It's been effectively overruled but I would put the final nail in."[56] In a 1998 law review article, Judge Kavanaugh said that a sitting president should have "absolute discretion" to determine whether and when to appoint a special counsel.[57] And he has said that special counsels should be "appointed (and removable) in the same manner as other high-level executive branch officials"[58] — in other words, whenever it would be convenient to the president. In a 1998 panel discussion, Judge Kavanaugh raised his hand after the moderator asked: "How many of you believe as a matter of law that a sitting president cannot be indicted during the term of office?"[59]

Judge Kavanaugh's record demonstrates that he lacks the requisite independence from President Trump to serve as a much-needed check on his abuses of power. As commentator Simon Lazarus has observed: "If President Donald Trump wished to replace retired Supreme Court justice Anthony Kennedy with a successor likely to back the White House in any Russia investigation showdown with Special Counsel

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[51] https://onlabor.org/the-kavanaugh-nomination-and-labor/.
[52] 769 F.3d 1127 (D.C. Cir. 2014).
[53] *Id.* at 1150.
[54] http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf.
[55] https://slate.com/news-and-politics/2018/07/brett-kavanaughs-criticism-of-united-states-v-nixon-should-worry-robert-mueller.html.
[56] https://www.c-span.org/video/?407491-1/discussion-politics-supreme-court.
[57] http://online.wsj.com/public/resources/documents/2018_0628_kavanaugh_1998_president_independent_counsel.pdf.
[58] *Id.*
[59] https://www.c-span.org/video/?101056-1/independent-counsel-statute-future.

Robert Mueller, or, more broadly, to legitimate Trump's penchant for sabotaging laws he disfavors, he could not have done better than nominate Brett Kavanaugh."[60]

Judge Kavanaugh's judicial record reflects his executive authority absolutism. For example, in *PHH Corp. v. Consumer Financial Protection Bureau*,[61] he ruled it was unconstitutional for the Consumer Financial Protection Bureau ("CFPB") to be headed by a single director who could not be removed by the president without cause.[62] He wrote the majority opinion for a conservative panel, which held that the structure of the CFPB violated Article II of the Constitution and ruled that the CFPB director should be subject to supervision and removal by the president without cause. Judge Kavanaugh asserted that independent agencies constitute "a headless fourth branch of the U.S. government" and wrote: "Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances."[63] An en banc panel of the D.C. Circuit vacated and remanded Judge Kavanaugh's decision, upholding the constitutionality of the Dodd-Frank Wall Street Reform and Consumer Protection Act provision specifying that the CFPB director serves a five-year term, subject to removal by the president only for "inefficiency, neglect of duty, or malfeasance in office."[64] The CFPB's independence has been critical to its ability to remain a steadfast enforcer of the consumer protection laws despite massive political opposition from the financial industry. A seat on the Supreme Court would allow Judge Kavanaugh and his allies to expand attacks on the ability of government to regulate and enforce the rules on behalf of ordinary people.

Judge Kavanaugh's dissent in *Doe v. Exxon Mobile* also demonstrates his extreme deference to executive power. In that case, 11 Indonesian villagers alleged they were victims of torture, sexual assault, and false imprisonment by Exxon's security forces. The majority didn't rule on Exxon's argument that the case should be dismissed on political question grounds, because it found the appeal premature. Judge Kavanaugh dissented and would have dismissed the case because "the Executive Branch has stated that the lawsuit will adversely affect the foreign policy interests of the United States…"[65]

It is also important to note Judge Kavanaugh's role in the Bush administration's deeply flawed detention and interrogation policies, and possible misrepresentations he made to the Senate Judiciary Committee at his 2006 D.C. Circuit nomination hearing. In response to a question from Senator Durbin, Judge Kavanaugh testified, under oath: "I was not involved and am not involved in the questions about the rules governing detention of combatants."[66] However, a 2007 *Washington Post* article reported that Judge Kavanaugh participated in a "heated meeting" in the White House in 2002 about whether U.S. citizen enemy combatants should have access to counsel.[67] That report appears to contradict Judge Kavanaugh's sworn testimony before the Senate Judiciary Committee. Senator Durbin sent a letter to Judge Kavanaugh in 2007 asking him to explain the discrepancy, but Senator Durbin, in recent comments he made about the Kavanaugh nomination,[68] said that he never received a response from Judge Kavanaugh.

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[60] http://prospect.org/article/here%E2%80%99s-how-democrats-can-expose-what-kavanaugh-threatens.
[61] 839 F.3d 1 (D.C. Cir. 2016), *vacated and remanded, PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).
[62] *Id.* at 5.
[63] *Id.* at 6.
[64] 881 F.3d at 77.
[65] 473 F.3d 345, 357 (D.C. Cir. 2007) (Kavanaugh, J., dissenting).
[66] https://www.rollcall.com/news/politics/democratic-senators-accused-potential-trump-scotus-pick-offering-misleading-testimony.
[67] http://voices.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/.
[68] https://www.judiciary.senate.gov/meetings/07/12/2018/executive-business-meeting.

We urge Senators to demand documents relevant to his involvement in this area to determine the truth about his role in the Bush administration's troubling detention policies. Lying to Senators under oath is a serious offense that cannot be disregarded in the confirmation process if that process is to have any legitimacy.

An email released recently by the George W. Bush Presidential Library provides further evidence that Judge Kavanaugh was involved in detention issues. The June 12, 2004 email from Deputy National Security Advisor James Wilkinson to Deputy Chief of Staff Harriet Miers includes several talking points for Bush administration officials to use on Sunday talk shows in anticipation of questions about the Justice Department's shameful "torture memo" that had been revealed by the *Washington Post* five days earlier. One of the talking points said that President Bush "has repeatedly made clear that torture of detainees is not permitted under U.S. policy, and he has never considered the possibility of authorizing torture."[69] The June 12, 2004 email stated that the talking points had been cleared by certain White House officials, including Karl Rove, but that the National Security Council "also wanted Harriet, Brett, and Andy to see them."[70] This demonstrates that Judge Kavanaugh had a pivotal role in reviewing and approving the White House's public response to the torture memo disclosure.

Undermined Environmental Protections: During his 12 years on the bench, Judge Kavanaugh has consistently ruled to protect polluters rather than the environment. He has opposed critical environmental protections for clean air and clean water, repeatedly ruling that the Environmental Protection Agency ("EPA") exceeded its statutory authority in issuing rules to limit pollutants. For example, in *EME Homer City Generation, L.P. v. EPA*,[71] Judge Kavanaugh struck down the EPA's Cross-State Air Pollution Rule, which regulates air pollution that crosses state boundaries, as a violation of the Clean Air Act. He concluded that the EPA exceeded its statutory authority in two ways – first, by requiring upwind states to reduce emissions more than the statute requires, and second, by not deferring to the states to be the initial ones to implement the required reductions. Judge Kavanaugh went further in limiting the EPA's authority than the conservative Supreme Court, which upheld the pollution rule on a 6-2 vote.[72]

In *Howmet Corp. v. EPA*,[73] Judge Kavanaugh dissented from a decision to approve an EPA fine of over $300,000 against a company that had improperly shipped a corrosive chemical to be added to fertilizer without properly labelling it and taking other precautions to treat it as a hazardous waste. Judge Kavanaugh claimed that the EPA had misinterpreted the language of its own regulation on the subject. But this view was rejected by the two judges in the majority, Janice Rogers Brown and David Sentelle, who are among the most conservative judges on the D.C. Circuit. As they pointed out, the EPA's interpretation was appropriate and helped prevent "significant risks to public health and the environment" from hazardous wastes.[74] Judge Kavanaugh would have allowed the corporation's shipment of the corrosive chemical to proceed without the precautions prescribed under federal law.

In *Mexichem Fluor Inc. v. EPA*,[75] Judge Kavanaugh wrote the opinion striking down a rule that banned certain uses of hydrofluorocarbons, gases used in air conditioning and refrigeration that when released into the atmosphere are extremely potent greenhouse gases. His ruling said that the EPA exceeded its

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[69] http://civilrightsdocs.info/pdf/judicial-nominations/2018/000000005A63763B7FAFE24BBC40FF72993DC146A4462500.eml_RV.pdf.
[70] *Id.*
[71] 696 F.3d 7 (D.C. Cir. 2012).
[72] 134 S. Ct. 1584 (2014).
[73] 614 F.3d 544 (D.C. Cir. 2010).
[74] *Id.* at 553.
[75] 866 F.3d 451 (D.C. Cir. 2017).

authority because the statute was meant to stop ozone-depleting substances, not to allow the EPA to order the replacement of substances that are not ozone-depleting but contribute to climate change.

In addition to his anti-environmental rulings, Judge Kavanaugh has advanced an anti-environmental view of the *Chevron* doctrine. For more than three decades, since 1984, the Supreme Court has required judges to defer to administrative agencies' interpretations of federal law in most cases where the law is "ambiguous" and the agency's position is "reasonable." Conservative Justice Antonin Scalia defended the *Chevron* doctrine as an important rule-of-law principle.[76] Federal agencies issue regulations addressing a wide array of civil and human rights issues, including environmental protections, immigration policy, health care protections, education laws, workplace safety, and consumer protections. Overturning the *Chevron* precedent would return that ultimate decision-making authority to judges, which appears to be what Judge Kavanaugh wants to do. He has said that "the *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes."[77] And he has called *Chevron* "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."[78] Judge Kavanaugh's clear intent to overturn this precedent and its progeny would impede the ability of federal agencies to carry out their vital missions.

Opposed to Common-Sense Gun Safety Laws: After the Supreme Court decided 5-4 in the 2008 case *District of Columbia v. Heller* that the Second Amendment protects an individual right to bear arms, Washington, D.C. passed laws that prohibited assault weapons and high-capacity magazines, and that required certain firearms to be registered. The same plaintiff, Richard Heller, argued again that the new gun laws violated the Second Amendment. In the 2011 case *Heller v. District of Columbia*,[79] a panel of three Republican-appointed judges ruled 2-1 that D.C.'s ban on assault weapons and high-capacity magazines was constitutional. Judge Kavanaugh dissented and would have held that the ban on assault weapons was unconstitutional. He wrote: "In *Heller*, the Supreme Court held that handguns – the vast majority of which today are semi-automatic – are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles."[80] It is troubling that Judge Kavanaugh sees no difference between assault weapons and handguns, and it is a strong indication that he, like President Trump, will cater to the gun lobby. During the 2016 campaign, President Trump stated: "I'm very proud to have the endorsement of the NRA and it was the earliest endorsement they've ever given to anybody who ran for president.... We are going to appoint justices that will feel very strongly about the Second Amendment."[81] Judge Kavanaugh clearly passes this litmus test.

Pro-Government Bias in Criminal Cases: Judge Kavanaugh reflexively rules for the government in criminal cases. A report by People For the American Way indicates that Judge Kavanaugh has written 12 dissents in criminal and law enforcement cases, and he has ruled for the government in 10 of the 12 cases.[82] For example, in *United States v. Askew*,[83] a majority of the en banc court, including three

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[76] https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3075&context=dlj.
[77] https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4733&context=ndlr.
[78] http://harvardlawreview.org/wp-content/uploads/2016/06/2118-2163-Online.pdf.
[79] 670 F.3d 1244 (D.C. Cir. 2011).
[80] *Id.* at 1269 (Kavanaugh, J., dissenting).
[81] https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063.
[82] http://www.pfaw.org/report/the-dissents-of-judge-brett-kavanaugh-a-narrow-minded-elitist-who-is-out-of-the-mainstream/.
[83] 529 F.3d 1119 (D.C. Cir. 2008) (en banc).

Republican-appointed judges, reversed a lower court and decided that the police violated the Fourth Amendment rights of a suspect by unzipping his jacket to search him without a warrant after a stop and frisk produced no results. Judge Kavanaugh wrote a dissent and claimed that the action was justified because it was a reasonable continuation of the stop and frisk and it helped police in showing the subject to a witness at an alleged robbery. The majority rejected Judge Kavanaugh's analysis.

And in *Roth v. U.S. Department of Justice,*[84] Judge Kavanaugh dissented from a majority ruling that the Department of Justice ("DOJ") improperly refused to say whether it had records in response to a Freedom of Information Act request by a death row prisoner who believed that DOJ records could corroborate his claim of innocence. The majority held that the public has an interest in knowing whether the federal government is withholding information that could corroborate a death-row inmate's claim of innocence, and also that this interest outweighed the privacy interests of three other men in having the FBI not disclose whether it possessed any information linking them to the murders. Judge Kavanaugh dissented and would have upheld the FBI's non-disclosure, arguing: "The privacy interests of third parties who are named in law enforcement documents are invariably strong" and in this case outweigh "the public interest in accurately assessing criminal liability or exposing prosecutorial or investigative misconduct."[85]

Troubling Views on Money in Politics: Judge Kavanaugh's judicial record indicates he would vote with the conservative bloc on the Supreme Court to continue opening the floodgates of money into our political system. An analysis by Demos and Campaign Legal Center of Judge Kavanaugh's cases involving money in politics shows that, if confirmed, he would be more aggressive than Justice Kennedy in lifting restrictions on big money.[86] For example, in *EMILY's List v. Federal Election Commission*,[87] Judge Kavanaugh wrote the opinion for a conservative three-judge panel that struck down FEC rules developed to address the influx of spending by outside organizations and paved the way for the creation of super PACs. In another case, *Independence Institute v. Federal Election Commission*,[88] he wrote the opinion for two conservative panel members (over a strong dissent) utilizing what Demos and Campaign Legal Center deemed "a novel theory that would limit disclosure based on a spender's tax-status, a theory subsequently rejected by a three-judge court and the Supreme Court."[89]

Sought to Undermine Church-State Separation in Education: As an attorney in private practice, Judge Kavanaugh was part of the legal team representing former Florida Governor Jeb Bush's effort to create the Opportunity Scholarships Program, a school voucher program in Florida that would direct public money to private schools by providing students who decide to leave some of the state's lowest-rated public schools with about $4,350 in tuition aid they could use in private or religious schools.[90] Notably, students attending these private schools receiving public funds would not have the same civil rights, including their right to services as a child with a disability, as if they were in a public school. In 2006, the Florida Supreme Court struck down the program as a violation of the state constitution's provision that requires a "uniform" system of public schools for all students.[91]

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[84] 642 F.3d 1161 (D.C. Cir. 2011).
[85] *Id.* at 1189 (Kavanaugh, J., dissenting).
[86] https://campaignlegal.org/sites/default/files/2018-07/CLC%20Demos%20Kavanaugh%20Brief%207-12-18%209pm.pdf.
[87] 581 F.3d 1 (D.C. Cir. 2009).
[88] 816 F.3d 113 (D.C. Cir. 2016).
[89] https://campaignlegal.org/sites/default/files/2018-07/CLC%20Demos%20Kavanaugh%20Brief%207-12-18%209pm.pdf.
[90] 767 So.2d 668 (Fla. 2000).
[91] 919 So.2d 392 (Fla. 2006).

In *Santa Fe Independent School District v. Doe*,[92] Judge Kavanaugh wrote an amicus brief on behalf of Republican members of Congress in which he argued that the use of loudspeakers for student-led prayers at high school football games did not constitute a violation of the Establishment Clause of the First Amendment. In his brief, he accused the other side of advocating that Christian students receive fewer rights than Nazis and KKK members. Judge Kavanaugh wrote: "But offense at one's fellow citizens is not and cannot be the Establishment Clause test, at least not without relegating religious organizations and religious speakers to bottom-of-the-barrel status in our society – below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes, all of whom may use the neutrally available public square and receive neutrally available government aid."[93] The Supreme Court rejected his hyperbolic argument 6-3, ruling that the prayer involved both perceived and actual endorsement of religion.

Ideological Jobs and Affiliations: Judge Kavanaugh's right-wing ideology is reflected not only in his judicial record but also in his earlier career as a partisan lawyer. After clerking for Third Circuit Judge Walter Stapleton, Ninth Circuit Judge Alex Kozinski, and Supreme Court Justice Anthony Kennedy, he went to work for Kenneth Starr to conduct investigations into President Clinton. Judge Kavanaugh was one of the primary authors of the infamous Starr Report, in which he laid out in graphic detail the case for impeachment. He then went to work at the Washington, D.C. law firm Kirkland & Ellis, LLP, where he represented corporate clients and Republican causes and politicians. In 2000, he worked as the Mid-Atlantic regional coordinator for the Bush-Cheney campaign, and he traveled to Florida to observe the recount as part of the *Bush v. Gore* litigation. He was rewarded with plum White House positions and ultimately a judgeship. From 2001 to 2003, Judge Kavanaugh served as Associate Counsel to President Bush, and from 2003 to 2006 he served as the Assistant to the President and Staff Secretary. In these positions, he worked on the nominations of several contentious judicial nominees – including Charles Pickering, Miguel Estrada, Priscilla Owen, Carolyn Kuhl, and many others – before he himself was nominated to the D.C. Circuit in 2003. He also worked on many policy issues, including Executive Order 13233, which revised the Presidential Records Act to make it easier for presidents to withhold documents from the public. Due to his controversial background and the intense opposition to his confirmation, it took three years for Judge Kavanaugh to be confirmed, and he was confirmed on a largely party-line vote.

Judge Kavanaugh is a longtime member of the Federalist Society and served as the co-chair of its Religious Liberties Practice Group School Choice Subcommittee from 1999 to 2001. This out-of-the mainstream legal organization represents a sliver of America's legal profession – just four percent – yet all 25 of the candidates President Trump considered for the Supreme Court nomination were on a list vetted and approved by the Federalist Society. As the *New York Times* put it in a recent editorial: "The Federalist Society claims to value the so-called strict construction of the Constitution, but this supposedly neutral mode of constitutional interpretation lines up suspiciously well with Republican policy preferences – say, gutting laws that protect voting rights, or opening the floodgates to unlimited political spending, or undermining women's reproductive freedom, or destroying public-sector labor unions' ability to stand up for the interests of workers."[94]

Ties to Judge Kozinski: As workplace and sexual harassment gain national attention in the midst of the #MeToo movement, Senators must ask Judge Kavanaugh what he knew about Judge Kozinski's sexual harassment and assaults of his law clerks, when he learned of it, and what actions he took in response. Judge Kavanaugh has reportedly remained close friends with Judge Kozinski since his 1991-1992

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[92] 530 U.S. 290 (2000).
[93] https://www.au.org/sites/default/files/2018-07/Santa%20Fe%20Independent%20School%20Dist%20v.%20Doe%20amicus%20brief.pdf.
[94] https://www.nytimes.com/2018/07/09/opinion/editorials/trump-kavanaugh-supreme-court-senate.html.

clerkship.[95] Judge Kozinski resigned from the bench in December 2017 following numerous allegations by at least 15 former law clerks of severe sexual harassment and abuse. Long before the *Washington Post* exposed the allegations against him in 2017, Judge Kozinski's sexualized and abusive behavior was an open secret in the legal profession. Judge Kavanaugh and Judge Kozinski reportedly worked together for years as clerkship screeners for Justice Kennedy. This process led to many applicants who had previously clerked for Judge Kozinski obtaining clerkships with Justice Kennedy. As a result, Judge Kavanaugh helped maintain the prestige of a Kozinski clerkship, which no doubt had the effect of encouraging many young attorneys to continue to seek Kozinski clerkships despite the widespread rumors of abusive behavior. One former Kozinski law clerk has stated: "It is unfathomable to me that his [Judge Kozinski's] closest associates did not know, and Kavanaugh was a very close associate. To not know would require a degree of willful blindness which is, in my mind, as disqualifying as actual knowledge. The last thing this country needs is a Supreme Court Justice who squeezes his eyes shut so tightly that he can't see what's in front of his face."[96] Professor Joanna Grossman, who clerked for a different judge on the Ninth Circuit, has said: "When I clerked on the Ninth Circuit, Kozinski sent a memo to all the judges suggesting that a rule prohibiting female attorneys from wearing push-up bras would be more effective than the newly convened Gender Bias Task Force. His disrespect for women is legendary."[97] Judge Kavanaugh must be truthful and forthcoming about any knowledge or awareness of Judge Kozinski's predatory and abusive behavior.

Judge Kavanaugh is an ideological extremist with a clear partisan agenda. He lacks the fair-mindedness necessary to serve a lifetime appointment at the highest level of the branch of government charged with making the ultimate decisions about our rights, freedoms, liberties, and the meaning of our laws and Constitution. Chairman Grassley has implemented a biased and unscrupulous process to review Judge Kavanaugh's Bush White House records, which has denied the Senate and the American people the opportunity to learn about the nominee's full record. As ten members of the Senate Judiciary Committee forcefully wrote in a recent letter: "[T]here is no legitimate reason for the Senate to rush this nomination and fail to perform its constitutional duty. This is especially true, when the President, who faces significant legal jeopardy, chose the one candidate who has consistently and clearly expressed doubt as to whether a sitting president can be investigated or indicted for criminal wrongdoing."[98] In light of the astonishing and unprecedented circumstances facing this nation, the Senate should not move forward with the consideration of Judge Kavanaugh for a lifetime position on the Supreme Court.

Thank you for your consideration of our views.

Sincerely,

The Leadership Conference on Civil and Human Rights
9to5, National Association of Working Women
A Better Balance
Access Living of Metropolitan Chicago
Advocates for Youth
African American Policy Forum
Alliance for Justice
American Atheists
American Federation of Labor--Congress of Industrial Organizations (AFL-CIO)

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[95] https://abovethelaw.com/2018/07/did-brett-kavanaugh-know-about-alex-kozinski/?rf=1.
[96] https://twitter.com/courtneymilan/status/1016530256411283456.
[97] https://twitter.com/JoannaGrossman/status/939542418638147584.
[98] https://www.feinstein.senate.gov/public/_cache/files/7/0/705493b3-8ee8-4448-bda1-d0400c99d752/6C9970DC7BC7AB0315B2994B50EDE36A.letter-to-grassley-on-kavanaugh-delay.pdf.

American Federation of Teachers
American Humanist Association
American Society on Aging
American-Arab Anti-Discrimination Committee
Americans for Financial Reform
Americans United for Separation of Church & State
Asian American Legal Defense and Education Fund (AALDEF)
Asian Americans Advancing Justice - AAJC
Asian Americans Advancing Justice - Los Angeles
Asian Pacific American Labor Alliance
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Bend the Arc Jewish Action
Black Women's Roundtable
Business & Professional Women of Colorado
Business and Professional Women of Denver (BPW Denver)
Caring Across Generations
Center for American Progress
Center for Biological Diversity
Center for Community Change Action (CCCA)
Center for Constitutional Rights
Center for Health and Gender Equity (CHANGE)
Center for Popular Democracy
Center for Public Representation
CenterLink: The Community of LGBT Centers
CLASP
Clearinghouse on Women's Issues
Coalition of Labor Union Women
Communications Workers of America (CWA)
Community Catalyst
Dallas Fort Worth Foster Parent Association
Defending Rights & Dissent
Demand Justice
Demos
Disability Rights Education & Defense Fund
Earthjustice
Economic Policy Institute Policy Center
Equal Justice Society
Equal Rights Advocates
Equality California
Equality Federation
Equality Maine
Equality New Mexico
Equality North Carolina
Every Voice
Fair Immigration Reform Movement (FIRM)
Fair Wisconsin
Faith in Action
Faith in Public Life
Family Equality Council
Family Values @ Work

Farmworker Justice
Feminist Majority
Fuse Washington
Gallatin Valley Friends of Cuba, Montana
Generation Progress
Global Justice Institute, Metropolitan Community Churches
GLSEN
Government Information Watch
GreenLatinos
Hawai'i Institute for Human Rights
Herd on the Hill
Hip Hop Caucus
Hispanic Federation
Human Rights Campaign
Immigrant Legal Resource Center
In Our Own Voice: National Black Women's Reproductive Justice Agenda
Indivisible
International Association of Women in Radio and Television-USA
International Women's Health Coalition
Jobs WIth Justice
Justice in Aging
Lambda Legal
LatinoJustice PRLDEF
Lawyers' Committee for Civil Rights Under Law
League of Conservation Voters
Legal Aid at Work
LULAC #1191
Main Street Alliance
Maine Conservation Voters
MALDEF
MANA, A National Latina Organization
Mi Familia Vota
MomsRising
Montana Chapter of the National Organization for Women (NOW)
Montgomery County (MD) Civil Rights Coalition
MoveOn
Muslim Advocates
Muslim Public Affairs Council
NAACP
NAACP Legal Defense and Educational Fund, Inc.
NARAL Pro-Choice America
National Abortion Federation
National Action Network
National Association of Human Rights Workers
National Association of Social Workers (NASW)
National Bar Association
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition for Asian Pacific American Community Development
National Coalition on Black Civic Participation

National Council of Jewish Women
National Council on Independent Living
National Education Association
National Employment Law Project
National Employment Lawyers Association
National Equality Action Team (NEAT)
National Federation of Business and Professional Women
National Federation of Business and Professional Women's Clubs-NYC (NFBPWC-NYC)
National Health Law Program
National Hispanic Media Coalition
National Immigration Law Center
National Institute for Reproductive Health (NIRH)
National Institute of Reproductive Health
National Latina Institute for Reproductive Health
National Latino Farmers and Ranchers Trade Association
National Law Center on Homelessness & Poverty
National LGBTQ Task Force Action Fund
National Organization for Women
National Partnership for Women & Families
National Urban League
National Women's Health Network
National Women's Law Center
National Workrights Institute
NC League of Conservation Voters
Nevada Conservation League
New Ways Ministry
NFBPC EL PASO WEST
NFBPWC
North Carolina Justice Center
OCA - Asian Pacific American Advocates
One Million Kids for Equality
Pantsuit Nation
People For the American Way
PFLAG National
Planned Parenthood Federation of America
PolicyLink
Population Connection Action Fund
Pride at Work
Progress Florida
Progress Virginia
Progressive Turnout Project
ProgressOhio
Protect Our Care
Religious Coalition for Reproductive Choice
Religious Institute
Reproaction
Secular Coalition for America
Service Employees International Union (SEIU)
Sierra Club
South Asian Network
Southeast Asia Resource Action Center (SEARAC)

The Leadership Conference

Southern Poverty Law Center
Southwest PA National Organization for Women
State Innovation Exchange (SIX)
The Immigration Hub
The Links, Incorporated
The National Council of Asian Pacific Americans (NCAPA)
The New Jersey Institute for Social Justice
The Washington Bar Associaton Young Lawyers Division
The Workmen's Circle
UltraViolet
United State of Women
United Steelworkers
United We Dream
US Women and Cuba Collaboration
Violence Policy Center
Voices for Progress
Voto Latino
West Pinellas National Organization for Women (NOW) Florida
Women Employed
Women's Law Project
Woodhull Freedom Foundation
World Without Genocide at Mitchell Hamline School of Law
YWCA USA

LEAGUE OF CONSERVATION VOTERS

United States Senate
Washington, DC 20510

Re: Oppose Judge Brett Kavanaugh for Supreme Court of the United States

Dear Senator,

The League of Conservation Voters (LCV) works to turn environmental values into national, state and local priorities. Each year, LCV publishes the *National Environmental Scorecard*, which details the voting records of members of Congress on environmental legislation. The *Scorecard* is distributed to LCV members, concerned voters nationwide, and the media.

LCV urges you to oppose the confirmation of Judge Brett Kavanaugh to a lifetime appointment on the Supreme Court of the United States. The Supreme Court holds immense power to protect our right to breathe clean air, drink clean water, and participate equitably in our democracy. Justices on the Court have an impact lasting generations, and it is essential that anyone nominated to the Court seeks to respect precedent, interpret the law in a fair and well-reasoned manner, and act as an independent check on the President. Supreme Court Justices also have an obligation to provide equal access to all those seeking justice, and to ensure that no one is above the law.

Judge Kavanaugh's record reflects a concerning preference for corporations and polluters over public health and the environment. In *Mingo Logan Coal Co. v. EPA*, Kavanaugh dissented from a ruling upholding the Environmental Protection Agency's authority to block a mining company from dumping pollutants into our waterways. And in *White Stallion Energy Center v. EPA*, Kavanaugh argued against regulations controlling the emission of mercury and other toxic pollutants into our air.

In several rulings, Judge Kavanaugh has shown hostility towards "*Chevron* deference" by frequently substituting his own statutory interpretations for that of federal agencies. He has also repeatedly challenged the underlying authority of the Environmental Protection Agency to regulate harmful air and water pollution. In *EME Homer City Generation, LP v. EPA*, a decision later rejected by the Supreme Court, Judge Kavanaugh struck down regulations protecting against pollution that crosses state lines. He has also ruled against the EPA's authority to regulate the pollution responsible for climate change, raising serious concerns about whether he would follow the precedent set by the Supreme Court's 2007 decision *Massachusetts v. EPA*.

Kavanaugh's past rulings on legal standing indicate a narrow view of standing that would make it harder to challenge threats to the environment, public safety, and consumer protection. In *Public Citizen v. NHTSA*, he held that increased risk of severe traffic accidents was not "sufficiently 'imminent'" to challenge vehicle safety standards. However, he has found that

corporations have standing to challenge environmental regulations even when the economic impact is minimal, saying "the amount is irrelevant" (*Carpenters Industrial Council v. Zinke*).

In addition to the threat posed to environmental protections, Kavanaugh's record indicates that his confirmation would dramatically shift the Court on fundamental issues like access to healthcare, reproductive rights, protection against discrimination, workers' rights, and voting rights. In *South Carolina v. Holder*, Kavanaugh upheld a South Carolina voter ID law that seeks to disenfranchise tens of thousands of people of color.

Finally, Judge Kavanaugh's record makes clear that he lacks the willingness to serve as an independent check on the President. In this rulings and writings, he has argued for expansive executive authority, including exemption from criminal investigation and broad power over independent agencies. These extreme views run contrary to the role of the Supreme Court.

For all those who want to breathe clean air, drink clean water, and leave a safer planet for future generations, and for the rights of workers, women, immigrants, the disabled, the LGBTQ community, and others, we strongly urge you to oppose the confirmation of Judge Brett Kavanaugh to the Supreme Court of the United States. We will strongly consider including this vote in our 2018 *Scorecard*. If you need more information, please call my office at (202) 785-8683 and ask to speak with a member of our Government Relations team.

Sincerely,

Gene Karpinski

President

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

Jay P. Lefkowitz, P.C.
To Call Writer Directly:
[redacted]

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August 29, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

I write in support of Judge Brett Kavanaugh as our next Associate Justice of the Supreme Court of the United States.

I have had the great pleasure of working with Judge Kavanaugh in private practice as well as at the White House. I have also had the privilege of arguing before him twice in the years since he became a judge on the D.C. Circuit. Based on those experiences, I can assure you that Judge Kavanaugh has all the qualities that we most admire and seek in judges. Judge Kavanaugh also has a strong commitment to protecting Americans' freedom of religion, no matter their faith.

Attached please find an article I wrote for *National Review* detailing some of my experiences with Judge Kavanaugh, including a pro bono matter we litigated for Temple Adat Shalom, a Reconstructionist synagogue in Maryland. After we won the case, the congregation gave us as a thank-you gift a lithograph with the traditional scriptural exhortation in Hebrew "tzedek tzedek, tirdof" — "Justice, Justice, shalt thou pursue." I told Brett he should keep it. He proudly hung that print in his West Wing office for years.

I hope this letter and the accompanying article prove useful in your deliberations.

Sincerely,

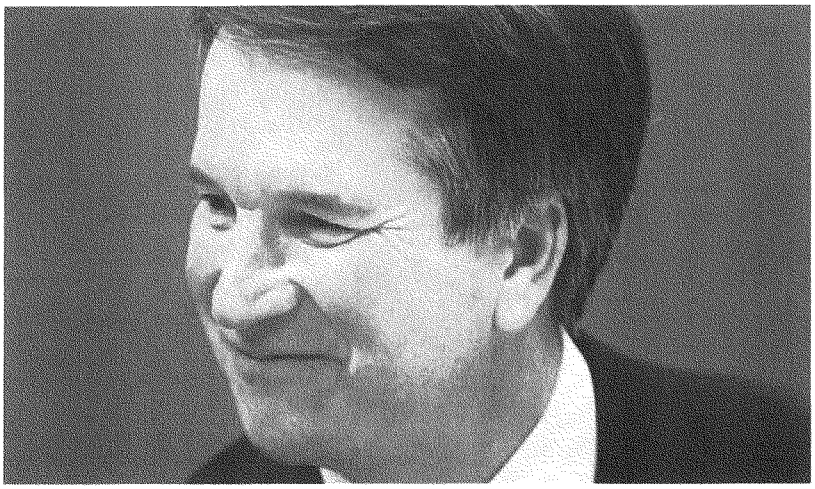
Jay P. Lefkowitz

Enclosure

LAW & THE COURTS

Brett Kavanaugh Is a Mensch

By JAY P. LEFKOWITZ | August 29, 2018 6:30 AM



Judge Brett Kavanaugh meets with Sen. Cindy Hyde-Smith on Capitol Hill, July 25, 2018. (Jonathan Ernst/Reuters)

The Supreme Court nominee is thorough, fair-minded, and committed to religious freedom for all.

With Brett Kavanaugh's Supreme Court confirmation hearings set to begin next week, I am reminded of a pro bono matter that Brett Kavanaugh and I worked on years ago that exemplifies his commitment to protecting Americans' freedom of religion — no matter their faith.

In 1999, a group of residents in West Bethesda, Md., sued to block construction of Temple Adat Shalom, a Reconstructionist synagogue, in their neighborhood. The neighbors' stated objection was that the size of the synagogue would mar the character of the neighborhood. The essence of their challenge was that the portion of the Montgomery County Code that deems "places of worship" a "permitted use" — and therefore exempts them from the onerous requirement of obtaining a special exception to the zoning laws — violated the Establishment Clause of the U.S. Constitution.

I was a young partner in the Washington, D.C., office of Kirkland & Ellis and had been involved in several religious-freedom cases, so I wasn't surprised when the synagogue asked me to represent them pro bono. I asked another young partner at the firm, Brett Kavanaugh, to join me. I turned to Brett because I knew him to have the same deep respect for religion that I have. And though he is Catholic and I am an observant Jew, we shared a commitment to upholding the religion prongs of the First Amendment — the Establishment Clause and the Free Exercise Clause — and seeing that they were properly interpreted and enforced. I also knew that Brett shared my commitment to pro bono work.

Pro bono legal work sometimes creates strange bedfellows, and this case was no exception. The point person for the congregation was Matt Nosanchuk, who later became President Obama's liaison to the Jewish community and associate director of the White House Office of Public Engagement. Despite our political differences, Brett and I found common ground with Matt on the issues in the case. We realized that Adat Shalom was simply the victim of a Not in My Backyard campaign; the allegation that the zoning code violated the federal Constitution was totally baseless.

The essence of our defense was that the Maryland law was neutral as to religion and therefore could not be construed as favoring or "establishing" religion. Indeed, while the law granted an exemption from the zoning process for "churches, memorial gardens, monasteries, and other places of worship," it

extended the same benefit to plainly non-religious facilities such as museums, libraries, and farmers' markets. Judge Andre Davis — a Clinton appointee who later was elevated to the Fourth Circuit by President Obama — agreed with us and dismissed the complaint, finding that the challenged law "had a valid secular purpose and achieves genuine neutrality toward religion."

The sensitivity and professionalism that Brett brought to the Adat Shalom case have always been his hallmarks. I had the pleasure of working together with Brett on other matters in private practice and again when we were colleagues in the White House. Brett combines great intellect with superb judgment and equanimity. Even when we were working on the most serious issues in the White House and encountered challenging situations, I never saw Brett lose his composure. He always treated his colleagues with respect.

In the years since Brett became a federal judge, I have argued before him in two complex administrative-law cases. Despite a full docket, he is always intimately familiar with the record in each case and the relevant case law. And though I admit to being happy with the outcome only in one of the two lawsuits (he ruled against me in the other), I can't think of any federal judge before whom I have argued who is better prepared for oral argument than Judge Kavanaugh.

Brett Kavanaugh has the qualities we most admire and seek in judges. He is smart, thoughtful, impartial, discreet, empathetic, and principled. If confirmed as an associate justice of the United States, he would continue to be a vigorous defender of the Constitution.

JAY P. LEFKOWITZ — *Jay P. Lefkowitz is a partner at Kirkland & Ellis who worked with Brett Kavanaugh when he was at the firm and later when both were on the White House staff of President George W. Bush.*

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September 26, 2018

The Honorable Chuck Grassley
Chairman
Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Judiciary Committee
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

Founded in 1970 as NOW Legal Defense and Education Fund, Legal Momentum is the nation's oldest civil rights organization dedicated to advancing the rights of women and girls. In the nearly fifty years that Legal Momentum has been at the forefront of this movement, we have brought awareness to the realities of sexual harassment and sexual assault in schools, workplaces, and homes; advanced policies which provide crucial services for victims and survivors and promote safe and supportive environments for seeking justice; and educated the judiciary and justice system professionals about gender bias and its insidious effect on our justice system.

Legal Momentum was closely involved in the Anita Hill/Clarence Thomas hearings before this Committee in 1991. We call on the Senate Judiciary Committee not to repeat the errors of that proceeding but instead—with the benefit of 27 years of further understanding about sexual harassment and assault—to conduct a full, fair, and informed inquiry.

By "full" we mean that an independent body must conduct an investigation of Dr. Blasey Ford's allegations - a body experienced and competent in gathering evidence in sexual assault investigations such that the Senate Judiciary Committee and the American public can rely on the integrity of the information gathering process and the information gathered.

By "informed" we mean that the Senate Judiciary Committee questioners must have a basic understanding of how memory works in traumatic situations – whether the situation is a home invasion or a hostage taking or a sexual assault. There should not be an expectation that Dr. Blasey Ford can provide a moment-by-moment, detailed account of the assault she alleges Judge Kavanaugh committed against her when they were in high school. Dr. Blasey Ford should be given the space to relate a narrative in whatever manner she recalls the events, whether a linear account or one told in traumatic, sensory

fragments. As President Ronald Reagan's daughter, Patti Davis, titled her September 22, 2018 op-ed in the Washington Post, "Why I don't recall all the details of my sexual assault," Ms. Davis described being raped by a music industry executive during a business meeting and wrote:

> "It's important to understand how memory works in a traumatic event. Ford has been criticized for the things she doesn't remember, like the address where she says the assault happened, or the time of year, or whose house it was. But her memory of the attack itself is vivid and detailed. His hand over her mouth, another young man piling on, her fear that maybe she'd die there, unable to breathe. That's what happens: Your memory snaps photos of the details that will haunt you forever, that will change your life and live under your skin. It blacks out other parts of the story that really don't matter much."

It is essential that the Senate Judiciary Committee begin this inquiry with an expert on traumatic memory who can explain to the panel, and the watching American public, why trauma victims focus on what Davis so powerfully called the "indelible" images that "will haunt you forever." Legal Momentum's National Judicial Education Program pioneered judicial education about the neurobiology of trauma almost twenty years ago. We know that the principles are not easily grasped. But the process through which Dr. Blasey Ford's testimony is elicited can only be fairly conducted, and her testimony understood, with this background. As articulated by Dr. Jim Hopper, renowned expert on psychological trauma, in a September 24, 2018 *Rolling Stone* article, "This is what makes sexual assault the easiest violent crime to get away with. Because the crime itself creates memories that then the perpetrator and their protectors can use to discredit the victim."

And by "fair" we mean resisting the inclination to mimic the criminal justice process in this Senate confirmation hearing. Dr. Blasey Ford is not on trial. This is not the criminal justice context. The purpose of this process is to determine the character and fitness of Judge Kavanaugh for a lifetime appointment to the highest court in our country, the final arbiter of all questions concerning the rights and benefits of American life.

Legal Momentum has been front and center for watershed moments for women's rights. We recognize that this, too, is a moment which will shape the thinking of the American public with regard to women's value in our society, safe harbor for perpetrators of sexual violence, and the integrity of our congressional and judicial systems. It is rare that a moment like this presents itself. The Senate Judiciary Committee has the opportunity to redeem itself from the mistakes made in 1991 and to conduct a full, fair, and informed inquiry into accusations of sexual assault committed by a man nominated to one of the most powerful positions in our government. We urge you to show the American public that we have grown as a society in the past 27 years, and that we can have faith in our system of government and in the rule of law.

Sincerely,

Carol Baldwin Moody, Esq.
President and CEO
Legal Momentum

Lynn Hecht Schafran, Esq.
Senior Vice President and Director,
National Judicial Education Program
Legal Momentum

August 28, 2018

The Honorable Charles Grassley, Chairman
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United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We are a diverse group of legal scholars who hold varied opinions about politics, legal scholarship, and the proper way to resolve cases that come before the Supreme Court. But we all agree that Judge Brett M. Kavanaugh displays outstanding scholarly and academic virtues and that he would bring to the Court an exceptional record of distinction in judicial service.

Many of us have learned from Judge Kavanaugh's articles, speeches, and opinions, which have contributed significantly to the scholarly literature and prompted thoughtful discussion. For instance, Judge Kavanaugh's 2016 book review, "Fixing Statutory Interpretation," is exemplary. The review discussed a recent volume on interpretive methodology by Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit, who responded at the time that he "could not have hoped for a more thoughtful examination of the subject" by Judge Kavanaugh, a "rightfully highly regarded jurist and colleague." Chief Judge Katzmann also observed that the "fresh ideas" in Judge Kavanaugh's essay would "open up new lines of thinking." Much like Chief Judge Katzmann, we are challenged and edified by Judge Kavanaugh's writings, even if we disagree with them.

We are also impressed by Judge Kavanaugh's long record of teaching and mentoring students of diverse backgrounds. Judge Kavanaugh's appearances at many law schools to meet students, give addresses, and judge moot courts have helped to provide a generation of law students with valuable insight into the federal judiciary. Further, for about a decade, Judge Kavanaugh has been the instructor for hundreds of students at several law schools, including Yale and Harvard Law Schools and the Georgetown University Law Center, where he taught courses on topics such as the separation of powers and the Supreme Court. The Deans of both Harvard and Yale Law Schools have praised him as a "mentor" to their students. Several of Judge Kavanaugh's academic colleagues have also described him as "a terrific judge" whose opinions are "smart, thoughtful,

and clear," a judge who "commands wide and deep respect," and "one of the most learned judges in America on a variety of issues."

In contributing to scholarship and law teaching, Judge Kavanaugh has a wealth of experiences to draw on. When he was nominated, *USA Today* described Judge Kavanaugh as, on paper, possibly "the most qualified Supreme Court nominee in generations." His varied and extensive legal experience spans private practice, the law school classroom, appellate advocacy including in the Supreme Court, and decades of government service. On the bench, Judge Kavanaugh has earned a reputation for issuing carefully crafted opinions. Because of his expertise in his craft and his laudable judicial temperament, he has received widespread, bipartisan praise. Donald Verrilli, who served as Solicitor General to President Obama, called Kavanaugh a "distinguished jurist by any measure." Lisa Blatt, one of the leading Supreme Court litigators of her generation, calls Kavanaugh a "superstar" within "the mainstream of legal thought." And Yale Law Professor Akhil Amar wrote in the *New York Times* that Kavanaugh is a jurist with "impeccable credentials, great intellect, unbiased judgment, and deep reverence for the laws and Constitution."

If he is confirmed as a Supreme Court justice, we believe that Judge Kavanaugh would continue to help build productive bridges between the bench, legal practitioners, and the academy. His careful consideration of legal issues and intellectual precision during his twelve years on the court of appeals is a strong indication of the rigor we expect he would bring to service on the Supreme Court were the Senate to confirm him.*

Respectfully,

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August 7, 2018

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

I write in support of the confirmation of Judge Brett M. Kavanaugh for the position of Associate Justice of the Supreme Court of the United States.

I served as a United States District Judge in the Eastern District of California from 1990 until 2007 when I became the dean of the Duke Law School, a position I held until this past June. As a judge and as a dean, I became well acquainted with Judge Kavanaugh. I came to know him both personally and through his opinions and reputation. As a dean, I particularly recall the occasion when he came to Duke Law School several years ago to preside at the finals of our Dean's Cup moot court competition. He did a wonderful job in taking the students through a hard series of questions while maintaining an encouraging and gracious demeanor. One could see what a fine judge he is and what a fair courtroom he would run, one in which every advocate and every party would feel heard and respected. As a judge, I knew him mostly by reputation, one that quickly formed around him as one of the brightest and most thoughtful judges on the bench.

I have read some of the comments by fellow deans and academics, and by former law clerks of Judge Kavanaugh. I find it quite extraordinary that Judge Kavanaugh has such a broad base of support among academics, who highly respect him for his inspiration of their students and for the brilliance of his judicial opinions, and among his former law clerks, who have found him such a wonderful mentor and example. I can assure you that this kind of deep, broad, and enthusiastic support is unusual and telling of the character and ability of Judge Kavanaugh.

There can be no serious doubt that Judge Kavanaugh is eminently qualified by his ability, training, education, character, judicial demeanor, and record on the bench. I am certain that the committee will see these attributes during the confirmation hearings.

I hope it is appropriate if I suggest that the confirmation of Judge Kavanaugh is an important opportunity for the two of you, who are so admired, and your colleagues on the Senate Judiciary Committee, to reaffirm your faith in the rule of law. There is an ecology to judging

which in turn influences the culture of the federal bench. Now is the time to re-affirm that judges are not and should not be political actors, and while they may disagree – far less often than is assumed – and may have different judicial philosophies, they are not and should not be partisan. I hope that this confirmation process may be an opportunity to demonstrate to the American people the committee's adherence to these shared values.

Sincerely,

David F. Levi

August 28, 2018

The Honorable Susan M. Collins
United States Senator
413 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Angus S. King
United States Senator
133 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Collins and King:

We, the undersigned Maine attorneys, respectfully urge you to oppose the confirmation of Judge Brett Kavanaugh as Associate Justice of the United States Supreme Court. We come from diverse backgrounds and areas of practice. While individually we have points we each consider to be of paramount importance, collectively we wish to draw your attention to a few key reasons why you should vote against Judge Kavanaugh's confirmation.

First, we are concerned that Judge Kavanaugh has demonstrated ideological hostility to the holding in *Roe v. Wade* and to the constitutional right to privacy that, among other guarantees, protects a woman's ability to make her own medical decisions and reproductive choices. We support legal abortion, without government interference -- Judge Kavanaugh's nomination threatens that right. After the President promised to nominate anti-abortion judges, he selected Judge Kavanaugh from a list provided and vetted by the Federalist Society and the Heritage Foundation. In a speech to the American Enterprise Institute this past September, Kavanaugh characterized *Roe* as "freewheeling judicial creation of unenumerated rights."[1] Just weeks later, Kavanaugh was added to the President's short list.

Judge Kavanaugh's jurisprudence reveals hostility toward abortion. In a 2017 case, *Garza v. Hargan*, Kavanaugh dissented to voice support for the Trump administration's refusal to allow an immigrant in custody access to abortion services. In 2015, in *Priests for Life v. Department of Health and Human Serv.*, Judge Kavanaugh, again dissenting, sided with attenuated, and what he ceded might be "misguided," religious views over women's rights to abortion and contraception.

We conclude that if Judge Kavanaugh is seated on the Supreme Court he is likely to cast the fifth vote, making a majority, to erode or eliminate federal protections for a woman's right to choose.

Second, we anticipate that Judge Kavanaugh, if elevated to the Supreme Court, will vote to unravel what remains of the Affordable Care Act, forcing premiums higher, stripping protections for patients with pre-existing conditions, and dismantling the essential health benefits provisions. In a speech to the Heritage Foundation in October 2017, just a month prior to being added to the President's short list, Kavanaugh criticized Chief Justice Roberts' opinion in *NFIB v. Sebelius*, and even suggested that the Supreme Court "consider jettisoning the constitutional avoidance canon."[2]

Previously, in 2011, Judge Kavanaugh dissented in *Seven-Sky v. Holder*, against an opinion upholding the ACA. In his dissent, Kavanaugh suggested that a future President, "may decline to

---

[1] Kavanaugh, From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist, 2017 Walter Berns Constitution Day Lecture at American Enterprise Institute (September 18, 2017) (transcript *available at* http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf).

[2] Kavanaugh, Joseph Story Distinguished Lecture at Heritage Foundation (October 25, 2017), *available at* https://www.heritage.org/joseph-story-2017, at 33:50.

enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional."

Third, we are troubled by Judge Kavanaugh's extreme partisan background. From his work under Kenneth Starr to draft the Clinton impeachment referral, to participation on the Republican team that litigated *Bush v. Gore*, to service in the George W. Bush White House, Judge Kavanaugh has been a Republican political operative for much of his career. There are many appropriate roles for such a partisan to continue to serve the public, but replacing Justice Kennedy on the United States Supreme Court should not be one of them.

A judiciary independent of the other branches of government and removed from partisan rancor should be a bulwark of American democracy. As Margaret Chase Smith wrote, "the importance of individual thinking to the preservation of our freedom cannot be overemphasized."[3] The American People must remain confident that the Justices of the Supreme Court are dedicated to such individual thinking rather than partisan loyalties.

Especially at a time when the President, his business, his campaign, and his foundation, are subjects of civil and criminal investigation and prosecutions in multiple state and federal jurisdictions, some of which unquestionably will end up before for the Supreme Court, the appearance of impartiality is as important today as it has ever been. Moreover, in light of recent indictments and the President's indefensible statements and behavior in Helsinki and upon his return, we respectfully suggest that it is in the best interests of the United States to table any nomination to replace Justice Kennedy and set aside the process until Special Counsel Mueller's investigation has concluded.

Finally, we have concerns that Judge Kavanaugh has displayed an apparent pattern of dishonesty. In his May 2006 confirmation hearings, Kavanaugh flatly stated, "I was not involved and am not involved in the questions about the rules governing detention of combatants, and so I do not have any involvement with that." However, the Washington Post later reported that Kavanaugh had argued to White House counsel Alberto Gonzalez and Solicitor General Ted Olson that Justice Anthony Kennedy, "would never accept absolute presidential discretion to declare a U.S. citizen an enemy and lock him up without giving him an opportunity to be represented and heard."[4]

Immediately upon his nomination to the Supreme Court, Judge Kavanaugh went out of his way to make the dubious claim that, "no president has ever consulted more widely, or talked with more people from more backgrounds, to seek input about a Supreme Court nomination."[5] That Kavanaugh would so openly launch into unverifiable and fawning hyperbole at the moment he was chosen to sit on the highest court in the land ought to raise serious questions about his credibility and integrity.

This list is far from comprehensive. We have additional concerns regarding Judge Kavanaugh's tendency to favor more powerful interests over the weak and powerless. His writing and decisions too often come down against regulations to protect the environment, labor, small business and fair elections. We implore you to carefully weigh each of these factors, and we urge you to oppose the confirmation of Judge Kavanaugh to the Supreme Court.

---

[3] Senator Margaret Chase Smith, We Must Not Forfeit Freedom, Commencement Address at Hood College (April 21, 1951), *in* 41 J. NAT'L EDUC. ASS'N 300 (1952).

[4] Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, at A1, *available at* http://voices.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/.

[5] Kavanaugh, Remarks at the White House (July 9, 2018) (transcript *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-announcing-judge-brett-m-kavanaugh-nominee-associate-justice-supreme-court-united-states/).

Sincerely,

Beth Ahearn
Cindy Allen
Lindsay Allen
Ryan Almy
Nancy C. Anderson
Justin Andrus
Roberta L. de Araujo
Cynthia Arn
Michael Asen
Jennifer Atkinson
Amber Attalla
Peter Baldacci
Philip Bartlett
Severin Beliveau
Seth Berner
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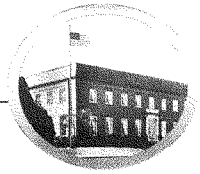

Phyllis Schlafly
Founder

The Phyllis Schlafly Center
Saint Louis, Missouri

August 31, 2018

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

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein,

I write to you today in support of Judge Brett Kavanaugh's confirmation to the United States Supreme Court.

Judge Kavanaugh has a long history of conservative, constitutionalist opinions from the bench. In 12 years on the bench with hundreds of decisions, he has expressed very strongly that the judiciary is to be restrained - reading and interpreting the laws and Constitution as written. He has frequently spoken against the overreach of supremacists judges finding 'new rights' in the Constitution and writing new laws from the bench.

From all we know, Judge Brett Kavanaugh will make an excellent justice on the Supreme Court. This choice is certainly another fulfillment of Trump's promise to nominate judges in the mold of Scalia. In 2016, on the day she endorsed him, candidate Donald Trump promised Phyllis Schlafly that he would defend the conservative platform of the GOP and would nominate constitutionalist judges across the board. We are confident that this pick meets that promise and are excited for the Senate to move quickly on his confirmation.

All the best.
Ed Martin

Ed Martin
President, Phyllis Schlafly Eagles

DAVID Y. IGE
GOVERNOR
STATE OF HAWAII

DOUGLAS S. CHIN
LT. GOVERNOR
STATE OF HAWAII

JOBIE M. K. MASAGATANI
CHAIRMAN
HAWAIIAN HOMES COMMISSION

WILLIAM J. AILA, JR.
DEPUTY TO THE CHAIRMAN

STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS
P. O. BOX 1879
HONOLULU, HAWAII 96805

September 18, 2018

Honorable Chuck Grassley, Chairman
US Senate Committee on the Judiciary
135 Hart Senate Office Building
Washington, D.C. 20510

Honorable Dianne Feinstein, Ranking Member
US Senate Committee on the Judiciary
331 Hart Senate Office Building
Washington, D.C. 20510

STATEMENT OF HAWAIIAN HOMES COMMISSION CHAIRMAN JOBIE MASAGATANI ON THE NOMINATION OF BRETT KAVANAUGH TO SERVE AS A JUSTICE ON THE U.S. SUPREME COURT

Aloha Chairman Grassley and Ranking Member Feinstein:

Having reviewed his writings and his statements in public proceedings, we find that Judge Kavanaugh neglected to recognize the history of actions by the United States government that has clearly established a trust responsibility not only on the part of the United States, but also the State of Hawaii for the lands that were set aside under Federal law in 1921 to provide for a permanent homeland for native Hawaiians (Hawaiian Homes Commission Act of 1920) and for the betterment of the conditions of native Hawaiians (Hawaii Admissions Act of 1959).

The Hawaiian Homes Commission Act set aside approximately 203,500 acres of land in what was then a Territory of the United States, the Territory of Hawaii, to assure that the indigenous, native people of Hawaii could be returned to their lands.

In the ensuing years, in the exercise of its constitutional authority, the U.S. Congress enacted more than 160 Federal laws designed to address the conditions of native Hawaiians. Additionally, upon its admission into the Union of States in 1959, the United States and the State of Hawaii agreed that the provisions of the Constitution of the State of Hawaii should reflect their respective responsibilities, including trust responsibilities, for the lands and resources designated to provide for the betterment of the conditions of native Hawaiians.

The lands and resources authorized under Federal law to be reserved for native Hawaiians in 1921 are today administered by the Hawaiian Homes Commission and the Department of Hawaiian Home Lands.

Our fiduciary duties and responsibilities to the beneficiaries of the Hawaiian Homes Commission Act are of paramount importance to existing and future generations of the indigenous, native people of Hawaii, to the State of Hawaii, and to the United States.

We cannot embrace nor endorse the views of those, like Judge Kavanaugh, who would deny our history, the Federal and State laws which have been enacted on the foundation of that history, including the right of the indigenous, native people of Hawaii to exercise self-determination under Federal law and policy.

About the Hawaiian Homes Commission

Established by the Hawaiian Homes Commission Act of 1920, the Hawaiian Homes Commission now serves as the executive board of the Department of Hawaiian Home Lands, whose primary responsibility is managing the Hawaiian Home Lands trust set aside for improving the conditions of native Hawaiians.

Congress of the United States
Washington, DC 20515

The Honorable Mitch McConnell
Senate Majority Leader
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Chuck Schumer
Senate Minority Leader
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Chuck Grassley
Chairman
Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

September 17, 2018

Dear Senators,

We urge you to delay Judge Brett Kavanaugh's nomination to the Supreme Court until a thorough investigation of Dr. Christine Blasey Ford's allegations has taken place.

To hold a vote now would be an insult to women and girls, sending a powerful message that they don't matter and will not be believed. Let's instead set an example for our children that sexual violence should be taken seriously and emphatically denounced.

If the allegations of sexual assault are true, they speak to Brett Kavanaugh's character and ability to determine right from wrong. Before giving Kavanaugh power to make decisions about women's lives, their protection under our laws prohibiting sexual violence, and their physical autonomy, Congress has a responsibility to allow the American people to learn the truth.

In the age of #MeToo, the vitriol that Anita Hill endured cannot happen again, both in our national discourse and throughout any testimony that Dr. Ford chooses to provide. Over this past year, survivors across the country have come forward with harrowing stories of sexual assault and harassment. Their bravery and experiences cannot be in vain.

Dr. Ford did not want to go public with her story, knowing the hostility, retaliation, and disbelief she would face. We applaud her courage for risking it all. Now that Dr. Ford has taken the brave step to come forward, we must do all we can to treat her with decency and respect.

We urge the Senate to rise to the occasion, take these allegations with the seriousness and careful consideration they deserve, and allow a thorough investigation.

Sincerely,

Lois Frankel
Chair
Democratic Women's Working Group

Brenda L. Lawrence
Vice Chair
Democratic Women's Working Group

Jackie Speier
Policy and Communications Chair
Democratic Women's Working Group

cc. U.S. Senators

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Member of Congress

Grace Meng
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Eric Swalwell
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Zoe Lofgren
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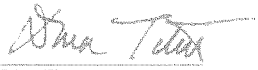

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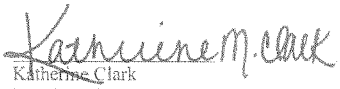

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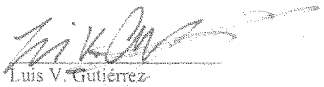

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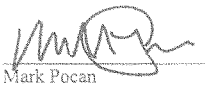

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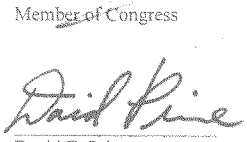

David E. Price
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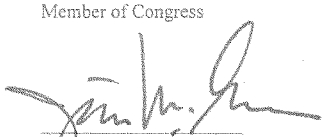

James P. McGovern
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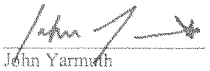
Member of Congress



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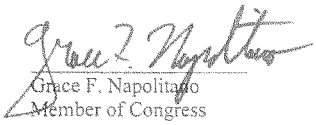

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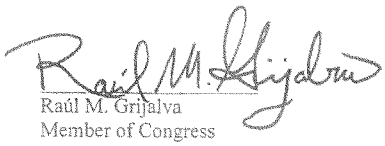

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Member of Congress

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Julia Brownley
Member of Congress

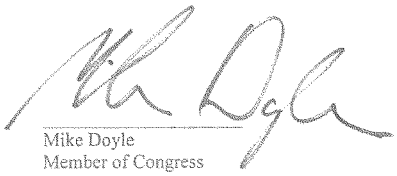
Nanette Diaz Barragán
Member of Congress

Dave Loebsack
Member of Congress

Ruben Gallego
Member of Congress

cc. U.S. Senators

Niki Tsongas
Member of Congress



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James R. Langevin
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Suzan DelBene
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Frank Pallone, Jr.
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Brendan F. Boyle
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Ben Ray Luján
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Joyce Beatty
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Kathleen M. Rice
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William Lacy Clay Jr.
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Marcy Kaptur
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Colleen Hanabusa
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Alcee L. Hastings
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Stephanie Murphy
Member of Congress

cc. U.S. Senators

Hakeem Jeffries
Member of Congress

Rick Larsen
Member of Congress

cc. U.S. Senators

Congress of the United States
Washington, DC 20515

The Honorable Chuck Grassley
Chairman
Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

September 26, 2018

Dear Senators,

As you continue to investigate the allegations of sexual assault and misconduct against Judge Brett Kavanaugh, we urge you to conduct this process with sensitivity, dignity, and a focus on ascertaining the truth. The public, through their elected representatives, has a right to evaluate the credentials and the character of a Supreme Court nominee. At the same time, this is also an intensely personal matter. Just as when dealing with any trauma survivor, we urge you to consult with experts and employ a trauma-informed approach when questioning Dr. Christine Blasey Ford – or any other survivor or witness for that matter – about her allegations against Judge Kavanaugh. This is a time to demonstrate leadership and what Congress has learned over past decades about how to support victims and empower survivors.

The Substance Abuse and Mental Health Service Administration (SAMSHA) describes trauma-informed approach as one that:

1. *Realizes* the widespread impact of trauma and understand the potential paths for recovery from that trauma;
2. *Recognizes* the signs and symptoms of trauma
3. *Responds* by fully integrating knowledge about trauma into policies, procedures, and practices
4. *Seeks* to actively resist *re-traumatization.*

To that end, we urge the Committee to ensure that Dr. Ford is comfortable with the details surrounding the hearing, including the time and location in which it is held and those that are in attendance. As she speaks about painful and personal subjects, she should be able to take breaks as needed and be permitted to seat her supporters in immediate proximity. She must fully understand the process of the hearing in advance and most importantly, Committee Members must conduct themselves in a way that respects Dr. Ford and her experience. Any question, statement, or committee policy that, intentionally or not, intimidates or belittles Dr. Ford would reflect poorly on Congress and the integrity of the judicial nomination process.

Taking such an approach is not only imperative to the wellbeing of Dr. Ford, but given the national attention Thursday's hearing will draw, it would send a powerful message to millions of survivors across the United States. Even in the #MeToo era, many are still suffering in silence

after experiencing vicious attacks and assaults. They fear that if they come forward, those they tell will not care or would dismiss them out-of-hand.

We applaud Dr. Ford for her tremendous bravery in sharing her story. In doing so, she has faced death threats, the relocation of her family for their safety, the compromise of her personal information and e-mail accounts, and the condemnation of many who chose not to believe her even before having the opportunity to hear her full account. It is fundamental, therefore, that she not be subjected to questions and an environment that re-traumatizes her. Nearly 27 years ago, Anita Hill testified before your committee with allegations against another Supreme Court nominee. She encountered numerous questions that demeaned and impugned her character, cast doubt on her integrity, and forced her to repeatedly describe the harassment she experienced in graphic, humiliating detail. This cannot occur again. Dr. Ford has already faced significant pressure to meet the Senate's timetable for testifying. She was denied her request for a Federal Bureau of Investigations (FBI) investigation of her allegations, something that had been conducted prior to Professor Hill's testimony in 1991. As someone who risked so much to step forward as a survivor, Dr. Ford deserves greater accommodation in this process.

We bring to your attention the September 18th letter sent to you by the National Task Force to End Sexual and Domestic Violence. We firmly second their recommendation that you consult with experienced professionals in the field of sexual violence and trauma to develop a comprehensive, trauma-informed approach for the committee to implement in any hearing involving Dr. Ford, or any other survivors who may come forward and wish to testify.

We have been incredibly heartened by the strength and resilience of survivors we have met through our work in Congress. Yet, trauma, and its manifestations over a survivor's lifetime, can be debilitatingly jarring and deeply engrained. Survivors of sexual violence are powerful, but we all share an obligation to ensure that they do not endure any more pain than they already have. In communities across the United States, those who survivors encounter after coming forward—prosecutors, law enforcement officers, emergency responders, healthcare providers, school administrators, and countless others— have been learning how to support these survivors by providing them with trauma-informed care. We therefore strongly urge the Senate Judiciary Committee to also undertake such a practice when engaging with Dr. Ford.

Thank you for your consideration of our request.

Sincerely,

Ann McLane Kuster
Member of Congress

Lois Frankel
Member of Congress

Gwen S. Moore
Member of Congress

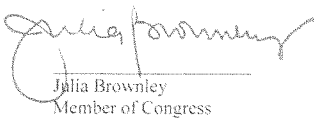
Suzanne Bonamici
Member of Congress

Raul M. Grijalva
Member of Congress

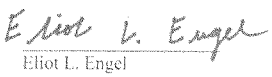
Dina Titus
Member of Congress

David N. Cicilline
Member of Congress

Kathleen M. Rice
Member of Congress



Julia Brownley
Member of Congress



Eliot L. Engel
Member of Congress

Jerry McNerney
Member of Congress

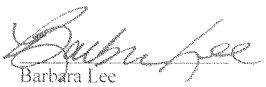
Grace Meng
Member of Congress

Debbie Dingell
Member of Congress

Mark Takano
Member of Congress

Alcee L. Hastings
Member of Congress

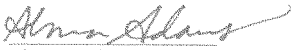
Steve Cohen
Member of Congress



Barbara Lee
Member of Congress

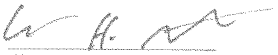
Henry C. "Hank" Johnson, Jr.
Member of Congress

Mark DeSaulnier
Member of Congress



Alma S. Adams
Member of Congress

Donald S. Beyer, Jr.
Member of Congress



Eleanor Holmes Norton
Member of Congress

Lucille Roybal-Allard
Member of Congress

Judy Chu
Member of Congress

Congress of the United States
Washington, DC 20515

September 6, 2018

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We write to express our strong opposition to the confirmation of Judge Brett Kavanaugh to a lifetime appointment on the U.S. Supreme Court. Although there are many reasons to oppose this nominee—his extreme views place him well outside the mainstream,[1] he may have misled the Senate in his previous confirmation hearing,[2] and he will not be an independent check on a president who desperately needs such a check[3] —we want to highlight Kavanaugh's alarming record on issues of state-church separation and religious liberty, core American principles.

He will undermine the "wall of separation."
Kavanaugh praised jurisprudence that "persuasively criticized" Thomas Jefferson's metaphor of "a strict wall of separation between church and state."[4] The Supreme Court first adopted this useful metaphor in the 1878 case, *U.S. v. Reynolds*, and courts and scholars have continually used it to explain the divided relationship between government and religion.[5]

Kavanaugh believes that Jefferson's metaphor is "based on bad history," is "useless as a guide to judging," and, most alarmingly, that "the wall metaphor was wrong as a matter of law and history."[6] Jefferson was one of the foremost legal scholars of his time, penning the Declaration of Independence, rewriting all of Virginia's colonial laws after independence, and famously authoring the Virginia Statute for Religious Freedom, which provided the basis for the religion clauses of the First Amendment.

The wall of separation is critical because genuine religious freedom requires a secular government. That was Jefferson's point when he used this metaphor and the intent of the First Amendment. That was the Supreme Court's point when it adopted the metaphor in 1878, and again in 1947, 1948, 1952, 1961 (three times), 1962, 1963, and on and on.[7]

He is hyper-sensitive to burdens on religion; deaf to burdens on women.
In 2017, Kavanaugh wrote a bitter dissent in which he argued unsuccessfully that forcing a 17-year-old girl detained as an illegal immigrant to continue her unwanted pregnancy was not an "undue burden" on her constitutionally protected reproductive rights and right to choose.[8] This decision would essentially have forced her to carry the pregnancy to term and still he thought it was not an "undue burden." Yet in 2015, Kavanaugh wrote a dissent arguing that it *is* a "substantial burden" on religion to ask a religious organization opting out of the ACA contraceptive mandate to fill out five blanks on a form — name, corporation name, date, address

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and signature.[9] For Kavanaugh, filling out a form burdens religion, but forcing a child to give birth is not a burden.

He will threaten 70 years of Establishment Clause jurisprudence.
Kavanaugh wrote that the Establishment Clause of the First Amendment does not necessarily require "an overarching test" and that such tests can be harmful.[10] He all but said the court should overturn the test that defines state-church separation, the *Lemon* test, which says that all government actions must have a secular purpose, must not have a primary effect of advancing or inhibiting religion, and must not lead to excessive religious entanglement.

The *Lemon* test, formulated by the Court in 1971, embodies the principles in all the Supreme Court's cases involving religion and government dating back to at least 1947. It is the culmination of more than 70 years of jurisprudence.

Kavanaugh has made it clear that he would not faithfully apply the *Lemon* test to strike down violations of the Establishment Clause. Instead, he would strike down the test, even though it is two years older than *Roe v. Wade*.

He is a danger to our secular public schools.
Before his time as a government attorney, Kavanaugh defended then-Governor Jeb Bush's private religious school voucher program that would have sent public money into the coffers of church schools.[11] The Florida Supreme Court struck down the unconstitutional program.[12] Kavanaugh has not deviated from his decades-old desire to send taxpayer money into churches and church-run schools. In a 2017 speech, Kavanaugh argued that "religious schools and religious institutions" ought to "receive[] funding or benefits from the state," as long as the funding goes to private institutions that are both "religious and nonreligious."[13]

However, the vast majority of private schools are religious, so even if funding is available to religious and nonreligious private schools, nearly all of the private school funding ends up supporting religious schools. For instance, in the Wisconsin Parental Choice Program, **100 percent** of the schools registered to participate in the 2017–18 school year are religious schools.[14]

He's shown hostility toward secular Americans and state-church plaintiffs.
Kavanaugh submitted a disturbing amicus brief to the Supreme Court in the landmark case *Santa Fe Independent School District v. Doe*.[15] In that 2000 case, the Supreme Court held 6-3, with Justice Kennedy voting in the majority, that school-organized prayers delivered over the loudspeakers at school events were unconstitutional.

His brief showed hostility and contempt for the families that brought the case and their lawyers. He wrote that citizens seeking to uphold the Constitution, specifically the First Amendment's Establishment Clause, want an "Orwellian world," are "absolutist," and seek "the full extermination of private religious speech from the public schools" and "to cleanse public schools throughout the country of private religious speech."[16]

One family of plaintiffs in this case shared Kavanaugh's Catholic faith and the other was Mormon, and yet Kavanaugh accused them of being "hostile to religion in any form."[17]

With unmitigated hyperbole, Kavanaugh cautioned the Supreme Court against deciding the case precisely on the grounds the Court eventually chose because doing so would "relegat[e] religious organizations and religious speakers to bottom-of-the-barrel status in our society — below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes...."[18]

This rhetoric and the consistent portrayal of state-church separation as hostile to religion is unfair to those brave families and their children and, more importantly, it shows that no plaintiff in a case involving state-church separation would get a fair hearing under Judge Kavanaugh.

He does not understand the true nature of religious freedom.
Kavanaugh would use his position on the high court to weaponize religious freedom. A vocal, conservative religious minority is working to redefine this critical individual right with the help of judges like Kavanaugh. Instead of a shield offering them protection from government overreach, they seek either the ability to use the government to impose their religious views on others, or to be exempt from civil rights protections, particularly for vulnerable minorities—the license to discriminate.

This was most obvious in his decision in the *Priests for Life* case. Kavanaugh would allow religious employers to deny women contraception in spite of the Affordable Care Act's contraception mandate, because a two-page form burdens their religion. The female employee's freedom is threatened, but Kavanaugh defended the "religious freedom" of the employer instead.

Religious liberty is a critical issue that Kavanaugh fundamentally misunderstands.
When it comes to the government funding religious schools, the religious liberty lies with the taxpayers, not the school. The coercive taxing power of the government cannot be used on citizens to give financial benefits to a religion to which they do not adhere. As the Supreme Court explained, "religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general."[19]

When it comes to the "wall of separation," Kavanaugh fails to understand that this is the greatest protection for religious liberty ever devised by political science, and that it is a uniquely American contribution to history. It is the reason Americans enjoy the religious liberty they so cherish.

This letter focuses on but one of the serious defects in Judge Kavanaugh's ability to serve on the U.S. Supreme Court, his infidelity to the First Amendment. The thriving and diverse religious marketplace in America is a result of a robust separation between state and church. As America becomes both less religious and more religiously diverse, the importance of keeping state and church separate is more vital than ever.[20] Judge Kavanaugh has indicated a clear desire to betray this American ideal.

For these reasons, we strongly oppose his confirmation to the Supreme Court. We hope that you will keep our opposition in mind as you deliberate.

Sincerely,

Jared Huffman
Member of Congress

Jamie Raskin
Member of Congress

Judy Chu
Member of Congress

David N. Cicilline
Member of Congress

Mark DeSaulnier
Member of Congress

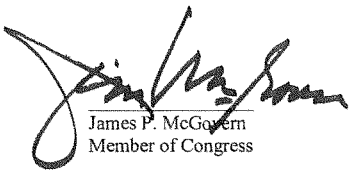
Pramila Jayapal
Member of Congress

Henry C. "Hank" Johnson, Jr.
Member of Congress

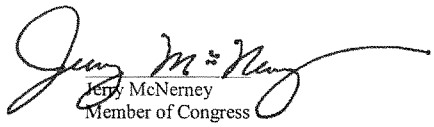
Barbara Lee
Member of Congress

Zoe Lofgren
Member of Congress

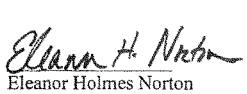
Carolyn B. Maloney
Member of Congress



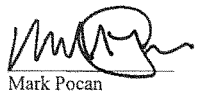
James P. McGovern
Member of Congress



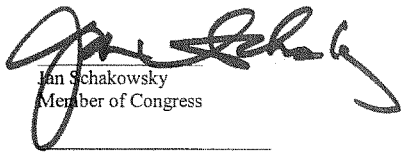
Jerry McNerney
Member of Congress



Eleanor Holmes Norton
Member of Congress



Mark Pocan
Member of Congress



Jan Schakowsky
Member of Congress

[1] *See* Washington Post, *The path ahead for Supreme Court nominee Brett Kavanaugh* (July 9, 2018). Kavanaugh writes separately 20% of the time, more so than any other candidate on Trump's short list, or any current Supreme Court justice, by a long shot. Jeremy Kidd & Ryan D. Walters, *Searching for Scalia in 2018: Measuring the "Scalia-ness" of President Trump's Supreme Court Shortlist* (Jan. 13, 2018). Kavanaugh is measured as more ideologically extreme than every member of the Court other than Justice Thomas, according to Judicial Common Space score developed by Lee Epstein, et al., *The Judicial Common Space*, The Journal of Law, Economics, & Organization 23, 303–25 (2007).

[2] Michael Kranish, *Kavanaugh's role in Bush-era detainee debate now an issue in his Supreme Court nomination*, THE WASHINGTON POST, (July 18, 2018) (during his 2006 confirmation hearing, Kavanaugh stated that he was "not involved" in "questions about the rules governing detention of combatants.").

[3] Adam Liptak, *Showdown on a Trump Subpoena Could Overshadow Brett Kavanaugh's Confirmation*, THE NEW YORK TIMES (July 10, 2018) (Kavanaugh "has expressed strong support for executive power [and] hostility to administrative agencies . . . .").

[4] Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, 2017 Walter Berns Constitution Day Lecture (Sept. 18, 2017), *available at* www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.

[5] 98 U.S. 145.

[6] Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*.

[7] *See Reynolds v. U.S.*, 98 U.S. 145 (1879); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

[8] *Garza v. Hargan*, 874 F.3d 735, 752 (2017) (Kavanaugh, J., dissenting).

[9] *Priests for Life v. DHS*, 808 F.3d 1, 15 (2015) (Kavanaugh, J., dissenting from denial for rehearing en banc).

[10] *Id.* at 27.

[11] Monique O. Madan, *New Supreme Court nominee Kavanaugh has ties to big Florida moments*, MIAMI HERALD (July 9, 2018). *See Bush v. Holmes*, 767 So.2d 668 (Fla. Dist. Ct. App. 2000).

[12] *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006).

[13] Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, 2017 Walter Berns Constitution Day Lecture (Sept. 18, 2017), *available at* http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.

[14] Wis. Dept. of Pub. Instruction, *News Release* (Jan. 31, 2017), *available at* dpi.wi.gov/sites/default/files/news-release/dpinr2017_15.pdf (listing all 163 private religious schools).

[15] Brief of Amici Curiae Congressman Steve Largent and Congressman J.C. Watts in Support of Petitioner, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), *available at* bit.ly/KavBrief.

[16] *Id.* at 4, 9, 22, 29.

[17] *Id.* at 28.

[18] *Id.* at 29.

[19] *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968).

[20] *See* Robert P. Jones & Daniel Cox, *America's Changing Religious Identity*, PUBLIC RELIGION RESEARCH INSTITUTE (Sept. 6, 2017), *available at* bit.ly/2uMdm9a (finding that 24% of Americans identify as nonreligious); Barna Group, *Atheism Doubles Among Generation Z* (Jan. 24, 2018), available at www.barna.com/research/atheism-doubles-among-generation-z/ (finding that 13% of Americans born between 1999 and 2015 are atheists); *Nones on the Rise: One-in-Five Adults Have No Religious Affiliation*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (October 9, 2012), *available at* www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx (showing that, for the first time in the country's history, the United States does not have a Protestant majority).

Congress of the United States
Washington, DC 20515

Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C. 20510

Honorable Charles Grassley
Chairman
Judiciary Committee
United States Senate
Washington, D.C. 20510

Honorable Charles Schumer
Minority Leader
United States Senate
Washington, D.C. 20510

Honorable Dianne Feinstein
Ranking Member
Judiciary Committee
United States Senate
Washington, D.C. 20151

September 13, 2018

Dear Leader McConnell, Leader Schumer, Chairman Grassley, and Ranking Member Feinstein:

We write to you to express our deep concerns and strong opposition to President Trump's Supreme Court nominee Judge Brett Kavanaugh. The American people deserve a justice that will uphold and protect the rights of every American. Unfortunately, a thorough review of Judge Kavanaugh's record demonstrates that he falls considerably short of this critical standard. Judge Kavanaugh's confirmation would be a serious setback for equity and justice in our nation and would, in particular, deeply harm Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) people and other vulnerable communities.

Every Supreme Court vacancy is significant, but the stakes for the LGBTQ community could not be higher in deciding who will replace Justice Kennedy—who served as the deciding vote in numerous landmark decisions affecting LGBTQ people. It is not an exaggeration to say that key protections that enable LGBTQ individuals to participate as equal members of our society are at stake. Judge Kavanaugh's record demonstrates that if he were confirmed to the Supreme Court, he would provide the fifth and decisive vote to undermine many of our core rights and legal protections.

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We are disturbed by Judge Kavanaugh's refusal in his confirmation hearing to answer even the most basic questions about the liberty and equality of LGBTQ people. While praising the correctness and greatness of other precedents of the Supreme Court, he repeatedly refused to express agreement with a single one of the Court's landmark decisions protecting equality and liberty for LGBTQ people. He refused to say not only whether firing an employee for being LGBTQ is illegal, but even whether it is immoral. And he refused to address his involvement in attacks on LGBTQ people's basic rights while he served in the George W. Bush White House—a subject still shrouded in secrecy because so much of Judge Kavanaugh's political record is being kept from Senators and the public.

We are particularly concerned about Judge Kavanaugh's approach to questions of personal liberty. Based on his record and public statements, it is likely he would seek to drastically roll back protections for personal liberty that have been essential to the ability of LGBTQ people to live authentically, to protect their families, and to make deeply personal decisions about their identity without fear of government penalty or interference. Judge Kavanaugh recently gave a presentation to the American Enterprise Institute in which he voiced strong agreement with the efforts of former Chief Justice Rehnquist to restrict the fundamental right to privacy and autonomy. Kavanaugh noted that that despite Rehnquist's inability to convince the court to rule otherwise in *Roe* and *Casey*, that Rehnquist has been successful in "stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition," thereby directly rejecting Justice Kennedy's recognition that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

Judge Kavanaugh noted that Rehnquist's dissent in *Roe*, which would have denied women the freedom to choose whether to carry a pregnancy to term, was premised on the number of then-existing laws prohibiting abortion, an approach that would effectively negate the Constitution as a check on states' denial of constitutional freedoms. If applied to other fundamental personal freedoms, his analysis would permit the government to impose severe burdens on those rights, even to the point of rendering their exercise impossible or futile. LGBTQ people have fought long and hard for judicial recognition of their personal freedoms under the law, to enter into consensual adult intimate relationships, to marry, and to raise children. Nothing in Judge Kavanaugh's record suggests that he would protect LGBTQ people against even serious incursions upon those rights.

When judges like Judge Kavanaugh invoke "tradition" as a reason to turn back challenges to discriminatory laws, they turn a blind eye to the fact that many traditions deeply rooted in our history reflect longstanding patterns of discrimination based on gender, sexual orientation, gender identity, national origin, and race. That approach—which the Supreme Court long ago rejected--stands in stark opposition to the principles embodied in case law that has developed over the last 50 years – case law that guarantees the right to contraception and a woman's freedom to choose and secures other protections enshrined in such landmark cases as *Roe v. Wade*, *Planned Parenthood v. Casey*, *Romer v. Evans*, and *Lawrence v. Texas*. Judge Kavanaugh has openly declared his animosity to those principles as well as his desire to turn back the clock, which poses a clear and present danger to the fundamental rights of LGBTQ people, women and all vulnerable minorities.

There are cases that will likely come before the Supreme Court soon that will ask the Court to consider the issues affecting the fundamental liberty of LGBTQ people, such as challenges to state laws that seek to undermine the equality of same-sex married couples, or federal policies that infringe upon the autonomy and privacy rights of transgender people, such as challenges to the President's policy banning military service by transgender men and women. For this reason, we are gravely concerned that Judge Kavanaugh's narrow and backward-looking approach to fundamental rights will do deep and lasting damage to LGBTQ people's lives, and to other communities for whom "history" and "tradition" provide no protection against the deprivation of liberty.

We also have serious concerns that Judge Kavanaugh will support a radical new view of religious exemptions from generally applicable laws that will undermine longstanding doctrine and erode our nation's commitment to protecting civil rights. Judge Kavanaugh has demonstrated that he is willing to provide a sweeping license to discriminate to religious adherents that construes even enforcement of the most basic protections for women and others as an undue burden on religious beliefs. For example, in *Priests for Life v. U.S. Department of Health and Human Services*, Judge Kavanaugh wrote a dissent in response to the D.C. Circuit Court's denial of a petition challenging the Affordable Care Act's requirement that religious organizations must submit a form to their insurer if they want to object to providing contraceptive coverage for their employees.

The organizations argued that completing the form impermissibly burdened their religious rights under the Religious Freedom Restoration Act (RFRA). Judge Kavanaugh argued in his dissent that the filing of the form substantially burdened the adherents' exercise of religion because they believed that doing so amounted to a requirement that they take action contrary to their beliefs. The majority criticized the dissent as advocating for a "potentially sweeping, new RFRA prerogative for religious adherents to make substantial-burden claims based on sincere but erroneous assertions about how federal law works." Judge Kavanaugh's belief that courts should accept, without question, any claim by a religious organization that a government requirement substantially burdens their sincere religious beliefs demonstrates his willingness to inappropriately extend RFRA and religious exemptions in ways that will undercut LGBTQ protections. This could impact LGBTQ individuals and families by allowing county clerks to deny marriage licenses to same-sex couples; allowing taxpayer-funded foster care and adoption agencies to turn away LGBTQ parents; allowing medical providers to refuse care to LGBTQ people or their children, causing real harms to LGBTQ people and our family members.

Our letter of opposition is based on what is known from Judge Kavanaugh's currently available public record. But the American people have a right to know about his entire record as a White House official and in other political roles and to have meaningful answers to questions about his views on core personal freedoms and protections that millions of people take for granted. LGBTQ Americans, people living with HIV, and other at-risk communities rely upon the Constitution's guarantees of equality, liberty, dignity and justice under the law for their ability to participate fully in society and make major life decisions, and they are entitled to know whether a new justice would protect those guarantees.

For all of these reasons we therefore ask that you oppose the confirmation of Judge Brett Kavanaugh to the Supreme Court.

Sincerely,

David N. Cicilline

Jerrold Nadler

Eleanor Holmes Norton

Mark Takano

Pramila Jayapal

Mark Pocan

Mike Quigley

Luis V. Gutiérrez

Bonnie Watson Coleman

Dwight Evans

Katherine Clark

Suzan DelBene

Yvette Clarke

Salud O. Carbajal

Debbie Wasserman Schultz

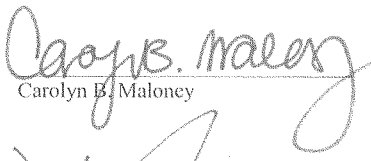
Brian Higgins

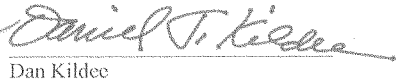
Darren Soto

Jan Schakowsky

Barbara Lee

Donald Norcross


Carolyn B. Maloney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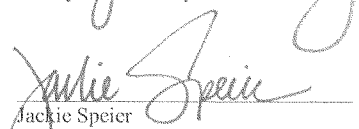
Jackie Speier

Mark DeSaulnier

Sean Patrick Maloney

Lisa Blunt Rochester

Jared Huffman

Frank Pallone, Jr.

Jamie Raskin

Robert A. Brady

Grace Meng

Adriano Espaillat

Diana DeGette

Alan Lowenthal

Susan A. Davis

Zoe Lofgren

Joseph P. Kennedy III

William R. Keating

Matt Cartwright

Nanette Diaz Barragán

André Carson

CC: Members of Senate Judiciary Committee

National Headquarters: 634 S. Spring Street, Los Angeles, CA 90014 Office: 213-629-2512

PRESS STATEMENT
FOR IMMEDIATE DISTRIBUTION

Sept. 5, 2018

CONTACT:

Sandra Hernandez: [redacted]

[redacted]

Tony Marcano: [redacted]

[redacted]

Statement: MALDEF Opposes Confirmation of Judge Brett Kavanaugh to U.S. Supreme Court

(LOS ANGELES) – Thomas A. Saenz, president and general counsel of MALDEF (Mexican American Legal Defense and Educational Fund), issued the following statement today opposing the confirmation of Brett Kavanaugh to the United States Supreme Court:

"As an organization that has worked for 50 years to promote the civil rights of all Latinos living in the United States, MALDEF has regularly pursued cases in the federal courts on behalf of that mission. We regularly take a position on federal appellate court nominees. Historically, MALDEF has also often appeared as counsel in the U.S. Supreme Court, so MALDEF appreciates the critical importance of the pending nomination of Judge Brett Kavanaugh to succeed Justice Anthony Kennedy.

"After a careful evaluation of the available record, MALDEF strongly opposes the confirmation of Judge Kavanaugh.

"There are two preliminary, but very critical considerations. First, the significant departure from appropriate and traditional process in the Senate's consideration of this nomination is dangerous and irresponsible. Consideration of the nomination when so much of the paper record on Judge Kavanaugh's views has not been released to the Senate or the public is a violation of the Constitution's directive that the Senate advise and consent to the nomination.

"Second, consideration of Judge Kavanaugh's nomination is inherently tainted by the significant and consistent anti-Latino rhetoric and actions of his nominator, Donald Trump. We have not had such an overtly racist chief executive in a century, so this aberrant president presents a real challenge as a Supreme Court nominator. We must acknowledge that any president will seek nominees who reflect the president's thinking. When that thinking includes open bias against particular groups, nominations should face additional and pointed scrutiny.

"Judge Kavanaugh, like many recent Supreme Court nominees, appears to lack familiarity or knowledge of the major legal concerns and historical experiences of the Latino community in the United States. That should be a concern – and a matter of Senate inquiry – because Latinos have been the nation's largest racial/ethnic minority group for over a decade, and Latino prominence will only grow in the future. Latinos currently comprise one quarter of all K-12 public school students, so Latinos will be increasingly significant to cases heard and decided during the likely lengthy tenure of any new Supreme Court justice.

"More fundamentally, Judge Kavanaugh's record demonstrates a lack of respect for important civil rights precedent in many areas, all of which affect the Latino community.

"Of particular concern to MALDEF are indications that Judge Kavanaugh would accept and endorse an interpretation of constitutional rights granted to all 'persons' as not in fact extending to all persons. His previous endorsements of the denial of 'person' rights to immigrants is far outside the boundaries of mainstream jurisprudence. His belief that an immigrant minor does not have the same rights of reproductive choice enjoyed by other persons should, on its own, disqualify him from elevation to the Supreme Court.

"This and other past Kavanaugh decisions of similar direction are particularly concerning in an era when many cases purport to present a clash of rights between different persons or entities. These cases have and will come before the Supreme Court, and a judge who seems to accept a hierarchy of rights holders that would implicitly or explicitly relegate immigrants to less than other persons is an unacceptable adjudicator.

"A greater explanation of Judge Kavanaugh's views on the interpretation of 'person' in the Constitution, and on the specific rights of immigrants, may exist in the records that have not been released for review. This further demonstrates why the current rush to judgment is utterly unacceptable.

"MALDEF strongly opposes the current rushed consideration of the Kavanaugh nomination, and we strongly oppose confirmation of this nominee to the United States Supreme Court."

###

Founded in 1968, MALDEF is the nation's leading Latino legal civil rights organization. Often described as the "law firm of the Latino community," MALDEF promotes social change through advocacy, communications, community education, and litigation in the areas of education, employment, immigrant rights, and political access. For more information on MALDEF, please visit: www.maldef.org.

Catholic Charities
ARCHDIOCESE OF WASHINGTON
Inspiring Hope, Building Futures.

Msgr. John J. Enzler
President and CEO

August 23, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein,

I am very pleased to write a letter on behalf of Judge Brett Kavanaugh who has been nominated by President Trump to be a Justice of the Supreme Court. I have known Brett for 40 years, having first met him when he was an altar boy at Little Flower Parish, Bethesda, MD. I watched him grow up and saw him often at Mater Dei, where he attended grade school and learned the motto "Work Hard, Play Hard, and Pray Hard." I then knew him as a student at Georgetown Preparatory School in Bethesda, where he became "a man for others." As a good athlete, he was captain of his basketball team as a senior.

I was blessed to co-officiate his wedding to Ashley and to baptize both of his daughters. He is a man of great character and integrity, with a great sense of humor. He is known by all as a wonderful husband and father, a dedicated son, and a strong Catholic who lives his faith every day.

More recently I have been able to see him quite often as he has volunteered on a monthly basis at our dinner program, "St. Maria's Meals." He has served food to the homeless many times over the past several years and volunteered most recently last week. So, I know Brett to be a man committed to his community and those less fortunate. I also know him to be someone who is well-loved by his neighbors as "the guy next door" - no pretense, no need to flout his background or intellectual skills, he just continues to live by those school mottos, doing the best he can in whatever he does, and doing that on behalf of the community in which he lives, and the nation he serves so well.

As a superb nominee, he will interpret the Constitution with great skill and intellect for our country. We will be blessed as a nation if he serves on the Supreme Court.

Sincerely,

Monsignor John Enzler
President and CEO, Catholic Charities of the Archdiocese of Washington, DC

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Senior Vice President, Fifth Third Bank

DR. AALIYA YAQUB
Physician, Entrepreneur

August 31, 2018

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
U.S. Senate
226 Hart Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
U.S. Senate
226 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of Muslim Advocates, a national legal advocacy and educational organization that works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths, I write to oppose the nomination of Judge Brett Kavanaugh as an Associate Justice of the Supreme Court.

Muslim Advocates was founded in 2005 by a group of American Muslim lawyers who work to ensure our nation lives up to its promise of freedom, justice, and equality for all.

Our commitment to these very ideals is why we are deeply concerned about Judge Kavanaugh's nomination to serve on the highest court. Judge Kavanaugh's 12-year record on the U.S. Court of Appeals for the D.C. Circuit, as well as his public writings, speeches, and legal career, demonstrate that if he were confirmed to the Supreme Court, he would be the fifth and decisive vote to undermine many core rights and legal protections for all Americans. Judge Kavanaugh's confirmation would shift the Supreme Court toward what can only be described as extremely regressive views on any number of issues, views that are out of step with the values most Americans hold dear.

As you know, civil rights laws provide a number of protections to ensure that no one suffers discrimination because of their religious beliefs. We are concerned that Judge Kavanaugh would allow religious freedom laws to be used to harm women, LGBTQ people, and religious minorities, including Muslims. In a range of contexts, as both jurist and lawyer, Judge Kavanaugh has prioritized the interests of the majority over those of vulnerable minorities.

For instance, in *Priests for Life v. U.S. Department of Health and Human Services*[1], Judge Kavanaugh argued that employers can cite religious beliefs to obstruct their employees' access to contraceptive coverage. While in private practice, he authored a Supreme Court brief in *Santa Fe Independent School District v. Doe*[2] defending a public school policy that promoted prayer at school football games. Statements he rendered in that brief, and his writings elsewhere, suggest that Judge Kavanaugh is likely to dispute five decades of settled Supreme Court rulings that prohibit public schools from sponsoring prayer. Furthermore, in a brief submitted to the Supreme Court in *Good News Club v. Milford Central School*,[3] Kavanaugh, again in private practice, argued against longstanding precedent prohibiting the use of public funds for religious activities. In fact, Judge Kavanaugh has also expressed hostility toward the very idea of a distinction between church and state. During a 2017 lecture at the American Enterprise Institute, Judge Kavanaugh praised former Chief Justice William Rehnquist for "persuasively criticiz[ing]" the metaphor of "a strict wall of separation between church and state."[4] Judge Kavanaugh approvingly noted that Justice Rehnquist said the metaphor was "based on bad history" and "useless as a guide to judging." He expressed his belief that "the wall metaphor was wrong as a matter of law and history." Abandoning the separation of church and state, at the expense of religious minorities and other vulnerable groups, is a gross distortion of a fundamental liberty protected by the First Amendment.

Additionally, since Judge Kavanaugh played a role in crafting President George W. Bush's shameful detention and interrogation policies, we fear how he would approach national security cases from a perch on the Supreme Court. Top national security experts have noted that Judge Kavanaugh is likely to be deferential to the President's use of aggressive war powers and would be too willing to defer to the political branches of government.[5] A clear example of this deference came in *Al-Bahlul v. U.S.*[6] where Judge Kavanaugh wrote in support of expansion of the jurisdiction of military tribunals to include domestic offenses typically heard by civilian courts, deferring to Congress and the President rather than preserving judicial authority.

He has similarly taken troubling positions in other cases touching national security questions. Across the board, Judge Kavanaugh not only endorsed sweeping deference to the government but has gone out of his way to stifle the very possibility of judicial review of executive action. Four cases in particular are instructive. First, in *Al-Bihani v. Obama*[7], Judge Kavanaugh concluded that, notwithstanding *Hamdi v. Rumsfeld*[8], the courts should ignore international law — even the possibility that a detention might violate such law — in construing Congress's authorization of the executive branch to hold the Guantanamo detainees. He did so even in the face of the President's

---

[1] 808 F.3d 1 (D.C. Cir. 2015)

[2] 530 U.S. 290 (2000)

[3] 533 U.S. 98 (2001)

[4] Brett Kavanaugh, From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist (Washington, DC: American Enterprise Institute, 2017) http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.

[5] Peter Margulies, Kavanaugh and the Military Commissions: Reading the Law "As Written" for an Unpopular Defendant (Washington, DC: Lawfare, 2018) https://www.lawfareblog.com/kavanaugh-and-military-commissions-reading-law-written-unpopular-defendant.

[6] 840 F.3d 757 (D.C. Cir. 2016)

[7] 590 F.3d 866 (2010)

[8] 542 U.S. 507 (2004)

own decision to rely on international law. Second, in *Omar v. McHugh*[9], Judge Kavanaugh joined an opinion rejecting the habeas petition of a U.S. citizen held in U.S. military custody and facing transfer to potential torture in Iraqi custody. Third, in *Doe v. Exxon Mobil Corp.*[10], he dissented from the majority opinion, holding that Exxon could be held liable under the Alien Tort Statute by Indonesian villagers who alleged they were subjected to torture and extra-judicial killings by Indonesian soldiers working for Exxon. Finally, in *Saleh v. Titan Corp.*[11], Judge Kavanaugh voted to bar state law tort claims against a private military contractor, even though no federal statute required such a result. Disregarding federalism interests, this decision treated the denial of remedies to torture victims as a sufficient federal interest to justify preemption in the absence of any congressional authorization. These decisions manifest Judge Kavanaugh's hostility to those harmed by government action—a hostility that trumps deference to the president, federalism interests, and even a due regard for the right against torture. Such decisions should be disqualifying for elevation to the Supreme Court.

It is disturbing that a jurist who goes out of his way to stymie the claims of vulnerable victims of serious constitutional claims has in other writings been so solicitous of the interests of the White House—especially in the context of criminal investigations of senior officials.[12] Such obsequious deference to authority, coupled with manifest disregard for the vulnerable, is a betrayal of all that makes the Court's history admirable.

If that were not enough, there are also grave questions as to whether Judge Kavanaugh purposely misled the Senate Judiciary Committee regarding his role in detention policy during his tenure in the Bush Administration. At the hearing, under oath, he said, "I was not involved and am not involved in the questions about the rules governing detention of combatants." A 2007 *Washington Post* report, however, appears to contradict Judge Kavanaugh's testimony, suggesting that as a White House staffer he indeed participated in discussions surrounding the issue.[13] All of these issues paint a picture of a nominee with an expansive view of executive power who would use it unabashedly to protect actions taken by a President in violation of the Constitution.

Finally, within days of his nomination, Judge Kavanaugh was described by the *Breitbart* website as someone with an "America First" approach who would "share President Trump's views on immigration."[14] In his opinions, Judge Kavanaugh has already demonstrated the President's hostility to immigrants and would serve as a rubber stamp on the Court for the President's anti-immigrant agenda. For instance, in *Agri Processor v. National Labor Relations Board*[15], a company refused to engage in collective bargaining with workers who had voted to unionize, on the basis that many of the workers were undocumented immigrants. The D.C. Circuit rejected this claim.

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[9] 646 F.3d 13 (D.C. Cir. 2011)

[10] 654 F.3d 11 (2011)

[11] 580 F.3d 1 (2009)

[12] *See, e.g.*, Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454 (2009); Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Georgetown L. J. 2133 (1998).

[13] Barton Gellman and Jo Becker, Pushing the Envelope on Presidential Power (Washington, DC: The Washington Post, 2007) http://voices.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/.

[14] Joe Binder, 'America First' SCOTUS Choice Judge Brett Kavanaugh Applies Trump's Economic Patriotism to the Law (Washington, DC: Breitbart, 2018) https://www.breitbart.com/big-government/2018/07/04/america-first-scotus-choice-judge-brett-kavanaugh-applies-trumps-economic-patriotism-to-the-law/.

[15] 514 F.3d 1 (D.C. Cir. 2008)

Judge Kavanaugh dissented, asserting that a federal immigration law had implicitly amended at least part of the National Labor Relations Act. The majority stated that Kavanaugh's views would have led to an "absurd result." Likewise, in *Fogo de Chao Inc. v. Department of Homeland Security*[16], a company challenged DHS's refusal to grant temporary visas to foreign workers with specialized cultural knowledge. The majority sided with the restaurant and its workers. Kavanaugh dissented, leaving the majority to express "puzzlement" and to question whether Judge Kavanaugh embraced "woodenly excluding any and all knowledge or skills acquired by an employee solely because those skills and knowledge were learned from family or community rather than in-company trainers."

Our country was founded on the belief that no one should suffer discrimination or persecution because of their faith. Yet, from day one, the Trump administration has made a mockery of that bedrock American principle by using religion as a sword to deny basic rights and dignity to others. Given President Trump's well-documented hostility toward Muslims, immigrants, people of color, the LGBTQ community, and women, Americans need—and deserve—a Supreme Court justice who will guarantee freedom and justice for <u>all</u> Americans. Unfortunately, a confirmed Justice Kavanaugh will only further threaten to erode our nation's promise of freedom, justice and equality for all.

For these reasons, we urge the Senate to reject Judge Kavanaugh's nomination.

Sincerely,

Farhana Y. Khera
President and Executive Director

[16] 769 F.3d 1127 (D.C. Cir. 2014)

WASHINGTON BUREAU · NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
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August 13, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

RE: NAACP OPPOSITION TO THE NOMINATION OF BRETT KAVANAUGH TO THE U.S. SUPREME COURT; QUESTIONS HE MUST ANSWER DURING HEARING ON THE NOMINATION; SUPPORT FOR POSTPONING CONSIDERATION AND A VOTE ON THE NOMINATION UNTIL THE 116TH CONGRESS IS SEATED IN JANUARY, 2019

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the NAACP, our nation's oldest, largest and most widely-recognized grassroots-based civil rights organization, I strongly urge you to oppose the nomination of Judge Brett Kavanaugh to the U.S. Supreme Court. Furthermore, I urge you to support delaying this vital decision and the important hearings into the judicial temperament of any nominee until after the November 2018 midterm election and the seating of the 116th Congress in January, 2019. Lastly, when hearings on any nominee are held, there are questions that must be asked and answered; the responses which all Americans deserve to know.

Our nation still struggles to realize the promise of equality; equal protection and equal opportunity under law for all Americans regardless of race, gender, ethnicity, point of national origin, sexual orientation, gender assignment or other differences. The next Supreme Court justice will play an outsized role in determining whether African Americans and other racial and ethnic minorities can enjoy our rights to equal protection and equal opportunity under law as guaranteed by the U.S. Constitution. Through his writings, his public statements for the record, and his decisions as a Judge on the U.S. Court of Appeals for the D.C. Circuit, Mr. Kavanaugh' s record demonstrates that he is a judicial extremist who does not empathize with the very real needs of working middle-class Americans or with the unique challenges facing racial and ethnic minority Americans. The Supreme Court is meant to be an unbiased guardian of the rights and liberties of all Americans. At this point in our nation's history, we need a fair-minded and independent jurist on the Court, not a divisive and biased ideologue who will further shake the public's faith in our nation's justice system.

If Judge Kavanaugh is confirmed to a lifetime appointment on the U.S. Supreme Court, we could see reversals of hard-won gains securing equal opportunity in areas including education, voting, employment, criminal justice, and housing, among others. We could see further exclusion of communities of color from full participation in our democracy. We could see racist policies and discussions continue to flourish within the criminal justice system. We could see the elimination of effective tools for proving discrimination and addressing it. We could see the overturning of the

guarantee to quality accessible health care for millions of Americans. The rights of African Americans and all racial and ethnic minorities to fully participate in our democracy and in every facet of political, educational, social, and economic life, on an equal basis, is on the line.

The constitutional process for appointing and confirming the next justice must be thoughtful, careful, deliberative, and conducted with well-informed, bipartisan support. The Senate should not consider a nominee until a new Senate is seated next year, after the results of the midterm election are in place. This will fully allow the American people, those who will be most affected by the confirmation, to have a voice in the selection of the nominee.

Regardless of who the ultimate nominee may be, I urge you to ask him or her questions that will interest and affect all Americans. The next Supreme Court Justice must tell the American people, point blank, if he or she believes if the Constitution, if our nation, is one in which people are guaranteed the right to pursue life, liberty, and prosperity. Does the nominee believe in adequate access to affordable health care for every American, regardless if his or her race, ethnicity, age, gender, or station in life? The next Supreme Court Justice needs to be asked if he or she believes that the President, or any individual, is above the law. The next Supreme Court nominee must clearly state whether he or she will protect Americans' most important right — the right to be safe from gun violence — or whether he or she will let virtually anyone carry any gun, anytime, anywhere. Does the nominee believe that racism still exists in almost every facet of American society, and that it should be effectively and affirmatively addressed?

The next U.S. Supreme Court Justice will play a central role in determining the fate of rights of all Americans for at least a generation – voting rights, equal opportunity programs like affirmative action, fair housing, fair employment, affordable health care, environmental justice, workers' rights, women's rights and the right to be free from racism in the criminal justice system. I thus urge you, in the strongest terms possible, to fully investigate the past record of any and every nominee for this position and weigh his or her answers, not on partisan standards, but rather on what is best for all of the American people.

Thank you for your attention to the concerns of the NAACP; should you have any questions or comments, please do not hesitate to contact me at my office at (202) 463-2940.

Sincerely,

Hilary O. Shelton
Director, NAACP Washington Bureau &
Senior Vice President for Policy and Advocacy

cc: Members, Senate Judiciary Committee

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40 Rector Street, 5th Floor
New York, NY 10006

LDF
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Washington, D.C. Office
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August 31, 2018

The Honorable Charles Grassley
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: *The Nomination of D.C. Circuit Court of Appeals Judge Brett M. Kavanaugh to serve as Associate Justice of the United States Supreme Court*

Dear Chairman Grassley and Ranking Member Feinstein

The NAACP Legal Defense and Educational Fund, Inc. (LDF) submits the attached report in opposition to the nomination of D.C. Circuit Court of Appeals Judge Brett M. Kavanaugh, who was nominated by President Donald J. Trump to fill the vacancy created by the June 25, 2018 retirement of Associate Justice Anthony M. Kennedy.

Founded by Thurgood Marshall in 1940, LDF has worked to pursue racial justice and eliminate structural barriers for African Americans in the areas of criminal justice, economic justice, education, and political participation for over 75 years. Many of LDF's historic victories have been in the United States Supreme Court, and other federal courts. In fact, LDF has been involved in over 700 cases before the United States Supreme Court, a docket second only to the United States Department of Justice. In landmark LDF cases such as *Brown v. Board of Education*,[1] *Newman v. Piggie Park Enterprises, Inc.*,[2] *Swann v. Charlotte-Mecklenburg Board of Education*,[3] and many others, the Supreme Court's decisions have transformed the meaning of equality and justice for millions of Americans. Because the replacement of a Justice on the Supreme Court can change the Court's balance and dynamic in both subtle and dramatic ways, each nomination is extraordinarily important to the

[1] 347 U.S. 483 (1954).
[2] 390 U.S. 400 (1968).
[3] 402 U.S. 1 (1971).

LDF
DEFEND EDUCATE EMPOWER

future direction of our country. For these reasons, LDF plays an active role in evaluating nominations to federal courts, and in particular, the United States Supreme Court.

As a fundamental part of its evaluation, LDF reviews the record of Supreme Court nominees to analyze their legal views and positions. In particular, LDF considers whether the nominee has demonstrated a commitment to faithfully applying civil rights statutes and adhering to established constitutional interpretations that have allowed our country to make critical, if incomplete, progress toward becoming a more just society. LDF shares its conclusions about a nominee's record to (1) contribute to the public's full understanding of a nominee's potential impact on civil rights, (2) support the Senate's constitutional obligation to "advise and consent" on such nominations, and (3) ensure that the Supreme Court's role in vindicating the civil rights of those who are most marginalized is fully recognized and considered in the confirmation process.

To that end, LDF has reviewed the available record of Judge Kavanaugh and prepared the attached detailed report. The nomination of Judge Kavanaugh to be a justice on the Supreme Court comes at a unique and unprecedented moment in our country's history. Our review of Judge Kavanaugh's record grapples with the judicial philosophies he holds and the rulings he has issued. It also reflects the highly unusual context surrounding his nomination. His record on and off the court independently shapes our assessment of his fitness to serve on the nation's highest court and our evaluation of the likely effect he would have on the Court's jurisprudence concerning fundamental civil rights and protections. This all indicates that Judge Kavanaugh, if confirmed, would damage the cause of civil rights, and that the Senate should not confirm him.

Thank you for considering this report. If you have any questions, please do not hesitate to contact me at 202-682-1300.

Sincerely,

Todd A. Cox
Director of Policy

CC: Members of the Senate Judiciary Committee

NATIONAL ABORTION FEDERATION

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August 31, 2018

The Honorable Charles Grassley
Chairman, Senate Committee on the Judiciary
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member, Senate Committee on the Judiciary
331 Hart Senate Office Building
Washington, D.C. 20510

Re: NAF Opposes the Nomination of Judge Kavanaugh to the Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein:

The National Abortion Federation (NAF) is the professional association of abortion providers and we write to express our strong opposition to the nomination of Judge Brett Kavanaugh to the Supreme Court of the United States. Judge Kavanaugh's nomination to the Supreme Court is the fulfillment of President Trump's promise to put forth a nominee who would oppose *Roe v. Wade*[i] and put the future of abortion care in this country at risk.

President Trump repeatedly promised to put forth a Supreme Court nominee who would "automatically"[ii] vote to overturn *Roe*, and Kavanaugh's name appeared on a list of potential nominees that was heavily influenced by the Heritage Foundation and the Federalist Society, indicating that he passed Trump's dangerous litmus test[iii]. With the Administration's repeated attacks on reproductive rights and state legislatures restricting access to abortion through any available means, the Constitutional right to access abortion care is under threat like never before. The Supreme Court must continue to act as the final defense against dangerous and unconstitutional attacks on basic rights and freedoms.

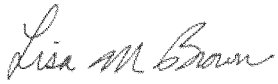
Kavanaugh is an extreme judge and his views on abortion and other progressive issues run counter to the vast majority of Americans. His anti-choice views are not just speculation. In October 2017, Judge Kavanaugh sat on a panel of three judges that heard a case of an undocumented minor seeking abortion care while in federal custody. Judge Kavanaugh issued an opinion denying this minor the health care she sought, arguing that somehow her access to abortion broke new constitutional ground. Thankfully, his decision was reversed by the full appeals court.

Our most basic civil and human rights are on the line. This vacancy on the highest court will decide our country's future and forever alter our already fraught judicial landscape.

board chair: Sue Carlisle, PhD, MD ***board members:*** Loris Chalken, JD • Vicki Cowart • Angel M. Foster, DPhil, MD, AM • Chrisse Franke • Melissa Grant
Daniel Grossman, MD • Dalton Johnson, MBA • Julie McDonald, DO, MPH • Suzanne Morris, MD • Brenda Peralta, MD, MS • Lisa Perreira MD, MPH
Sarah Ward Prager, MD, MAS • Ann Schutt-Aine, MD • Rolanda Ryan • Elizabeth Talcroft, MSN, NP
Cristina Villarreal Velasquez, PhD • Katie Watson, JD • Lori Williams, MSN, WHNP-C, APRN

We need a Supreme Court justice who will honor established precedent, including the constitutional right to privacy and abortion, and that is not Judge Brett Kavanaugh.

Sincerely,



Lisa Brown
General Counsel & Senior Policy Director

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[1] Washington Post, Trump promised judges who would overturn Roe v. Wade, March 21, 2018,https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/?noredirect=on&utm_term=.ba770d88c947

[2] CNBC, Trump: I'll appoint Supreme Court justices to overturn *Roe v. Wade* abortion case, Oct 19, 2016.https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html

[3] *VOX*, The litmus test for a Supreme Court nominee, July 5, 2018.https://www.vox.com/mischiefs-of-faction/2018/7/5/17532488/litmus-test-supreme-court-nominee

National Association of Federal Defenders

Chairman Chuck Grassley
Chair, Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C. 20510

Senator Diane Feinstein
Ranking Member, Senate Judiciary Committee
331 Hart Senate Office Building
Washington, D.C. 20510

September 12, 2018

Re: Nomination of Hon. Brett Kavanaugh

Dear Senators Grassley and Feinstein:

On September 7, 2018, the Federal Defender for the District of Columbia testified in support of Judge Brett Kavanaugh's nomination to the United States Supreme Court. I write on behalf of the National Association of Federal Defenders to make clear his testimony was not offered on behalf of, nor does it reflect the views of, federal defenders generally. As a group, federal defenders have never taken a position on whether a nominee to the Supreme Court should be confirmed, and we do not take a position on Judge Kavanaugh's nomination.

Although during the testimony there were three cases discussed in which Judge Kavanaugh ruled in favor of criminal defendants, many other criminal law topics of concern were not mentioned. We hope that your committee will explore all of Judge Kavanaugh's past statements and writings to assure that his views are consistent with fundamental notions of due process for persons accused of crime.

Thank you for your consideration.

Sincerely,

/s
Andrea K. George
President
National Association of Federal Defenders
[redacted]

National Cattlemen's Beef Association

PUBLIC LANDS COUNCIL

August 30, 2018

The National Cattlemen's Beef Association (NCBA) and Public Lands Council (PLC) urge you to support Judge Brett Kavanaugh as he seeks confirmation to the Supreme Court of the United States. NCBA is America's largest and oldest national cattle trade representing nearly 175,000 members through state affiliates, while PLC is the only national organization dedicated to the representation of ranchers who operate on federal lands. NCBA and PLC support Judge Kavanaugh's swift confirmation to the Supreme Court because his tenure on the DC Circuit provides an exemplary record of objective legal review.

America's cattle producers rely on clarity in the law and objectivity in its application, which allows them to operate their businesses efficiently and effectively. Judge Kavanaugh has a proven record of refusing to opine as a judicial activist – writing dissents that present strict legal analysis. These dissents are then used as the basis to overturn numerous DC Circuit court opinions. Judge Kavanaugh doesn't just follow Supreme Court precedent – he helps make it.

Judge Kavanaugh exhibits a key quality of a Supreme Court justice – the ability to rule on the law, rather than the facts of a specific case. This is vital to ensuring continuity and providing assurance to America's cattle producers. It also raises regulatory agencies to a higher standard for rulemaking, ultimately resulting in rules that explicitly convey executive intent without overreaching. Clear and unambiguous regulations that follow the rule of law are critical. Kavanaugh is a champion for adhering to the letter of the law, as demonstrated in his *Homer City v. EPA* opinion:

> Congress could well decide to alter the [Clean Air Act] to permit or require EPA's preferred approach to the good neighbor issue. Unless and until Congress does so, we must apply and enforce the statute as it's now written. [...] It is not our job to set environmental policy. Our limited but important role is to independently ensure that the agency stays within the boundaries Congress has set.

Rather than bringing personal biases to the bench, Judge Kavanaugh relies on a textual interpretation of the law above all else.

It is vital that the Senate work expeditiously to confirm Judge Kavanaugh. Clarity and objectivity are not partisan concepts, and America's cattle producers need leaders who embody these principles in every branch of government.

Kevin D. Kester

Kevin Kester
President
National Cattlemen's Beef Association

David Eliason

Dave Eliason
President
Public Lands Council

NCLR NATIONAL CENTER FOR LESBIAN RIGHTS

September 4, 2018

Dear Senator:

We write to urge you to vote against the confirmation of Judge Brett Kavanaugh to a seat on the United States Supreme Court. It is clear that Mr. Kavanaugh's confirmation to a lifetime appointment on our nation's highest court would prevent any semblance of balance on the Court and jeopardize essential protections and freedoms that ensure the ability of all Americans to participate equally in our society. Mr. Kavanaugh's nomination represents a serious threat to voting rights, reproductive freedom, and the civil rights of women, LGBT people, people with disabilities, immigrants, and racial and religious minorities. His confirmation would undermine the Court's ability and responsibility to check executive branch abuses and overreaching—a role that is an essential component of our constitutional system of checks and balances. The Senate and the administration should work together to identify a nominee who is fair-minded, dedicated to protecting equal justice for all, and committed to the Court's role in our tripartite system of government.

We are also deeply concerned that vast swaths of documents from Mr. Kavanaugh's tenure in the White House under President Bush are being wrongfully withheld from review, making it impossible for the Senate to perform its constitutional duty of advice and consent. During the time that Mr. Kavanaugh served in the White House, significant issues of concern to our community, such as an amendment to the Constitution that would have barred marriage equality, were under consideration. The Senate and the public deserve to know the extent of Mr. Kavanaugh's involvement in a major effort to impede civil rights for lesbian, gay and bisexual Americans.

While the concerns about Mr. Kavanaugh's nomination are many, we write to highlight key issues of particular importance to the LGBTQ community.

First, Mr. Kavanaugh's stated views on **fundamental rights** give rise to a well-founded fear that his confirmation to the Court would undermine equality for LGBT people. He has rejected the recognition of any rights not expressly enumerated in the Constitution or rooted in "history and tradition," a view long rejected by the Court and that favors those who were in power at the country's founding. Such an approach leaves out many groups in our society and would make it difficult or impossible for our community to obtain and maintain recognition of our rights to equal treatment under the law. It is through a recognition that our Constitution's core protections for liberty, equality and privacy must be applied in light of our evolving understanding of justice that the Supreme Court has recognized protections for personal decisions around childbearing, family formation, and intimate conduct. It would be a grave mistake to place someone on the Court who has openly expressed disagreement with the extension of these protections to previously excluded groups and would threaten their continued application to LGBT people and to deeply personal reproductive health care decisions.

Second, Mr. Kavanaugh's deference to claims of **religious liberty** pose a threat to the rights of dignity of LGBT people. While religious liberty and LGBT equality are not in tension – many people of faith support LGBTQ equality and of course many LGBT people are people of faith - the unfortunate reality is that many who oppose equal rights for our community couch their opposition in religious terms. Some seek to evade the requirements of antidiscrimination laws and marriage equality by claiming religious exemptions in order to deny to LGBT people equal access to businesses open to the public, health care services, and the recognition of our marriages on equal terms. We know from Judge Kavanaugh's time on the court of appeals that he holds an outlier view of religious exemptions, favoring a stunningly broad view of the deference owed to such claims. Because opposition to equal treatment for LGBT people so often is framed as a matter of accommodating the religious beliefs of the person or entity seeking to discriminate, we are deeply concerned that Mr. Kavanaugh's presence on the Supreme Court would tip the balance too far in favor of such claims, leaving our community vulnerable to job loss, denial of access to essential health care, and the stigma of being turned away from places of public accommodation.

Third, we have grave concerns about Mr. Kavanaugh's extreme views on **deference to the president**. From rescinding agency guidance to protect transgender students to proposed regulations expanding religious exemptions in health care to the president's impulsive and unlawful ban on military service by transgender people, this administration has been advancing an agenda of hostility toward our community bolstered by flawed interpretations of statutory and constitutional law. A Supreme Court justice who believes that the president is above the law is unlikely to hold this administration accountable for its continued attacks on LGBTQ people.

Finally, we oppose Mr. Kavanaugh's confirmation because it would be a serious threat to **racial justice**. In three recent reports, Demos, the NAACP Legal Defense and Educational Fund, Inc. (LDF), and The Lawyers' Committee for Civil Rights Under Law have independently analyzed Mr. Kavanaugh's history on a series of issues bearing on racial justice. They all concluded that his confirmation would be a devastating step backward for communities of color and other marginalized people. Just as we cannot afford a justice who will read LGBT people out of the Constitution, we cannot afford one who adheres to a dangerous "colorblind" view and ignores this nation's history of slavery, segregation, and state-sanctioned violence, and the systemic inequities still experienced by people of color today.

Thank you for your consideration. Should you have any questions, please do not hesitate to contact Julie Gonen, NCLR's federal policy director, at jgonen@nclrights.org or 202-734-3547.

Sincerely,

National Center for Lesbian Rights

NATIONAL CENTER FOR

IN CHARTER SCHOOLS

September 3, 2018

The Honorable Chuck Grassley
Chairman
U.S. Senate Committee on the Judiciary
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein,

The National Center for Special Education in Charter Schools (NCSECS) is dedicated to ensuring that students with disabilities have equal access to charter schools and that charter schools are designed and operated to enable all students to succeed. Public charter schools have the opportunity to create effective, inclusive learning environments and to be exemplars of educational equity, quality, and innovation. NCSECS works intently with the civil rights and disability communities in advocating for the fundamental principle that public schools must be required to serve all students.

To this end, we believe that Supreme Court Justices must recognize and preserve the historical and practical value of education, civil rights, and disability laws. We urge the United States Senate Committee on the Judiciary to clarify Supreme Court nominee Judge Kavanaugh's history with and views on the importance of civil rights protected under the law, particularly as they relate to students with disabilities and their families.

We are concerned that his legal record indicates a lack of commitment to upholding civil rights protections under the law, as evidenced by his rulings in *Doe ex rel. Tarlow v. D.C.* and *Hester v. D.C.*, as well as his dissent in *Seven-Sky v. Holder*. Moreover, his record suggests a lack of understanding about how school choice intersects with issues of equity, evidenced by his strong support of government funded private and religious school voucher programs, many of which require students and families to waive their rights under the Individuals with Disabilities Education Act (IDEA).

On behalf of students with disabilities, their families, and advocates, we urge the Judiciary Committee to ask Judge Kavanaugh the following questions to clarify his position on the laws impacting students with disabilities:

1) Do you support the unanimous U.S. Supreme Court opinion issued in *Endrew F. v. Douglas County School District* which interpreted the scope of IDEA's free appropriate public education requirements as ensuring that schools must proactively provide every child with a disability the chance to meet challenging objectives? And furthermore, do you agree the Court was right to reject the Tenth Circuit's reasoning that the child may only be offered a program to provide "merely more than de minimis" educational benefit?

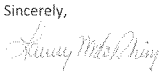
2) Will you commit to assuring that the Court will clarify the legal expectations that attach to schools receiving public funding through voucher programs and that such programs uphold and do not waive any student's rights under the IDEA and all other civil rights statutes?

3) Do you uphold the need for the Office for Civil Rights and that it must support the role intended by Congress: to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation's schools?

4) Do you agree that charter schools are fundamentally public schools and that they must uphold all federal education and civil rights laws as well as state sunshine laws?

It has been 43 years since the passage of the IDEA, 45 since the passage of Section 504 of the Rehabilitation Act, and 28 since the passage of the Americans with Disabilities Act, yet students with disabilities continue to lag behind their peers in important educational outcomes. Vetting Judge Kavanaugh provides an opportunity to explore the importance of upholding the collective protections of equity that these laws provide. In your hands lies the impact of the next lifetime appointment to the Supreme Court of the United States on future generations of American students to come and we therefore ask you to take great care in making this monumental decision.

Sincerely,



Lauren Morando Rhim, Ph.D.
Executive Director

cc: Members of the U.S. Senate Committee on the Judiciary
Chairman Lamar Alexander
Ranking Member Patty Murray

September 4, 2018

Dear Senator:

The National Center for Transgender Equality writes to express our strong opposition to the confirmation of Judge Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States. For 15 years, the National Center for Transgender Equality has worked to improve the lives of the nearly two million Americans who are transgender through advocacy and education. In 2015, NCTE conducted the U.S. Transgender Survey—the largest survey conducted to date of transgender Americans—which found that transgender people face staggering levels of discrimination in nearly every sphere of life and are more likely to experience poverty, unemployment, homelessness, and violence.

The fact that the President of the United States, who made this nomination, has now been implicated in crimes aimed at influencing his election by itself calls into question the legitimacy of advancing this nomination at this time. So too does the enormous amount of Judge Kavanaugh's political and legal record that is being hidden prior to his hearing. These hidden documents could shed important light on what are already known to be controversial views of Presidential power and constitutional rights, as well as on his acknowledged involvement in an effort to amend the U.S. Constitution to ban marriages of same-sex couples in every state. Compounding concerns about Judge Kavanaugh's ability to be impartial is the deeply partisan and unprecedented way in which he was nominated: after two special-interest groups determined that Judge Kavanaugh passed President Trump's articulated litmus tests – a test calling for the overturning of *Roe v. Wade* and an end to the protections of the Affordable Care Act. Judge Kavanaugh's nomination to the Supreme Court was expressly predicated on a determination that he would undermine the laws and liberties that millions of Americans, including transgender Americans, rely on. The limited information currently available to the public appears only to confirm our grave concern he would not serve as a fair and impartial judge.

The Supreme Court touches the life of every American, not just at particular moments in time, but for decades and lifetimes. Supreme Court Justices have an awesome and precious responsibility to ensure the integrity and independence of our highest court. Americans deserve a justice who is – and who is seen to be – fair-minded, unbiased, and committed to protecting Americans' personal liberty. What we currently know about Brett Kavanaugh indicates that he does not meet these high standards.

Judge Kavanaugh Would Endanger Transgender Americans by Overturning Pre-Existing Condition Protections

1133 19th Street NW
Suite 302
Washington, DC 20036

202-642-4542
www.TransEquality.org

Before the Affordable Care Act, transgender Americans and Americans living with HIV/AIDS and many other health conditions were labeled uninsurable – simply being transgender or having HIV was considered a "pre-existing condition." President Trump has promised that Judge Kavanaugh would strip Americans of protection from such discrimination and bring back that shameful time, and the President's Administration is actively seeking to bring before the Court a vehicle for doing so. Judge Kavanaugh has repeatedly criticized the ACA and the Supreme Court's past ruling upholding it, calling the law "unprecedented on the federal level in American history" and the Court's ruling "very odd."[1] As his own former law clerk wrote, "No other contender on President Trump's list is on record so vigorously criticizing" the ACA.[2] Transgender Americans, and millions of others, cannot afford to see this campaign promise fulfilled.

Judge Kavanaugh Thinks Claims of Undue Burden on Religious Liberty Should Always Prevail
Judge Kavanaugh's limited public record also indicates that he would sanction the weaponization of our hallowed tradition of religious freedom by turning it into a license to discriminate. Kavanaugh's dangerous view of what constitutes an undue burden on religious freedom is profoundly out of step with other jurists and established precedent. In *Priests for Life v. U.S. Department of Health and Human Services*,[3] an employer did not want to provide insurance coverage to its employees for contraception and was required to file an opt-out form with their insurer or the federal government in order to avail itself of a religious exemption. The employer claimed that even filing the form was an undue burden on its religious views. The D.C. Circuit soundly rejected the organization's challenge, which went beyond Supreme Court precedent.

Judge Kavanaugh, however, dissented, arguing the mere filing of the opt-out form was a substantial burden on the organization's religious liberty and that courts "may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiff's religious beliefs," including its beliefs about what constitutes a substantial burden under the law.[4] If Judge Kavanaugh has his way, courts will be required to accept, without question, claims that a government requirement constitutes an undue burden on an organization's religious freedom—gutting a key legal principle. In this case, his view prevailing would have denied contraceptive coverage to employees. Applied more broadly, this view would gravely undermine civil rights laws and other protections for employees and for individuals served by taxpayer-funded grantees and contractors.

Judge Kavanaugh Will Sanction Employment Discrimination
Transgender people face widespread discrimination in many facets of life, including employment. One in six transgender workers in the U.S. Transgender Survey reported having lost a job because of being

[1] Hon. Brett Kavanaugh, The Role of the Judiciary in Maintaining the Separation of Powers (Feb. 1, 2018), https://www.heritage.org/courts/report/the-role-the-judiciary-maintaining-the-separation-powers.
[2] Sarah E. Pitlyk, Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism, *National Review* (July 3, 2018), https://www.nationalreview.com/2018/07/judge-brett-kavanaughs-impeccable-record-of-constitutional-conservatism.
[3] 808 F.3d 1 (D.C. Cir. 2015).
[4] *Id.* at 18 (Kavanaugh, J., dissenting).

transgender at some point in their lives.[5] Judge Kavanaugh has repeatedly made sweeping rulings against civil rights and other workplace protections. This includes not only the *Priests for Life* ruling, the notorious *SeaWorld* ruling in which case he called safeguards against workplace deaths "paternalistic,"[6] and the his *Miller v. Clinton* dissent arguing for a sweeping exception to nondiscrimination protections for some federal workers,[7] and a broader pattern of ruling overwhelmingly for powerful interests.

The question of whether an employer can fire an employee for being transgender is likely to come before the Supreme Court in the very near future. The Supreme Court was recently asked to review *EEOC v. R.G. &. G.R. Harris Funeral Homes*, a Sixth Circuit case holding that a funeral home violated Title VII of the Civil Rights Act when it fired a longtime employee simply for being transgender.[8] In *Harris Funeral Homes*, the funeral home in question argued against over a decade of precedent that federal law offers no protection against firing workers for being transgender, and further argued that requiring continued employment of the transgender employee would constitute an unjustified substantial burden on the funeral home's religious beliefs.

Although far too much is still not known about Judge Kavanaugh's political and legal record, we do know that he has consistently ruled in favor of corporations and against protections for employees. If confirmed, we are convinced that he will continue to erode worker protections, endangering the livelihood and well-being of Americans across the country, and exacerbating the already rampart discrimination experienced by many, including transgender Americans.

Judge Kavanaugh Subscribes to a Dangerous View of Presidential Power

The limited portions of his record available to the public indicate that Judge Kavanaugh holds controversial and dangerous views about presidential power. Such views are especially concerning when the president nominating Judge Kavanaugh is the subject of ongoing investigations and has been implicated in election-related crimes, and that same president has aggressively used presidential power to attack vulnerable minorities including transgender people.

Conclusion

This letter of opposition is based on what is currently known regarding Judge Kavanaugh's record and views, as well as the President's specific promises about what Judge Kavanaugh would do as a Justice. For such a momentous nomination—one that could tip the balance of the Court—Americans deserve to

[5] James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality.
[6] *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1217 (D.C. Cir. 2014)
[7] 687 F.3d 1332 (D.C. Cir. 2012).
[8] 884 F.3d 560 (6th Cir 2018).

know the full record of a Supreme Court nominee, as well as the nominee's views on the personal freedoms that Americans cherish and the Constitution protects. What we know of Judge Kavanaugh is enough to say without question that his nomination should not be advanced at a time when Senators and the American people cannot examine huge portions of his record. His available record indicates that Judge Kavanaugh does not meet the high standard for a Supreme Court Justice, and we urge you to oppose his confirmation

Thank you for your consideration.

Sincerely,

Mara Keisling
Executive Director

National Congress of American Indians

September 12, 2018

Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Judge Brett M. Kavanaugh's Views on Native Hawaiians

Dear Chairman Grassley:

The National Congress of American Indians ("NCAI") and the Native American Rights Fund "(NARF") write to share our concerns regarding Judge Brett M. Kavanaugh's views on Native Hawaiians, and the rights of indigenous peoples. NCAI and NARF are non-partisan organizations, and supported the confirmation of Justice Neil Gorsuch because his record demonstrated an understanding of the fundamental principles of tribal sovereignty and the federal trust responsibility.

Last week, documents were released from Judge Kavanaugh's time at the White House that contained troubling opinions about Congressional authority to enact programs benefiting Native Hawaiians. In an email commenting on draft congressional testimony from a Department of the Treasury official, he opined: "I think the testimony needs to make clear that any program targeting Native Hawaiians as a group is subject to strict scrutiny and of questionable validity under the Constitution." He expressed similar views in an e-mail regarding the creation of an Office of Native American Affairs in the Small Business Administration. These views are derived from his work an amicus brief filed in *Rice v. Cayetano*, a Supreme Court case from 2000 regarding the rights of Native Hawaiians. And he detailed these views in a Wall Street Journal opinion piece, demonstrating that these are not merely advocacy or advice in his capacity as a lawyer, but his personal views. Examined as a whole, they reveal a troubling misunderstanding of history as well as the unique relationship between indigenous peoples, their governments, and the federal government.

The United States annexed the fully independent Kingdom of Hawaii at gunpoint, a factual point that Kavanaugh fails to mention or consider in advancing his views. Moreover, the United States undertook a duty to protect Native Hawaiians and their lands, an obligation that has been overlooked and gone unfulfilled. Therefore, it is particularly cynical that in his Wall Street Journal op-ed, Kavanaugh repeatedly derided the Department of Justice's support for Native Hawaiian self-determination as mere "political correctness".

Kavanaugh's op-ed goes on to say that "The Supreme Court ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe." Kavanaugh portrays himself as a student of history, but he diminishes Native Hawaiians to merely an "ethnic group" and tries to claim the moral high ground in preventing racial bias. Native Hawaiians, like other indigenous peoples, including American Indians and Alaska Natives are not "minority groups" or "racial groups." Instead, they have a political status recognized in the Constitution as indigenous governments that pre-dated the United States and exercised sovereignty over lands now a part of the United States. They also have a right to self-determination recognized in the United Nations Declaration on the Rights of Indigenous Peoples. Kavanaugh does not appear to appreciate these crucial distinctions.

Our concern is that Kavanaugh was willing to disregard facts and history in interpreting the law, in order to arrive at a conclusion that fit his political goals. He zealously pressed a position that was inclined toward limiting the rights of indigenous peoples, even if it required ignoring history and an artificial reading of the law. This stands in stark contrast to the last Supreme Court nominee that came before your committee, Neil Gorsuch, whose robust record demonstrated knowledge of history and law in this area and a fidelity to its application.

We encourage all Senators to inquire about Judge Kavanaugh's views on the role of indigenous peoples in the U.S. Constitution and the primacy of Congress in passing laws to fulfill the United States' obligations to the indigenous peoples who's lands and territories are encompassed within the borders of what is now known as the United States. It is crucially important that when the rights of indigenous peoples come before the Supreme Court, the decisions are made by judges who are independent, knowledgeable, and free from preconceived bias.

We also urge you to make available the entire record of Judge Kavanaugh, so that the Senate can make informed decisions. If you have any questions, please contact John Dossett, NCAI Legal Counsel at jdossett@ncai.org, or Joel Williams, NARF Senior Staff Attorney at williams@narf.org.

Very Respectfully,

Jefferson Keel, NCAI President

John Echohawk, NARF Executive Director

National Congress of American Indians

NARF

September 28, 2018

Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Opposition to Confirmation of Brett Kavanaugh to the Supreme Court

Dear Chairman Grassley:

The National Congress of American Indians and the Native American Rights Fund write to urge the Senate to oppose the confirmation of Judge Brett Kavanaugh to the Supreme Court. NCAI and NARF are non-partisan organizations, and supported the confirmation of Justice Neil Gorsuch, because his record demonstrated an understanding of the fundamental principles of tribal sovereignty and the federal trust responsibility.

In our September 12 letter, we shared concerns regarding Judge Kavanaugh's views on the rights of indigenous peoples. He was willing to disregard facts and history in interpreting the Constitution to arrive at conclusions that fit partisan political goals. He is inclined toward limiting the rights of indigenous peoples, even when it required artificial reading of the law. His record raised serious questions on judicial integrity, independence and impartiality

Now those concerns are deepened. There is too much doubt about his character, and the Supreme Court must be reserved for Justices with unimpeachable trustworthiness. It is crucially important that when the rights of indigenous peoples come before the Supreme Court, the decisions are made by Justices who are widely respected for their integrity and honesty. We urge that the nomination be withdrawn.

Very Respectfully,

Jefferson Keel, NCAI President

John Echohawk, NARF Executive Director

NCJW®

National Council of Jewish Women

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Web www.ncjw.org

August 22, 2018

The Honorable Charles Grassley
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The National Council of Jewish Women (NCJW) writes to express its strong opposition to the nomination of Judge Brett Kavanaugh to the US Supreme Court. NCJW believes that only those committed to upholding constitutional rights and fundamental freedoms should be nominated and confirmed to our nation's highest court. Judge Kavanaugh has demonstrated throughout his career that he would favor the wealthy and powerful over protecting the civil and human rights of all individuals, especially women.

Moreover, for this Committee to proceed with a hearing without Kavanaugh's full record is an egregious partisan move that taints the confirmation process entirely. Indeed, while Judge Kavanaugh's opinions shed light on the many hard-won freedoms he aims to roll back, such as the right to health care including abortion, what we do not yet know may prove to be even more dangerous to Americans. The fact that he may have worked on issues including torture, the Federal Marriage Amendment, and block granting Medicaid during his time in the White House makes it even more crucial that Congress and the public have access to Judge Kavanaugh's complete record.

Our next Supreme Court justice — filling a lifetime appointment on the nation's highest court — must be a fair-minded constitutionalist who understands the real world and how the law impacts all Americans, including women, minorities, and historically marginalized groups. Judge Kavanaugh has proven to be a narrow-minded elitist who, if given the chance, will only continue to roll back the clock on those who most need the Court's protection. Accordingly, we strongly **urge the Senate Judiciary Committee to vote against the confirmation** of Judge Kavanaugh to the US Supreme Court.

Sincerely,

Nancy K. Kaufman

Nancy K. Kaufman
CEO, National Council of Jewish Women

NATIONAL EDUCATION ASSOCIATION
nea.org
Great Public Schools for Every Student

1201 16th St., N.W. | Washington, DC 20036 | Phone: (202) 833-4000

Lily Eskelsen García
President

Rebecca S. Pringle
Vice President

Princess R. Moss
Secretary-Treasurer

John C. Stocks
Executive Director

August 30, 2018

United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Senator:

On behalf of the three million members of the National Education Association and the 50 million students they serve, we strongly urge you to oppose Brett Kavanaugh's nomination to the United States Supreme Court. Votes associated with this issue may be included in NEA's Report Card for the 115th Congress.

We oppose Judge Kavanaugh's nomination for many reasons. He cannot be trusted to protect Americans with pre-existing health conditions while the Trump administration argues in federal court that such protections are unconstitutional.[1] He believes nearly all sensible gun regulations are unconstitutional.[2] He has made it clear he believes affirmative action is unconstitutional, calling it a "naked racial spoils system."[3] Educators are particularly concerned that he has been an outspoken voucher activist for nearly two decades—as a private citizen, lawyer, political staffer, and judge. Vetted and chosen by groups who want to privatize public education and eradicate educator labor unions, he would advance the voucher agenda of Secretary of Education Betsy DeVos and her allies—a profound threat to our students and communities. The Senate has a duty to stop this from happening. Details on Judge Kavanaugh's record are provided below and in NEA's report, Kavanaugh Could Unleash School Voucher Programs throughout the Nation.

Kavanaugh supports replacing public education with vouchers
Pro-voucher groups funded and supported by Betsy DeVos and her allies are engaged in a legal campaign to unleash vouchers nationwide.[4] Judge Kavanaugh is expected to help further this goal if his nomination to the Supreme Court is confirmed.[5] And for good reason: throughout his career, he has been a voucher activist.

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[1] *See, e.g., Sissel v. U.S. Dep't of Health and Human Servs.*, 799 F.3d 1035 (D.C. Cir. 2015); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

[2] *Heller v. D.C.*, 670 F.3d 1244, 1266 (D.C. Cir. 2011).

[3] *See* Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL ST. J., Sept. 27, 1999, https://turtletalk.files.wordpress.com/2018/07/are_hawaiians_indians_the_jus.pdf.

[4] Erica L. Green, *Kavanaugh Could Unlock Funding for Religious Education, School Voucher Advocates Say*, N.Y. TIMES, Aug. 14, 2018, https://www.nytimes.com/2018/08/14/us/politics/kavanaugh-vouchers-religious-education.html.

[5] *Id.*

Judge Kavanaugh co-chaired the Federalist Society's subcommittee on school choice.[6] A piece published by the Federalist Society during his tenure argued for "replacing the government's education monopoly with a universal government-funded voucher system."[7] He defended then-Florida Governor Jeb Bush in a constitutional challenge to Florida's voucher system ultimately struck down by the Florida Supreme Court.[8] He appeared on CNN[9] and gave public speeches—even as a judge—to argue pro-voucher positions.[10] He had a hand in crafting President George W. Bush's education policies, including the first federal voucher program in American history[11] that even Betsy DeVos' Education Department recognizes as a failure.[12] As a judge, he issued a decision that makes it harder for taxpayers to challenge voucher programs as a violation of the United States Constitution.[13] He serves on the board of a voucher-supported school in Washington, D.C.[14]

On top of all that, the Federalist Society and the Heritage Foundation vetted and approved Judge Kavanaugh's nomination to the Supreme Court. These corporate-funded organizations, major supporters of Betsy DeVos' voucher agenda, favor replacing our public education system[15] with vouchers nationwide.

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[6] Brett Kavanaugh Questionnaire for Nominee to the Supreme Court, U.S. Senate Committee on the Judiciary, https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJQ%20(PUBLIC).pdf.

[7] Rick Garnett, *The Justice of School Choice*, Federalist Soc'y Religious Liberties Practice Grp. Newsletter, Vol. 3, Issue 2 (captured by the WayBack Machine on June 17, 2001), https://web.archive.org/web/20010717152126fw_/http://www.fed-soc.org:80/justice-rely3i2.htm.

[8] *Bush v. Holmes*, 919 So. 2d 391, 409 (Fla. 2006).

[9] Burden of Proof, *Supreme Court Rules on Gay Rights, Abortion, Separation of Church and State*, CNN.com Transcripts (June 29, 2000), http://www.cnn.com/TRANSCRIPTS/0006/29/bp.00.html.

[10] Brett Kavanaugh, Am. Enter. Inst., 2017 Walter Berns Constitution Day Lecture, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist* 12–13 (Sept. 18, 2017), http://lc.org/PDFs/Attachments2PRsLAs/2018/071018KavanaughSpeech2017.pdf.

[11] Valerie Strauss & Bill Turque, *Fate of D.C. Voucher Program Darkens*, WASH. POST, June 9, 2008, https://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040120-7.html.

[12] U.S. Dep't of Educ. et al., Evaluation of the DC Opportunity Scholarship Program: Impacts Two Years After Students Applied 19–30 (May 2018); *see also* Matt Barnum, *D.C.'s Private School Voucher Program Hurt Low-Income Students' Math Test Scores, According to Federal Study*, CHALKBEAT, May 29, 2018, https://chalkbeat.org/posts/us/2018/05/29/dcs-private-school-voucher-program-hurt-low-income-students-math-test-scores-according-to-federal-study/.

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[14] Brett Kavanaugh Questionnaire for Nominee to the Supreme Court, U.S. Senate Committee on the Judiciary, https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJQ%20(PUBLIC).pdf

[15] Louise Radnofsky, *Trump Adds Five to List of Candidates for Supreme Court Vacancies*, WALL ST. JOURNAL, Nov. 17, 2017, https://www.wsj.com/articles/trump-adds-five-to-list-of-candidates-for-supreme-court-vacancies-1510960518.

Kavanaugh sides with corporations and employers over workers and unions
Pro-voucher organizations and their allies are engaged in a concerted legal campaign to bankrupt and silence educator labor unions.[16] Here, too, Judge Kavanaugh would be an ally.

On the D.C. Circuit, Judge Kavanaugh consistently sided with corporations and employers over workers and unions. Based on our review, in the overwhelming majority of labor law cases in which Judge Kavanaugh wrote a majority or dissenting opinion he ruled against the union. He has disregarded the deferential standard of review for National Labor Relations Board decisions when the Board upholds workers' rights, but hides behind the standard when the Board's decisions are unfavorable to workers.[17] He repeatedly rejected the National Labor Relations Board's findings of facts and law to deprive workers of their rights to protest or picket,[18] and consistently ignored evidence of employers' anti-union animus to let companies evade their obligations under the National Labor Relations Act.[19] He ruled that a law authorizing the Secretary of Defense to develop a new personnel system permitted the complete suspension of collective bargaining for hundreds of thousands of civilian Department of Defense employees[20] although the statute and the Secretary himself said otherwise.[21] He sided with the Trump Plaza Hotel and Casino when it tried to prevent its workers from unionizing although nearly 70 percent of the workers had voted to unionize.[22] Again as a lone dissenting judge, he argued that intentional discrimination by the State Department was legal.[23] He even sided with Verizon when it limited union employees' rights to display pro-union signs on their own cars, parked in the employee parking lot. [24]

In short, Judge Kavanaugh would be an ally of those who want to privatize our education system, weaken educator labor unions, and silence the educators who stand in the way of their efforts. We strongly urge you to oppose his nomination to the United States Supreme Court.

Sincerely,

Marc Egan
Director of Government Relations
National Education Association

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[16] *See* Noam Schieber, *Trump Nominee Is Mastermind of Anti-Union Legal Campaign*, N.Y. TIMES, July 18, 2018, https://www.nytimes.com/2018/07/18/business/economy/union-fees-lawyer.html.

[17] *See, e.g.*, *Trump Plaza Assocs. v. N.L.R.B.*, 679 F.3d 822, 831 (D.C. Cir. 2012) (not deferring to NLRB when union prevailed with NLRB) and *Verizon New England Inc. v. N.L.R.B.*, 826 F.3d 480, 488 (D.C. Cir. 2016) (same).

[18] *See, e.g.*, *Verizon New England Inc.*, 826 F.3d at 488; *Venetian Casino Resort, LLC v. N.L.R.B.*, 793 F.3d 85 (D.C. Cir. 2015); *S. New England Tel. Co. v. N.L.R.B.*, 793 F.3d 93 (D.C. Cir. 2015).

[19] *See, e.g.*, *Island Architectural Woodwork, Inc. v. N.L.R.B.*, 892 F.3d 362 (D.C. Cir. 2018) (Kavanaugh, J., dissenting); *N.L.R.B. v. CNN Am., Inc.*, 865 F.3d 740 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); *United Food & Commercial Workers, AFL-CIO v. N.L.R.B.*, 519 F.3d 490 (D.C. Cir. 2008).

[20] *Am. Fed'n of Gov't Employees, AFL-CIO v. Gates*, 486 F.3d 1316, 1319 (D.C. Cir. 2007).

[21] *Id.* at 1331 (Tatel, J., dissenting).

[22] *Trump Plaza Assocs.*, 679 F.3d at 831

[23] *Miller v. Clinton*, 687 F.3d 1332, 1335 (D.C. Cir. 2012).

[24] *Verizon New England Inc.*, 826 F.3d at 488.

NATIONAL EDUCATION ASSOCIATION
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Great Public Schools for Every Student

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Lily Eskelsen García
President

Rebecca S. Pringle
Vice President

Princess R. Moss
Secretary-Treasurer

John C. Stocks
Executive Director

September 27, 2018

United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Senator:

On behalf of the three million members of the National Education Association and the 50 million students they serve, we urge you in the strongest terms possible to vote no on confirming Judge Brett Kavanaugh to the Supreme Court of the United States. Votes associated with this issue ***will be*** included in NEA's Report Card for the 115th Congress.

As noted in an earlier letter, NEA opposes Judge Kavanaugh's nomination based on his record. Today, Dr. Ford provided credible, sobering and measured testimony regarding serious and deeply disturbing allegations. In contrast, Judge Kavanaugh followed Dr. Ford and delivered a belligerent diatribe that should raise more questions about his temperament and disposition to sit on the nation's highest court for life as a fair-minded, non-partisan jurist.

We oppose Judge Kavanaugh's nomination for many reasons. He cannot be trusted to protect Americans with pre-existing health conditions while the Trump administration argues in federal court that such protections are unconstitutional.[1] He believes nearly all sensible gun regulations are unconstitutional.[2] He has made it clear that he believes affirmative action is unconstitutional, calling it a "naked racial spoils system."[3] Educators are particularly concerned that he has been an outspoken voucher activist for nearly two decades — as a private citizen, lawyer, political staffer and judge. Vetted and chosen by groups who want to privatize public education and eradicate educator labor unions, he would advance the voucher agenda of Secretary of Education Betsy DeVos and her allies — a profound threat to our students and communities that the Senate has a duty to stop. Details on Judge Kavanaugh's record are provided below and in NEA's report, Kavanaugh Could Unleash School Voucher Programs throughout the Nation.

[1] *See, e.g.*, *Sissel v. U.S. Dep't of Health and Human Servs.*, 799 F.3d 1035 (D.C. Cir. 2015); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

[2] *Heller v. D.C.*, 670 F.3d 1244, 1266 (D.C. Cir. 2011).

[3] *See* Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL ST. J., Sept. 27, 1999, https://turtletalk.files.wordpress.com/2018/07/are_hawaiians_indians_the_jus.pdf.

Kavanaugh supports replacing public education with vouchers

Pro-voucher groups funded and supported by Betsy DeVos and her allies are engaged in a legal campaign to unleash vouchers nationwide.[4] Judge Kavanaugh is expected to help further this goal if his nomination to the Supreme Court is confirmed.[5] And for good reason: throughout his career, he has been a voucher activist.

Judge Kavanaugh co-chaired the Federalist Society's subcommittee on school choice.[6] A piece published by the Federalist Society during his tenure argued for "replacing the government's education monopoly with a universal government-funded voucher system."[7] He defended then-Florida Governor Jeb Bush in a constitutional challenge to Florida's voucher system ultimately struck down by the Florida Supreme Court.[8] He appeared on CNN[9] and gave public speeches — even as a judge — to argue pro-voucher positions.[10] He had a hand in crafting President George W. Bush's education policies, including the first federal voucher program in American history[11] that even Betsy DeVos' Education Department recognizes as a failure.[12] As a judge, he issued a decision that makes it harder for taxpayers to challenge voucher programs as a violation of the United States Constitution.[13] He serves on the board of a voucher-supported school in Washington, D.C.[14]

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Pro-voucher organizations and their allies are engaged in a concerted legal campaign to bankrupt and silence educator labor unions.[16] Here, too, Judge Kavanaugh would be an ally.

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[23] *Miller v. Clinton*, 687 F.3d 1332, 1335 (D.C. Cir. 2012).

[24] *Verizon New England Inc.*, 826 F.3d at 488.

Kavanaugh opposes key provisions of the Affordable Care Act
Judge Kavanaugh has signaled that he will find the Affordable Care Act's protections for people with pre-existing conditions unconstitutional — a theory being litigated by Republican state attorneys general that the Trump Administration's Department of Justice is supporting in federal courts. A president need not enforce the individual mandate, Kavanaugh says, because "[u]nder the Constitution, the president may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional, even if a court has held or would hold the statute constitutional."[25] He also argues that requiring religious non-profits to "opt out" of contraceptive coverage for employees substantially burdens their religious rights.[26].

In short, Judge Kavanaugh would be an ally of those who want to privatize our education system, weaken educator labor unions, silence educators who stand in the way of these efforts, and threaten essential healthcare protections for students, educators, and families all across America. His initial testimony before the Judiciary Committee did nothing to allay those concerns. His testimony today, September 27, only raised our concern about his temperament to serve on the highest court in the land. For all of these reasons, we strongly urge you to vote no on confirming Judge Kavanaugh to the Supreme Court of the United States.

Sincerely,

Marc Egan
Director of Government Relations
National Education Association

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[25] *Seven-Sky*, 661 F.3d at 50 n.43.

[26] *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 15 (D.C. Cir. 2015).

NELA
National Employment Lawyers Association

September 28, 2018

Submitted Via Email: [redacted]

The Honorable Chuck Grassley, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

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

Dear Chair Grassley and Ranking Member Feinstein:

On behalf of the National Employment Lawyers Association (NELA), and its 4,000 circuit, state, and local affiliate members across the country, I write to express our strong opposition to the scheduled confirmation vote of Judge Brett Kavanaugh to the United States Supreme Court. NELA members have represented thousands of sexual harassment and assault survivors. Our members know from working very closely with survivors how common it is for a survivor to take a very long time to find the safety and support and to arrive at the difficult decision to report harassment and assault. Our members are also extremely familiar with the unfortunate fact that such misconduct often, if not always, has dramatic and life-long effects on the survivor.

We urge that any confirmation vote on Judge Kavanaugh's nomination to the Supreme Court be delayed. When the Senate votes on a lifetime appointment to the U.S. Supreme Court it will make a decision with grave and far-reaching consequences for the nation. It should go without saying that such a decision should be informed by the most complete information available about the nominee. This situation calls for completion of a full investigation into the allegations made by Professor Ford and the two other women who have come forward as of this date by the Federal Bureau of Investigation.

We make this request out of respect for the rule of law and due process under law. In addition, we appreciate the nature of sexual assault and harassment, and the fact that it is often the case that only people experienced with trauma can understand its nuances. Further, we understand that only a detailed examination of all evidence – including any eye witnesses – can discern the truth. As lawyers, we know that careful fact-finding is essential to a fair process and that a professional investigation, by trained investigators (as opposed to senators or senate staffers) involving questioning of all known witnesses and others, is essential to the necessary careful

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fact-finding. The integrity of our nation's highest court should be of paramount concern; this decision is far too important to rush.

Among many other things, our members look to the Supreme Court to establish guiding precedent on issues related to women's rights in the workplace. It would negatively affect the trust that workers throughout the country must place in the Supreme Court for a vote to proceed without certainty on these allegations. It would simply be too detrimental to the Court to have one of its members credibly accused of sexual assault without further examination.

As the ABA aptly stated in its letter, the Supreme Court must remain an institution that will reliably follow the law and not politics.

Sincerely,

James H. Kaster
NELA Board President

September 3, 2018

The Honorable Charles Grassley, Chairman
United States Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
United States Judiciary Committee
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Grassley and Feinstein:

As an organization long dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families, the National Immigration Law Center (NILC) writes to you to state our strong opposition to the confirmation of Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

The Justices who serve on our Supreme Court have the power to shape our nation's future, and as such, we must nominate individuals with a track record of upholding our nation's most cherished values of protecting the rights of all people. Judge Kavanaugh's record on the bench indicates that he would work to enact a vision that is dangerous to the rights of immigrant families across our nation.

One case that vividly illustrates Kavanaugh's views on the rights of immigrants and workers, as well as how he views on settled law and precedent, is *Agri Processor Co v National Labor Relations Board*. After workers at a Brooklyn meat distribution warehouse voted to join a union, the company refused to recognize the union and negotiate with workers. The workers went on strike, prompting the company to check their social security numbers. When some social security numbers did not match, Agri Processor Co fired them and insisted that the union vote didn't count because some of the workers were undocumented. The National Labor Relations Board, which administers American labor law, rejected the company's arguments and was affirmed by the D.C. Circuit Court of Appeals. Both the Board and the court recognized that labor and employment laws use a broad definition of employee to grant workplace rights; and that definition includes people who are undocumented. Therefore, the company violated labor law when it refused to bargain with its workers. The only judge on the DC Circuit Court to dissent was Judge Kavanaugh, who claimed that an undocumented worker "is not an 'employee'" and should be not be protected under labor protection laws. To reach this result, Kavanaugh deviated

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from decades of established law and precedent. Judge Karen LeCroft Henderson, one of the most conservative members of the court, wrote a separate opinion to note that she wanted to agree with Kavanaugh but could not because the law didn't support his result. The Justices that sit on the Supreme Court should work to protect the rights of all people. If Brett Kavanaugh was willing to depart from settled law in this case, what other precedents would he ignore to reach a particular result? What other rights does Judge Kavanaugh believe undocumented immigrants shouldn't have due to their immigration status?

A more recent ruling from Judge Kavanaugh further reveals how he understands the rights of immigrants. This past October, in *Garza v. Hargan,* Kavanaugh clearly disregarded the constitutional right of a 17-year-old girl in immigration detention. Seventeen-year-old Jane Doe was eight weeks pregnant when she entered the United States. Due to her age and immigration status, Jane was placed in the custody of an Office of Refugee Resettlement (ORR) shelter. While under the custody of ORR, Jane decided to terminate her pregnancy. A Texas judge ruled that Jane was able to make her own decisions about her pregnancy (a judicial bypass), as required by state law. However, ORR refused to let her leave the shelter for the abortion, before a federal district court ordered ORR to release Jane to volunteers who had arranged and would pay for the abortion. As Jane's pregnancy approached its second trimester, however, Kavanaugh stopped the order from taking effect. In the short span of four days, the full D.C. Circuit Court of Appeals assembled, heard arguments, and ruled that ORR needed to release Jane. Again, Kavanaugh dissented, contending that the order created "a new right for unlawful immigrant minors in the U.S. Government detention to obtain immediate abortion on demand." He would not affirm that the Due Process clause protects "any person" in the United States, as the constitution states, and he insisted that Jane's rights would matter only if she could get herself out of immigration detention. Does Brett Kavanaugh not believe that immigration detainees are protected by the Constitution, including the due process right to privacy? What about the due process rights to family relationships, which are undermined by this administration's family separation policies, or the protection against abusive conditions of detention?

A seat on the Supreme Court represents a lifetime duty to maintain the rights and values of our democracy. Over the next few decades, the Court will define whether the rights all people in this country, including immigrants, will be protected. That's why it's important for all of us to know what this nominee for the Supreme Court, Brett Kavanaugh, has said about the rights of immigrant and for our Senators to understand what his previous opinions say about how he would rule on the Court. The National Immigration Law Center has joined hundreds of civil and human rights organizations and thousands of everyday Americans in opposition to this nomination. We urge you to oppose the confirmation of Judge Brett Kavanaugh to the Supreme Court of the United States.

Sincerely,

The National Immigration Law Center

NATIONAL LATINO FARMERS & RANCHERS TRADE ASSOCIATION
1029 Vermont Avenue, NW, Suite 601
Washington, DC 20005
202-628-8833 ▼ Fax: 202-393-1816

August 31, 2018

The Honorable Chuck Grassley, Chairman
The Honorable Dianne Feinstein, Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senators:

For the reasons detailed in the coalition letter enclosed here, the National Latino Farmers and Ranchers Trade Association opposes the nomination of Brett Kavanaugh. This is the first time our organization has taken such a position, and we urge the Senate to vote no on this nominee.

Respectfully,

President/CEO

The Leadership Conference
on Civil and Human Rights

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Mexican American Legal
Defense and Educational Fund
Hilary Shelton
NAACP
Secretary
Jo Ann Jenkins
AARP
Treasurer
Lee A. Saunders
American Federation of State,
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Helena Berger
American Association of
People with Disabilities
Kimberly Churches
AAUW
Kristen Clarke
Lawyers' Committee for
Civil Rights Under Law
Lily Eskelsen Garcia
National Education Association
Fatima Goss Graves
National Women's Law Center
Chad Griffin
Human Rights Campaign
Mary Kay Henry
Service Employees International Union
Sherrilyn Ifill
NAACP Legal Defense and
Educational Fund, Inc.
David H. Inoue
Japanese American Citizens League
Derrick Johnson
NAACP
Michael B. Keegan
People for the American Way
Samer E. Khalaf
American-Arab
Anti-Discrimination Committee
Marc Morial
National Urban League
Janet Murguia
UnidosUS
Debra L. Ness
National Partnership for
Women & Families
Rabbi Jonah Pesner
Religious Action Center
Of Reform Judaism
Lisa Rice
National Fair Housing Alliance
Anthony Romero
American Civil Liberties Union
Anisa Tootla
League of Women Voters of the
United States
Richard L. Trumka
AFL-CIO
Toni Van Pelt
National Organization for Women
Randi Weingarten
American Federation of Teachers
Dennis Williams
International Union, UAW
John C. Yang
Asian Americans Advancing Justice |
AAJC

Policy and Enforcement
Committee Chair
Michael Lieberman
Anti-Defamation League
President & CEO
Vanita Gupta

The Leadership Conference

July 17, 2018

OPPOSE THE CONFIRMATION OF BRETT KAVANAUGH TO THE SUPREME COURT OF THE UNITED STATES

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, and the more than 100 undersigned organizations, we write to express our strong opposition to the confirmation of Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

The Supreme Court is the final arbiter of our laws and Constitution, and its rulings dramatically impact our rights and freedoms. Every Supreme Court vacancy is significant, but the stakes could not be higher in deciding who will replace Justice Kennedy – who served as the deciding vote in nearly all the momentous cases of the past dozen years. Critical civil and human rights issues hang in the balance, including access to health care for millions of Americans, the ability of women to control their own bodies, voting rights, labor rights, economic security, rights of immigrants and persons with disabilities, LGBTQ equality, equal opportunity and affirmative action, environmental protections, and whether the judiciary will serve as a constitutional check on a reckless president.

Judge Kavanaugh's 12-year record on the U.S. Court of Appeals for the D.C. Circuit, as well as his known writings, speeches, and legal career, demonstrate that if he were confirmed to the Supreme Court, he would be the fifth and decisive vote to undermine many of our core rights and legal protections. In case after case, he has ruled against individuals and the environment in favor of corporations, the wealthy, and the powerful. He has advanced extreme legal theories to overturn longstanding precedent to diminish the power of federal agencies to help people. And he has demonstrated an expansive view of presidential power that includes his belief that presidents should not be subject to civil suits or criminal investigations while in office despite what misconduct may have occurred. Many of our organizations opposed Judge Kavanaugh's nomination to the D.C. Circuit,[1] and our fears and concerns have been realized. Judge Kavanaugh has not served as a neutral and fair-minded jurist. He has served as a conservative ideologue who lacks the impartiality and independence necessary to sit on the highest court in the land.

Moreover, Judge Kavanaugh's nomination to the Supreme Court was the product of a deeply flawed and biased process in which President Trump outsourced his constitutional duties to

[1] *See, e.g.*, https://civilrights.org/opposition-to-kavanaughs-confirmation-to-the-dc-circuit/.

two right-wing special interest groups: the Federalist Society and Heritage Foundation. These extremist organizations pre-approved candidates, including Judge Kavanaugh, based on the dangerous and unprecedented litmus tests that President Trump put forward as a presidential candidate. In a 2016 presidential debate, he said that his Supreme Court appointees would vote to overturn *Roe v. Wade*. He said: "If we put another two or perhaps three justices on, that is really what will happen. That will happen automatically in my opinion. Because I am putting pro-life justices on the Court."[2] He also indicated he had a litmus test on the Affordable Care Act, stating in a February 2016 interview: "We're going to have a very strong test.... I'm disappointed in Roberts because he gave us Obamacare, he had two chances to end Obamacare, he should have ended it by every single measurement and he didn't do it, so that was a very disappointing one."[3] Judge Kavanaugh has passed these litmus tests, or he wouldn't have been nominated. If confirmed, he would vote to undermine women's control over their own bodies and sabotage accessible health coverage for millions of people, disproportionately impacting women, people of color, people with disabilities, and low-income families.

The confirmation process for Judge Kavanaugh should not be rushed to fulfill a campaign promise or to reward elite Washington, D.C. interest groups or donors. Each individual Senator has an obligation to independently review his entire record, a significant portion of which has not yet been disclosed. It could take weeks before the National Archives and the George W. Bush Presidential Library begin to make public the hundreds of thousands of documents relevant to the nominee's record. It is a dereliction of Senators' constitutional duty to simply allow one's political party to determine approval of such an impactful appointment before that record is public and reviewed. The American people are represented in this crucial process in the Senate. The independent vetting that Supreme Court candidates receive has long been rigorous and this should be no exception. Justice Kennedy himself was not the first nominee to the seat he is vacating. Two nominees before him failed because of the Senate's role, and the nation was better for it.

Sought to Undermine Access to Health Care: Access to health care is a civil and human rights issue of profound importance. Based on his known record and the process by which he was selected, if confirmed to the Supreme Court, there's every reason to believe Judge Kavanaugh would be a vote to overturn and gut critical health care protections. As a D.C. Circuit judge, he has written dissenting opinions in three cases that could have undermined the Affordable Care Act ("ACA") and jeopardized access to health care. In *Seven-Sky v. Holder*,[4] which upheld the ACA's requirement that individuals purchase health insurance as within Congress's authority under the Commerce Clause, Judge Kavanaugh maintained, in dissent, that the court did not yet have jurisdiction to hear the case. In his view, the Anti-Injunction Act limited the court's ability to hear the case until the taxpayer first paid the disputed tax and then brought suit for a refund. Using hyperbolic language, he labeled the individual mandate as "unprecedented on the federal level in American history" and a "significant expansion" of congressional authority.[5] Of

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[2] https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063.
[3] https://www.wgbh.org/news/2016/02/08/news/donald-trump-litmus-tests-supreme-court-justices-less-taxes-big-business-0.
[4] 661 F.3d 1 (D.C. Cir. 2011), *abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).
[5] *Id.* at 51-52 (Kavanaugh, J., dissenting).

particular alarm was his suggestion that "the President might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional."[6]

In *Priests for Life v. U.S. Department of Health and Human Services*,[7] the D.C. Circuit rejected a challenge to the ACA's accommodation to the birth control benefit, which allows certain religiously-affiliated non-profit employers to opt out of providing birth control coverage directly to their workers by submitting a one-page form notifying their insurer or the federal government of their objections. When a qualifying employer opts out, the accommodation guarantees employees receive contraceptive coverage separately from their insurer. These objecting employers argued that the mere submission of the opt-out form rendered the organizations "complicit" in providing contraceptive coverage and thus impermissibly burdened their religious rights under the Religious Freedom Restoration Act ("RFRA"). The challengers sought rehearing en banc, and the D.C. Circuit denied it. Dissenting to the denial, Judge Kavanaugh maintained that objecting employers should have prevailed on their RFRA claim. He asserted that the filing of the form substantially burdened the organizations' exercise of religion because they were required, in order to avoid financial penalties, to take an action contrary to their sincere religious beliefs and courts "may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiff's religious beliefs – including about complicity in wrongdoing."[8] Judge Kavanaugh's view that courts ought to accept, without question, any claim by a religious organization that a government requirement substantially burdens a sincerely held religious belief and their free exercise of religion, raises serious concerns about his willingness to allow religious beliefs to be used as a license to discriminate and deny essential health care.

In *Sissel v. U.S. Department of Health and Human Services*,[9] Judge Kavanaugh authored another dissent from the D.C. Circuit's denial to rehear a case challenging the constitutionality of the ACA en banc. The *Sissel* court had rejected the claim that the ACA was unconstitutional because it was a revenue-raising bill, but failed to originate in the House of Representatives as required under the Origination Clause. Although Judge Kavanaugh acknowledged that the law's passage did not violate the Origination Clause, he nonetheless argued for the full D.C. Circuit to rehear the case because of the allegedly faulty reasoning in the panel decision. As a rehearing of the case would have prolonged the uncertainty surrounding the ACA's constitutional status, thereby hindering its implementation, Judge Kavanaugh's position in *Sissel* – one that the Supreme Court did not adopt, as it declined to hear the case – provides further evidence of his skepticism of the ACA.

Hostile to Women's Reproductive Freedom: Judge Kavanaugh's hostility towards women's reproductive rights was demonstrated by his rulings in the recent high-profile case, *Garza v. Hargan*.[10] In this case, Judge Kavanaugh was a member of a three-judge panel that sided with the Trump administration and blocked Jane Doe, a 17-year-old immigrant woman, from getting an abortion. Judge Kavanaugh issued an order delaying Jane Doe's abortion under the guise of finding her a sponsor, and

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[6] *Id.* at 50 (Kavanaugh, J., dissenting).
[7] 808 F.3d 1 (D.C. Cir. 2015).
[8] *Id.* at 18 (Kavanaugh, J., dissenting).
[9] 799 F.3d 1035 (D.C. Cir. 2015).
[10] 874 F.3d 735 (D.C. Cir. 2017) (en banc).

held that this did not unduly burden her right to an abortion.[11] Four days later, the D.C. Circuit reheard the case en banc and reversed the panel decision, ruling that Jane Doe was entitled to seek an abortion without delay. Judge Kavanaugh dissented, arguing that the en banc majority had "badly erred," and adopting the language of anti-abortion extremists, stated that the majority decision had effectively given Jane Doe and others like her a new right "to obtain immediate abortion on demand." As one of the judges in the majority pointed out in criticizing Judge Kavanaugh's dissent: "Abortion on demand? Hardly.... Unless Judge Kavanaugh's dissenting opinion means the demands of the Constitution and Texas law."[12]

Judge Kavanaugh has also revealed his anti-abortion views off the bench. In a speech last year to the conservative American Enterprise Institute, he praised Chief Justice Rehnquist's opinion in *Washington v. Glucksberg*[13] for "stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition," stating that Chief Justice Rehnquist accomplished in *Glucksberg* what he was unable to in *Roe v. Wade*.[14] Such unenumerated rights include not only the right to an abortion but also the right to use contraception and the right to marriage equality. Judge Kavanaugh's apparent skepticism of those rights is disturbing.

A recent op-ed from one of Judge Kavanaugh's former law clerks, Sarah Pitlyk, who now works at an extreme anti-abortion organization, also sheds light on his anti-abortion ideology. She wrote: "As social conservatives know from bitter experience, a judicial record is the best – really, the only – accurate predictor of a prospective justice's philosophy on the issues that matter most to us. On the vital issues of protecting religious liberty and enforcing restrictions on abortion, no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh. On these issues, as on so many others, he has fought for his principles and stood firm against pressure. He would do the same on the Supreme Court."[15] This is additional confirmation that Judge Kavanaugh passed President Trump's *Roe v. Wade* litmus test. Ms. Pitlyk also made clear that Judge Kavanaugh passed the anti-ACA litmus test too. She wrote: "Although he ultimately determined that a challenge to Obamacare had to be brought later, he left no doubt about where he stood. No other contender on President Trump's list is on record so vigorously criticizing the law."[16]

Restricted Voting Rights: In two voting rights cases, Judge Kavanaugh has demonstrated his lack of commitment to racial justice. In 2012, in *South Carolina v. United States*,[17] Judge Kavanaugh wrote an opinion for a three-judge panel upholding a South Carolina voter ID law that was objected to by the U.S. Department of Justice because of the significant racial disparities in the law's photo ID requirement. Journalist Ari Berman wrote an article entitled "63,756 Reasons Racism Is Still Alive in South Carolina," explaining: "That's the number of minority registered voters who could be blocked from the polls by the

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[11] No. 17-5236, 2017 WL 4707112 (D.C. Cir. Oct. 19, 2017).
[12] *Id.* at 738 (Millett, J., concurring).
[13] 521 U.S. 702 (1997).
[14] http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.
[15] https://www.nationalreview.com/2018/07/judge-brett-kavanaughs-impeccable-record-of-constitutional-conservatism/.
[16] *Id.*
[17] 898 F. Supp. 2d 30 (D.D.C. 2012).

state's new voter ID law."[18] Perhaps even more troubling than Judge Kavanaugh's opinion in this case was his refusal to acknowledge the importance of Section 5 of the Voting Rights Act. In a notable concurrence, Judge Bates – a fellow Republican appointee – wrote that "one cannot doubt the vital function that Section 5 of the Voting Rights Act played here. Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive… [T]he history of [the South Carolina law] demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws."[19] The fact that Judge Bates felt compelled to write a separate concurrence to make this basic point about the Voting Rights Act highlights the significance of Judge Kavanaugh's refusal to include it in his opinion for the court. This is a clear and dangerous signal about Judge Kavanaugh's views on voting rights and racial justice in America, and it strongly suggests he would be a reliable fifth vote to continue the Supreme Court's diminishment of the landmark Voting Rights Act.

Judge Kavanaugh worked against the interests of minority voters as an attorney as well. In the case *Rice v. Cayetano*,[20] he co-authored, along with conservative firebrands Robert Bork and Roger Clegg, a Supreme Court brief arguing that Hawaii violated the Constitution by permitting only Native Hawaiians to vote in elections for the Office of Hawaiian Affairs, a state agency charged with working for the betterment of Native Hawaiians. Although the Supreme Court sided with Judge Kavanaugh in this case, Justice Stevens wrote an eloquent dissent and said the voting provision at issue should be permissible because "there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs, and to preserve a distinct and vibrant culture that is as much a part of this Nation's heritage as any."[21]

In addition to filing a brief in *Rice v. Cayetano*, Judge Kavanaugh also wrote a *Wall Street Journal* op-ed in 1999 about this case in which he revealed a lack of understanding about the rights of indigenous peoples. Rather than recognizing, as does the Annex to the U.N. Declaration on the Rights of Indigenous Peoples, that "indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources,"[22] Judge Kavanaugh made partisan allegations about the Clinton Administration Justice Department's motives for filing a brief in support of Hawaii. He wrote: "As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency."[23] He also wrote: "The Supreme Court ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe."[24] When viewed against the history of U.S. injustice against Native Hawaiians, Judge Kavanaugh's cynical and partisan comments are alarming.

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[18] https://www.thenation.com/article/63756-reasons-why-racism-is-still-alive-in-south-carolina/.
[19] 898 F. Supp. 2d 30, 53-54 (D.D.C. 2012) (Bates, J., concurring).
[20] 528 U.S. 495 (2000).
[21] *Id.* at 529 (Stevens, J., dissenting).
[22] http://www.un-documents.net/a61r295.htm.
[23] Brett Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL ST. J., Sept. 27, 1999.
[24] *Id.*

Dismissive of Discrimination Claims: Judge Kavanaugh's ideological bias can also be seen in his rulings in employment discrimination cases, where he has dissented and voted to dismiss claims that a majority of his D.C. Circuit colleagues found to be meritorious. In *Howard v. Office of the Chief Administrative Officer of the U.S. House of Representatives*,[25] Judge Kavanaugh dissented from a majority decision which held that under the Congressional Accountability Act ("CAA"), an African-American woman fired from her position as House of Representatives deputy budget director could pursue claims of racial discrimination and retaliation in federal court. Judge Kavanaugh dissented, arguing that the Speech or Debate Clause of the Constitution prohibited the employee from moving forward with her claims, and he would have dismissed her case. Judge Kavanaugh's interpretation of this constitutional provision would bar workers in Congressional offices and throughout the legislative branch from pursuing most CAA claims in federal court, including many sexual harassment, discrimination, and retaliation claims, leaving the inadequate and secret CAA administrative process as their only recourse. Especially in light of recent scandals in Congress about the treatment of staff, the potential consequences of Judge Kavanaugh's dissent warrants serious inquiry.

In *Miller v. Clinton*,[26] the majority held that the State Department violated the Age Discrimination in Employment Act ("ADEA") when it imposed a mandatory retirement age and fired an employee when he turned 65. The State Department argued that it was exempt from the ADEA in light of a separate federal law (the Basic Authorities Act) that permits U.S. citizens employed abroad to be excepted from U.S. anti-discrimination laws. The majority disagreed and held that there was "nothing in the Basic Authorities Act that abrogates the ADEA's broad proscription against personnel actions that discriminate on the basis of age" and that "the necessary consequence of the Department's position is that it is also free from any statutory bar against terminating an employee like Miller solely on account of his disability or race or religion or sex."[27] Judge Kavanaugh dissented, arguing that the Basic Authorities Act trumps existing anti-discrimination laws. His willingness to embrace such a broad exemption from anti-discrimination laws is troubling. So too was his accusation that the majority was "stacking the deck with inapposite interpretive presumptions, and raising the specter of rampant race, sex, and religious discrimination."[28]

And in *Rattigan v. Holder*,[29] the majority ruled that an African-American FBI agent could pursue a case of improper retaliation for filing a discrimination claim where the agency began a security investigation against him, as long as he did so without questioning unreviewable decisions by the FBI security division. Judge Kavanaugh dissented and said the entire claim must be dismissed, despite the majority's warning that this was not required by precedent and that the courts should preserve "to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation."[30] Judge Kavanaugh's dissents in these three cases embrace positions that carve out federal employees from the protections of federal employment discrimination laws or limit their ability to enforce such rights.

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[25] 720 F.3d 939 (D.C. Cir. 2013).
[26] 687 F.3d 1332 (D.C. Cir. 2012).
[27] *Id.* at 1335.
[28] *Id.* at 1357 (Kavanaugh, J., dissenting).
[29] 689 F.3d 764 (D.C. Cir. 2012).
[30] *Id.* at 770 (internal quotations and citation omitted).

Hostile to Workers' Rights: Judge Kavanaugh has a pattern of ruling against workers and employees in other types of workplace cases as well, such as workplace safety, worker privacy, and union disputes. For example, in *SeaWorld of Fla., LLC v. Perez*,[31] Judge Kavanaugh dissented from a majority opinion upholding a safety citation against SeaWorld following the death of a trainer who was working with a killer whale, which had killed three trainers previously. While the majority deferred to the Occupational Safety and Health Review Commission's finding that SeaWorld had insufficiently limited the trainers' physical contact with the whales, Judge Kavanaugh strongly disagreed and questioned the role of the government in determining appropriate levels of risk for workers. He wrote: "When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves – that the risk of significant physical injury is simply too great even for eager and willing participants?"[32] According to David Michaels, a former Occupational Safety and Health Act Assistant Secretary: "In his dissent in the SeaWorld decision, Judge Kavanaugh made the perverse and erroneous assertion that the law allows SeaWorld trainers to willingly accept the risk of violent death as part of their job. He clearly has little regard for workers who face deadly hazards at the workplace."[33]

In *National Labor Relations Board v. CNN America, Inc.*,[34] Judge Kavanaugh dissented in part from Chief Judge Garland's majority opinion upholding a National Labor Relations Board ("NLRB") order that CNN recognize and bargain with a worker's union and finding that CNN violated the National Labor Relations Act ("NLRA") by discriminating against union members in hiring. Judge Kavanaugh dissented from the finding that CNN was a successor employer, and his position would have completely absolved CNN of any liability for failing to abide by the collective bargaining agreement.

Judge Kavanaugh also dissented in *National Federation of Federal Employees v. Vilsack*,[35] where the D.C. Circuit majority invalidated a random drug testing program for U.S. Forest Service employees at Job Corps Civilian Conservation centers. The majority, which included another Republican-appointed judge, observed that there was no evidence of any difficulty maintaining a zero-tolerance drug policy during the 14 years before the random drug testing policy was adopted, and that the primary administrator of the Job Corps, the Department of Labor, had no such policy. Judge Kavanaugh dissented and tried to deal a major blow to employee privacy rights. The majority criticized Judge Kavanaugh, noting: "Our dissenting colleague paints with a broad brush without regard to precedent from the Supreme Court, and this court, on the particularity of the Fourth Amendment inquiry" with respect to such drug testing programs.[36]

In *American Federation of Government Employees, AFL-CIO v. Gates*,[37] Judge Kavanaugh authored the majority opinion that reversed the lower court's partial blocking of Department of Defense regulations, which had found that many of the Pentagon's regulations would "entirely eviscerate collective bargaining." Judge Kavanaugh disagreed. Judge Tatel dissented in part, noting that Judge Kavanaugh's

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[31] 748 F.3d 1202 (D.C. Cir. 2014).
[32] *Id.* at 1217 (Kavanaugh, J., dissenting).
[33] http://jordanbarab.com/confinedspace/2018/07/10/kavanaugh-threat-to-osha-workers/.
[34] 865 F.3d 740 (D.C. Cir. 2017).
[35] 681 F.3d 483 (D.C. Cir. 2012).
[36] *Id.* at 489 n.5.
[37] 486 F.3d 1316 (D.C. Cir. 2007).

majority opinion would allow the Secretary of Defense to "abolish collective bargaining altogether – a position with which even the Secretary disagrees."[38]

Anti-Immigrant Views: In his ruling discussed above in *Garza v. Hargan* (involving Jane Doe's right to an abortion) and in cases discussed below, Judge Kavanaugh has demonstrated hostility to the rights of immigrants. He has been described by a Breitbart writer as someone with an "America First" approach who would "share President Trump's views on immigration."[39]

In *Agri Processor v. National Labor Relations Board,*[40] a company refused to engage in collective bargaining with workers who had voted to unionize, on the basis that many of the workers were undocumented immigrants. The D.C. Circuit rejected this claim, based on the plain language of the NLRA and applicable Supreme Court precedent. But Judge Kavanaugh dissented, asserting that a federal immigration law had implicitly amended at least part of the NLRA. The majority rejected that argument and stated that "not only is there no clear indication that Congress intended IRCA implicitly to amend the NLRA, but all available evidence actually points in the opposite direction."[41] The majority stated that Judge Kavanaugh's dissent would lead to an "absurd result."[42] Former U.S. Department of Labor official Sharon Block has noted that his *Agri Processor* dissent is significant because "it reflects a broader trend in Kavanaugh's record of being unsympathetic to the plight of immigrants."[43]

In another immigration case, *Fogo de Chao Inc. v. Department of Homeland Security,*[44] a company challenged DHS's refusal to grant temporary visas to foreign workers with specialized cultural knowledge relating to Brazilian-style cooking, even though such visas had been granted in the past. The majority sided with the restaurant and its workers, and remanded the case for further consideration. Judge Kavanaugh dissented, leaving the majority to express "puzzlement" and to question whether Judge Kavanaugh embraced "woodenly excluding any and all knowledge or skills acquired by an employee solely because those skills and knowledge were learned from family or community rather than in-company trainers."[45]

Troubling Views on Presidential Power: Judge Kavanaugh has expressed extreme and disturbing views about presidential power. Despite being a lead author and prosecutor on Kenneth Starr's independent counsel team when it was a Democratic president under investigation, he now believes that presidents should not be subject to civil lawsuits or criminal investigations while in office. In a 2009 law review article, Judge Kavanaugh wrote that "we should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions" and "the country loses when the President's focus is distracted by

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[38] *Id.* at 1331 (Tatel, J., dissenting in part).
[39] https://www.breitbart.com/big-government/2018/07/04/america-first-scotus-choice-judge-brett-kavanaugh-applies-trumps-economic-patriotism-to-the-law/.
[40] 514 F.3d 1 (D.C. Cir. 2008).
[41] *Id.* at 4.
[42] *Id.* at 7.
[43] https://onlabor.org/the-kavanaugh-nomination-and-labor/.
[44] 769 F.3d 1127 (D.C. Cir. 2014).
[45] *Id.* at 1150.

the burdens of civil litigation or criminal investigation and possible prosecution."[46] Had this been the law in the 1970s, the Supreme Court would not have had the opportunity to rule on the Watergate tapes case in *United States v. Nixon*, and President Nixon would never have resigned from office. In a 1998 law review article, Judge Kavanaugh said that a sitting president should have "absolute discretion" to determine whether and when to appoint a special counsel.[47] And he has said that special counsels should be "appointed (and removable) in the same manner as other high-level executive branch officials"[48] — in other words, whenever it would be convenient to the president. In a 1998 panel discussion, Judge Kavanaugh raised his hand after the moderator asked: "How many of you believe as a matter of law that a sitting president cannot be indicted during the term of office?"[49]

Judge Kavanaugh's record demonstrates that he lacks the requisite independence from President Trump to serve as a much-needed check on his abuses of power. As commentator Simon Lazarus has observed: "If President Donald Trump wished to replace retired Supreme Court justice Anthony Kennedy with a successor likely to back the White House in any Russia investigation showdown with Special Counsel Robert Mueller, or, more broadly, to legitimate Trump's penchant for sabotaging laws he disfavors, he could not have done better than nominate Brett Kavanaugh."[50]

Judge Kavanaugh's judicial record reflects his executive authority absolutism. For example, in *PHH Corp. v. Consumer Financial Protection Bureau*,[51] he ruled it was unconstitutional for the Consumer Financial Protection Bureau ("CFPB") to be headed by a single director who could not be removed by the president without cause.[52] He wrote the majority opinion for a conservative panel, which held that the structure of the CFPB violated Article II of the Constitution and ruled that the CFPB director should be subject to supervision and removal by the president without cause. Judge Kavanaugh asserted that independent agencies constitute "a headless fourth branch of the U.S. government" and wrote: "Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances."[53] An en banc panel of the D.C. Circuit vacated and remanded Judge Kavanaugh's decision, upholding the constitutionality of the Dodd-Frank Wall Street Reform and Consumer Protection Act provision specifying that the CFPB director serves a five-year term, subject to removal by the president only for "inefficiency, neglect of duty, or malfeasance in office."[54] The CFPB's independence has been critical to its ability to remain a steadfast enforcer of the consumer protection laws despite massive political opposition from the financial industry. A seat on the Supreme Court would allow Judge

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[46] http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf.
[47] http://online.wsj.com/public/resources/documents/2018_0628_kavanaugh_1998_president_independent_counsel.pdf.
[48] *Id.*
[49] https://www.c-span.org/video/?101056-1/independent-counsel-statute-future.
[50] http://prospect.org/article/here%E2%80%99s-how-democrats-can-expose-what-kavanaugh-threatens.
[51] 839 F.3d 1 (D.C. Cir. 2016), *vacated and remanded, PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).
[52] *Id.* at 5.
[53] *Id.* at 6.
[54] 881 F.3d at 77.

Kavanaugh and his allies to expand attacks on the ability of government to regulate and enforce the rules on behalf of ordinary people.

It is also important to note Judge Kavanaugh's role in the Bush administration's deeply flawed detention and interrogation policies, and possible misrepresentations he made to the Senate Judiciary Committee at his 2006 D.C. Circuit nomination hearing. In response to a question from Senator Durbin, Judge Kavanaugh testified, under oath: "I was not involved and am not involved in the questions about the rules governing detention of combatants."[55] However, a 2007 *Washington Post* article reported that Judge Kavanaugh participated in a "heated meeting" in the White House in 2002 about whether U.S. citizen enemy combatants should have access to counsel.[56] That report appears to contradict Judge Kavanaugh's sworn testimony before the Senate Judiciary Committee. Senator Durbin sent a letter to Judge Kavanaugh in 2007 asking him to explain the discrepancy, but Senator Durbin, in recent comments he made about the Kavanaugh nomination,[57] said that he never received a response from Judge Kavanaugh. We urge Senators to demand documents relevant to his involvement in this area to determine the truth about his role in the Bush administration's troubling detention policies. Lying to Senators under oath is a serious offense that cannot be disregarded in the confirmation process if that process is to have any legitimacy.

Undermined Environmental Protections: During his 12 years on the bench, Judge Kavanaugh has consistently ruled to protect polluters rather than the environment. He has opposed critical environmental protections for clean air and clean water, repeatedly ruling that the Environmental Protection Agency ("EPA") exceeded its statutory authority in issuing rules to limit pollutants. For example, in *EME Homer City Generation, L.P. v. EPA,*[58] Judge Kavanaugh struck down the EPA's Cross-State Air Pollution Rule, which regulates air pollution that crosses state boundaries, as a violation of the Clean Air Act. He concluded that the EPA exceeded its statutory authority in two ways – first, by requiring upwind states to reduce emissions more than the statute requires, and second, by not deferring to the states to be the initial ones to implement the required reductions. Judge Kavanaugh went further in limiting the EPA's authority than the conservative Supreme Court, which upheld the pollution rule on a 6-2 vote.[59]

In *Howmet Corp. v. EPA,*[60] Judge Kavanaugh dissented from a decision to approve an EPA fine of over $300,000 against a company that had improperly shipped a corrosive chemical to be added to fertilizer without properly labelling it and taking other precautions to treat it as a hazardous waste. Judge Kavanaugh claimed that the EPA had misinterpreted the language of its own regulation on the subject. But this view was rejected by the two judges in the majority, Janice Rogers Brown and David Sentelle, who are among the most conservative judges on the D.C. Circuit. As they pointed out, the EPA's interpretation was appropriate and helped prevent "significant risks to public health and the environment"

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[55] https://www.rollcall.com/news/politics/democratic-senators-accused-potential-trump-scotus-pick-offering-misleading-testimony.
[56] http://voices.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/.
[57] https://www.judiciary.senate.gov/meetings/07/12/2018/executive-business-meeting.
[58] 696 F.3d 7 (D.C. Cir. 2012).
[59] 134 S. Ct. 1584 (2014).
[60] 614 F.3d 544 (D.C. Cir. 2010).

from hazardous wastes.[61] Judge Kavanaugh would have allowed the corporation's shipment of the corrosive chemical to proceed without the precautions prescribed under federal law.

In *Mexichem Fluor Inc. v. EPA*,[62] Judge Kavanaugh wrote the opinion striking down a rule that banned certain uses of hydrofluorocarbons, gases used in air conditioning and refrigeration that when released into the atmosphere are extremely potent greenhouse gases. His ruling said that the EPA exceeded its authority because the statute was meant to stop ozone-depleting substances, not to allow the EPA to order the replacement of substances that are not ozone-depleting but contribute to climate change.

In addition to his anti-environmental rulings, Judge Kavanaugh has advanced an anti-environmental view of the *Chevron* doctrine. For more than three decades, since 1984, the Supreme Court has required judges to defer to administrative agencies' interpretations of federal law in most cases where the law is "ambiguous" and the agency's position is "reasonable." Conservative Justice Antonin Scalia defended the *Chevron* doctrine as an important rule-of-law principle.[63] Federal agencies issue regulations addressing a wide array of civil and human rights issues, including environmental protections, immigration policy, health care protections, education laws, workplace safety, and consumer protections. Overturning the *Chevron* precedent would return that ultimate decision-making authority to judges, which appears to be what Judge Kavanaugh wants to do. He has said that "the *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes."[64] And he has called *Chevron* "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."[65] Judge Kavanaugh's clear intent to overturn this precedent and its progeny would impede the ability of federal agencies to carry out their vital missions.

Opposed to Common-Sense Gun Safety Laws: After the Supreme Court decided 5-4 in the 2008 case *District of Columbia v. Heller* that the Second Amendment protects an individual right to bear arms, Washington, D.C. passed laws that prohibited assault weapons and high-capacity magazines, and that required certain firearms to be registered. The same plaintiff, Richard Heller, argued again that the new gun laws violated the Second Amendment. In the 2011 case *Heller v. District of Columbia*,[66] a panel of three Republican-appointed judges ruled 2-1 that D.C.'s ban on assault weapons and high-capacity magazines was constitutional. Judge Kavanaugh dissented and would have held that the ban on assault weapons was unconstitutional. He wrote: "In *Heller*, the Supreme Court held that handguns – the vast majority of which today are semi-automatic – are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles."[67] It is troubling that Judge Kavanaugh sees no difference between assault weapons and handguns, and it is a strong indication that he, like President Trump, will cater to the gun lobby. During the 2016 campaign,

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[61] *Id.* at 553.
[62] 866 F.3d 451 (D.C. Cir. 2017).
[63] https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3075&context=dlj.
[64] https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4733&context=ndlr.
[65] http://harvardlawreview.org/wp-content/uploads/2016/06/2118-2163-Online.pdf.
[66] 670 F.3d 1244 (D.C. Cir. 2011).
[67] *Id.* at 1269 (Kavanaugh, J., dissenting).

President Trump stated: "I'm very proud to have the endorsement of the NRA and it was the earliest endorsement they've ever given to anybody who ran for president.... We are going to appoint justices that will feel very strongly about the Second Amendment."[68] Judge Kavanaugh clearly passes this litmus test.

Pro-Government Bias in Criminal Cases: Judge Kavanaugh reflexively rules for the government in criminal cases. A report by People For the American Way indicates that Judge Kavanaugh has written 12 dissents in criminal and law enforcement cases, and he has ruled for the government in 10 of the 12 cases.[69] For example, in *United States v. Askew*,[70] a majority of the en banc court, including three Republican-appointed judges, reversed a lower court and decided that the police violated the Fourth Amendment rights of a suspect by unzipping his jacket to search him without a warrant after a stop and frisk produced no results. Judge Kavanaugh wrote a dissent and claimed that the action was justified because it was a reasonable continuation of the stop and frisk and it helped police in showing the subject to a witness at an alleged robbery. The majority rejected Judge Kavanaugh's analysis.

And in *Roth v. U.S. Department of Justice,*[71] Judge Kavanaugh dissented from a majority ruling that the Department of Justice ("DOJ") improperly refused to say whether it had records in response to a Freedom of Information Act request by a death row prisoner who believed that DOJ records could corroborate his claim of innocence. The majority held that the public has an interest in knowing whether the federal government is withholding information that could corroborate a death-row inmate's claim of innocence, and also that this interest outweighed the privacy interests of three other men in having the FBI not disclose whether it possessed any information linking them to the murders. Judge Kavanaugh dissented and would have upheld the FBI's non-disclosure, arguing: "The privacy interests of third parties who are named in law enforcement documents are invariably strong" and in this case outweigh "the public interest in accurately assessing criminal liability or exposing prosecutorial or investigative misconduct."[72]

Troubling Views on Money in Politics: Judge Kavanaugh's judicial record indicates he would vote with the conservative bloc on the Supreme Court to continue opening the floodgates of money into our political system. An analysis by Demos and Campaign Legal Center of Judge Kavanaugh's cases involving money in politics shows that, if confirmed, he would be more aggressive than Justice Kennedy in lifting restrictions on big money.[73] For example, in *EMILY's List v. Federal Election Commission*,[74] Judge Kavanaugh wrote the opinion for a conservative three-judge panel that struck down FEC rules developed to address the influx of spending by outside organizations and paved the way for the creation of super PACs. In another case, *Independence Institute v. Federal Election Commission*,[75] he wrote the

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[68] https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063.
[69] http://www.pfaw.org/report/the-dissents-of-judge-brett-kavanaugh-a-narrow-minded-elitist-who-is-out-of-the-mainstream/.
[70] 529 F.3d 1119 (D.C. Cir. 2008) (en banc).
[71] 642 F.3d 1161 (D.C. Cir. 2011).
[72] *Id.* at 1189 (Kavanaugh, J., dissenting).
[73] https://campaignlegal.org/sites/default/files/2018-07/CLC%20Demos%20Kavanaugh%20Brief%207-12-18%209pm.pdf.
[74] 581 F.3d 1 (D.C. Cir. 2009).
[75] 816 F.3d 113 (D.C. Cir. 2016).

opinion for two conservative panel members (over a strong dissent) utilizing what Demos and Campaign Legal Center deemed "a novel theory that would limit disclosure based on a spender's tax-status, a theory subsequently rejected by a three-judge court and the Supreme Court."[76]

Sought to Undermine Church-State Separation in Education: As an attorney in private practice, Judge Kavanaugh was part of the legal team representing former Florida Governor Jeb Bush's effort to create the Opportunity Scholarships Program, a school voucher program in Florida that would direct public money to private schools by providing students who decide to leave some of the state's lowest-rated public schools with about $4,350 in tuition aid they could use in private or religious schools.[77] Notably, students attending these private schools receiving public funds would not have the same civil rights, including their right to services as a child with a disability, as if they were in a public school. In 2006, the Florida Supreme Court struck down the program as a violation of the state constitution's provision that requires a "uniform" system of public schools for all students.[78]

In *Santa Fe Independent School District v. Doe*,[79] Judge Kavanaugh wrote an amicus brief on behalf of Republican members of Congress in which he argued that the use of loudspeakers for student-led prayers at high school football games did not constitute a violation of the Establishment Clause of the First Amendment. In his brief, he accused the other side of advocating that Christian students receive fewer rights than Nazis and KKK members. Judge Kavanaugh wrote: "But offense at one's fellow citizens is not and cannot be the Establishment Clause test, at least not without relegating religious organizations and religious speakers to bottom-of-the-barrel status in our society – below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes, all of whom may use the neutrally available public square and receive neutrally available government aid."[80] The Supreme Court rejected his hyperbolic argument 6-3, ruling that the prayer involved both perceived and actual endorsement of religion.

Ideological Jobs and Affiliations: Judge Kavanaugh's right-wing ideology is reflected not only in his judicial record but also in his earlier career as a partisan lawyer. After clerking for Third Circuit Judge Walter Stapleton, Ninth Circuit Judge Alex Kozinski, and Supreme Court Justice Anthony Kennedy, he went to work for Kenneth Starr to conduct investigations into President Clinton. Judge Kavanaugh was one of the primary authors of the infamous Starr Report, in which he laid out in graphic detail the case for impeachment. He then went to work at the Washington, D.C. law firm Kirkland & Ellis, LLP, where he represented corporate clients and Republican causes and politicians. In 2000, he worked as the Mid-Atlantic regional coordinator for the Bush-Cheney campaign, and he traveled to Florida to observe the recount as part of the *Bush v. Gore* litigation. He was rewarded with plum White House positions and ultimately a judgeship. From 2001 to 2003, Judge Kavanaugh served as Associate Counsel to President Bush, and from 2003 to 2006 he served as the Assistant to the President and Staff Secretary. In these

[76] https://campaignlegal.org/sites/default/files/2018-07/CLC%20Demos%20Kavanaugh%20Brief%207-12-18%209pm.pdf.
[77] 767 So.2d 668 (Fla. 2000).
[78] 919 So.2d 392 (Fla. 2006).
[79] 530 U.S. 290 (2000).
[80] https://www.au.org/sites/default/files/2018-07/Santa%20Fe%20Independent%20School%20Dist%20v%20Doe%20amicus%20brief.pdf.

positions, he worked on the nominations of several contentious judicial nominees – including Miguel Estrada, Priscilla Owen, Carolyn Kuhl, and many others – before he himself was nominated to the D.C. Circuit in 2003. He also worked on many policy issues, including Executive Order 13233, which revised the Presidential Records Act to make it easier for presidents to withhold documents from the public. Due to his controversial background and the intense opposition to his confirmation, it took three years for Judge Kavanaugh to be confirmed, and he was confirmed on a largely party-line vote.

Judge Kavanaugh is a longtime member of the Federalist Society and served as the co-chair of its Religious Liberties Practice Group School Choice Subcommittee from 1999 to 2001. This out-of-the mainstream legal organization represents a sliver of America's legal profession – just four percent – yet all 25 of the candidates President Trump considered for the Supreme Court nomination were on a list vetted and approved by the Federalist Society. As the *New York Times* put it in a recent editorial: "The Federalist Society claims to value the so-called strict construction of the Constitution, but this supposedly neutral mode of constitutional interpretation lines up suspiciously well with Republican policy preferences – say, gutting laws that protect voting rights, or opening the floodgates to unlimited political spending, or undermining women's reproductive freedom, or destroying public-sector labor unions' ability to stand up for the interests of workers."[81]

Ties to Judge Kozinski: As workplace and sexual harassment gain national attention in the midst of the #MeToo movement, Senators must ask Judge Kavanaugh what he knew about Judge Kozinski's sexual harassment and assaults of his law clerks, when he learned of it, and what actions he took in response. Judge Kavanaugh has reportedly remained close friends with Judge Kozinski since his 1991-1992 clerkship.[82] Judge Kozinski resigned from the bench in December 2017 following numerous allegations by at least 15 former law clerks of severe sexual harassment and abuse. Long before the *New York Times* exposed the allegations against him in 2017, Judge Kozinski's sexualized and abusive behavior was an open secret in the legal profession. Judge Kavanaugh and Judge Kozinski reportedly worked together for years as clerkship screeners for Justice Kennedy. This process led to many applicants who had previously clerked for Judge Kozinski obtaining clerkships with Justice Kennedy. As a result, Judge Kavanaugh helped maintain the prestige of a Kozinski clerkship, which no doubt had the effect of encouraging many young attorneys to continue to seek Kozinski clerkships despite the widespread rumors of abusive behavior. One former Kozinski law clerk has stated: "It is unfathomable to me that his [Judge Kozinski's] closest associates did not know, and Kavanaugh was a very close associate. To not know would require a degree of willful blindness which is, in my mind, as disqualifying as actual knowledge. The last thing this country needs is a Supreme Court Justice who squeezes his eyes shut so tightly that he can't see what's in front of his face."[83] Professor Joanna Grossman, who clerked for a different judge on the Ninth Circuit, has said: "When I clerked on the Ninth Circuit, Kozinski sent a memo to all the judges suggesting that a rule prohibiting female attorneys from wearing push-up bras would be more effective than the newly convened Gender Bias Task Force. His disrespect for women is legendary."[84] Judge

[81] https://www.nytimes.com/2018/07/09/opinion/editorials/trump-kavanaugh-supreme-court-senate.html.
[82] https://abovethelaw.com/2018/07/did-brett-kavanaugh-know-about-alex-kozinski/?rf=1.
[83] https://twitter.com/courtneymilan/status/1016530256411283456.
[84] https://twitter.com/JoannaGrossman/status/939542418638147584.

Kavanaugh must be truthful and forthcoming about any knowledge or awareness of Judge Kozinski's predatory and abusive behavior.

We urge you to exercise your full "advice and consent" responsibility by engaging in a searching and thorough review of Judge Kavanaugh's extensive record. It has been publicly reported that there could be in excess of a million pages of documents from Judge Kavanaugh's work in the Bush White House.[85] The significant number of documents that exists is likely the reason that Deputy Attorney General Rod Rosenstein recently made an unprecedented and inappropriate request for more than 100 federal prosecutors and attorneys to assist in document review.[86] The Senate Judiciary Committee must ensure that all requested documents about Judge Kavanaugh's extensive record are produced and examined, that the committee and the public have sufficient time to study the record prior to a hearing, and that committee members are permitted to adequately question Judge Kavanaugh and receive full and complete answers. Our letter of opposition is based on what is currently known about Judge Kavanaugh's public record, and we may submit follow-up letters or analysis once additional materials are made available by Judge Kavanaugh, the National Archives, the George W. Bush Presidential Library, and other sources. Before the Senate Judiciary Committee considers acting on the nomination of Judge Kavanaugh, the American people have a right to know specific information about his entire record in order to gauge how his appointment to the Supreme Court would impact our rights, freedoms, and liberties.

Thank you for your consideration of our views.

Sincerely,

The Leadership Conference on Civil and Human Rights
Advocates for Youth
Alliance for Justice
American Atheists
American Federation of Labor – Congress of Industrial Organizations (AFL-CIO)
American Federation of State, County, and Municipal Employees
American Federation of Teachers
American Humanist Association
American-Arab Anti-Discrimination Committee
Americans United for Separation of Church & State
Asian American Legal Defense and Education Fund (AALDEF)
Asian Pacific American Labor Alliance
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Bend the Arc Jewish Action
Black Women's Roundtable
Business & Professional Women of Colorado
Business and Professional Women of Denver (BPW Denver)

[85] https://www.politico.com/story/2018/07/09/brett-kavanaugh-vince-foster-files-703344.
[86] https://www.nytimes.com/2018/07/11/us/politics/rosenstein-kavanaugh-document-review-prosecutors.html.

Center for American Progress
Center for Biological Diversity
Center for Constitutional Rights
Center for Health and Gender Equity (CHANGE)
Center for Popular Democracy
Center for Responsible Lending
CLASP
Clearinghouse on Women's Issues
Coalition of Labor Union Women
Defending Rights & Dissent
Demand Justice
Disability Rights Education & Defense Fund
Earthjustice
Economic Policy Institute Policy Center
Equal Justice Society
Equal Rights Advocates
Equality California
Every Voice
Faith in Action
Faith in Public Life
Family Equality Council
Family Values @ Work
Farmworker Justice
Feminist Majority
GLSEN
GreenLatinos
Herd on the Hill
Human Rights Campaign
Immigrant Legal Resource Center
In Our Own Voice: National Black Women's Reproductive Justice Agenda
International Association of Women in Radio and Television-USA
Jobs With Justice
Lambda Legal
LatinoJustice PRLDEF
Muslim Advocates
Muslim Public Affairs Council
NAACP
NARAL Pro-Choice America
National Abortion Federation
National Association of Human Rights Workers
National Association of Social Workers (NASW)
National Bar Association
National Black Justice Coalition

National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition for Asian Pacific American Community Development
National Coalition on Black Civic Participation
National Council of Jewish Women
National Education Association
National Employment Law Project
National Employment Lawyers Association
National Equality Action Team (NEAT)
National Federation of Business and Professional Women
National Federation of Business and Professional Women's Clubs-NYC (NFBPWC-NYC)
National Health Law Program
National Immigration Law Center
National Institute for Reproductive Health (NIRH)
National Latina Institute for Reproductive Health
National Law Center on Homelessness & Poverty
National Organization for Women
National Partnership for Women & Families
National Urban League
National Women's Law Center
National Workrights Institute
NFBPC EL PASO WEST
NFBPWC
People For the American Way
PFLAG National
Planned Parenthood Federation of America
PolicyLink
Population Connection Action Fund
Progress Florida
Progressive Turnout Project
Public Knowledge
Secular Coalition for America
Service Employees International Union (SEIU)
Sierra Club
Southern Poverty Law Center
State Innovation Exchange (SIX)
The Immigration Hub
The National Council of Asian Pacific Americans (NCAPA)
The New Jersey Institute for Social Justice
The Washington Bar Association Young Lawyers Division
The Workmen's Circle
United State of Women
United Steelworkers

Violence Policy Center
Voices for Progress
West Pinellas National Organization for Women (NOW) Florida
Women Employed
Woodhull Freedom Foundation

NATIONAL LGBTQ TASK FORCE
ACTION FUND

1325 Massachusetts Ave. NW
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Washington, DC 20005
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September 12, 2018

Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Oppose the Confirmation of Judge Kavanaugh to the United States Supreme Court

Dear Chairman Grassley, Ranking Member Feinstein, and members of the Committee:

The National LGBTQ Task Force Action Fund (Task Force) thanks you for the opportunity to submit testimony regarding the nomination of Judge Brett Kavanaugh to the Supreme Court of the United States. The Task Force writes to express its strong opposition to the confirmation of Judge Kavanaugh to be an Associate Justice of the Supreme Court.

The National LGBTQ Task Force Action Fund is the oldest national lesbian, gay, bisexual, transgender, and queer (LGBTQ) advocacy group. As a progressive social justice organization, the Task Force works to achieve full freedom, justice, and equality for LGBTQ people and our families. The Task Force advocates for change at the federal, state, and local levels and trains organizers across the nation to combat discrimination against LGBTQ people in every aspect of their lives, including housing, employment, healthcare, reproductive health, retirement, affirmative action, and basic human rights. The Task Force has advocated at the United States Supreme Court on behalf of LGBTQ individuals, filing amicus briefs in *Zubik v. Burwell*, *Whole Woman's Health v. Hellerstedt*, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, *Janus v. AFSCME*, and more.

The Supreme Court has played a critical role in the recognition and enforcement of the fundamental rights of LGBTQ people in this country, including the right to be free from discrimination based on gender, the right to privacy, and the rights to marry and have children. These rights are not in the text of the Constitution. Judge Kavanaugh believes that a judge must interpret the Constitution according to its text and that any unenumerated rights must be rooted in the nation's history and tradition—a history and tradition from which LGBTQ people, and especially LGBTQ people of color, have often been excluded. If confirmed, Judge Kavanaugh will put these rights at risk—changing the trajectory of the Court and harming LGBTQ people in all areas of our lives.

On healthcare, Judge Kavanaugh's record speaks for itself. During his time on the District of Columbia Circuit Court of Appeals, Judge Kavanaugh

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wrote three dissenting opinions opposing the constitutionality of sections of the Patient Protection and Affordable Care Act (ACA). Such an opinion written in the Supreme Court would put the lives of LGBTQ people across the country at risk. LGBTQ people disproportionately experience poverty and disability and thus struggle to afford much needed health services. These disparities are even more prevalent for transgender people, especially transgender people of color. For example, 33 percent of transgender and gender-nonconforming respondents in the 2015 National Transgender Discrimination Survey did not go to a healthcare provider when needed because they could not afford it.

Moreover, the LGBTQ community is disproportionately affected by HIV/AIDS. According to the Center for Disease Control, one in two black gay and bisexual men will contract HIV in their lifetime, a little over one in two black transgender women will contract HIV in their lifetime, and in 2012, one in five people living with HIV were Latinx.[1] People living with or at risk of contracting HIV may be unable to afford preventative and anti-retroviral medications—especially without the ACA. The ACA was life-changing for LGBTQ people—increasing access to health services, prohibiting insurance companies from discriminating against transgender people and people with HIV, and expanding Medicaid coverage for people living with HIV/AIDS. Judge Kavanaugh's record of opposition to the ACA is a serious threat to the lives of LGBTQ people.

Judge Kavanaugh's record also shows that he would likely vote to restrict access to reproductive health services that are necessary to the wellbeing of the LGBTQ community. LGBTQ rights are reproductive rights. Without the constitutional right to privacy established in cases like *Griswold v. Connecticut* and *Roe v. Wade*, anti-sodomy laws could still be constitutional, and same-sex couples may not have the right to marry in all 50 states. In other words, the legal basis for recognizing LGBTQ rights is the recognition of reproductive rights, and a Supreme Court ruling limiting these rights will not only affect women, but also LGBTQ people of all genders. LGBTQ people also need the right to choose whether to use contraception or to obtain an abortion, without religious, employer, or governmental intrusion. For example, LGBTQ people use contraceptives to lower the risk of STI/STD transmission, to treat conditions like endometriosis, for menstruation regulation, and for pregnancy prevention. Judge Kavanaugh's praise for reeling in unenumerated rights like the right to privacy, suggestions that *Roe v. Wade* was incorrectly decided, approval of broad religious exemptions from contraceptive coverage under the ACA, and opposition to a migrant teen's access to an abortion provide key insight: his positions

[1] Pronounced "Latin-ex," this term is a gender-neutral way to describe people of Latin American descent.

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threaten reproductive rights, health, and justice for all people—including LGBTQ people.

Judge Kavanaugh's partiality toward broad religious exemptions could also roll back protections that general civil rights laws provide to LGBTQ people. LGBTQ people are not explicitly protected from discrimination under federal law, and less than half of the states prohibit discrimination based on sexual orientation and gender identity. In just 20 states and the District of Columbia, state law explicitly prohibits discrimination based on sexual orientation and gender identity in employment and housing; 19 states and D.C. protect LGBTQ people from discrimination in places of public accommodations. These existing protections are crucial to ensuring that LGBTQ people get and stay hired, secure housing, and can use spaces and services open to the public without discrimination.

Broad religious exemptions from these antidiscrimination laws can make these protections meaningless. In recent years, there has been an uptick in refusals to serve LGBTQ people for claimed religious reasons. Just look at *Masterpiece Cakeshop*, the recent high-profile Supreme Court case regarding a bakery owner's refusal to provide wedding cake services to a gay couple. But this is about more than cake—it's about whether religious viewpoints supersede nondiscrimination laws, including equal employment and fair housing laws. In the coming years, cases involving religious refusals to serve or employ LGBTQ people or other minorities are likely to come to the Supreme Court again. On the Supreme Court, Judge Kavanaugh's strong deference to employers and businesses seeking religious exemptions could erode the few existing protections LGBTQ people, and others protected by civil rights laws, have.

If confirmed to the Supreme Court, Judge Kavanaugh will not only change the role of the Court as a potential safeguard of LGBTQ rights, he will also affect the lives of LGBTQ people for generations to come. For these reasons, the Task Force asks that you oppose the confirmation of Judge Kavanaugh to be an Associate Justice of the Supreme Court of the United States. Thank you for your consideration. If you have any questions regarding this testimony, please contact Candace Bond-Theriault, Policy Counsel [redacted] or Bridget Schaaff, Federal Policy Fellow [redacted]).

Sincerely,

National LGBTQ Task Force Action Fund

National Organization for Women

Sept. 25, 2018

The Hon. Charles E. Grassley
Chair
U.S. Senate Committee on the Judiciary
Senate Dirksen Room 224
U.S. Senate
Washington, D.C. 20510

The Hon. Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
Senate Dirksen Room 224
U.S. Senate
Washington, D.C. 20510

Dear Senators Grassley and Feinstein,

The National Organization for Women is concerned that the Senate Judiciary Committee is failing in its duties to fully vet individuals nominated to judicial posts. The fact that many outstanding questions remain as to the veracity and moral character of Supreme Court nominee Brett Kavanaugh is troubling. We know that Judge Kavanaugh has not been truthful in all questions presented to him by the committee; we also have serious doubts about his personal life as relates to problems with alcohol, gambling and credit card debt, and the burden of proving his innocence remains in response to several allegations of sexual misconduct.

This is to not forget that the Committee leadership has refused to obtain and release for public scrutiny the 90,000 documents pertaining to Brett Kavanaugh's three years of work during the Bill Clinton and George W. Bush administrations. Additionally, the committee's reliance on documents reviewed – and possibly censored -- by a private attorney representing the Bush family is to be condemned. Kavanaugh's exact role in the many controversial events during that 35-month period remains shrouded by an unprecedented declaration of Presidential privilege and the chair's failure to obtain and release National Archive documents.

What is the reason for the secrecy? We submit that it is because there is more bad news about this nominee. That not even the painful recounting by the survivor of an alleged attempted rape by a drunk Brett Kavanaugh and the witnessing by Mark Judge is sufficient to convince the Committee's leadership that a more complete FBI background investigation should be conducted. Nor has the additional disclosure of a

National Organization for Women

serious sexual misconduct incident against a woman during the nominee's college years prompted a call for further investigation. The committee need not be reminded that the alleged attempted rape is an unreported crime that remains open to prosecution.

A comparison can be made of the committee leadership's conduct to that of the 1991 Senate Judiciary Committee's when members interrogated and humiliated Anita Hill and refused to hear from three more survivors of sexual harassment by then nominee Clarence Thomas. The current case approaches a level far beyond that in its refusal to request and release all pertinent documents of the nominee, its failure to request and obtain additional FBI background information, and the committee leadership's willingness to embrace a nominee who is demonstrably dishonest.

This rushed leadership effort to move a highly flawed nominee to a committee vote and then to a full Senate vote translates to a further politicization of the nation's highest court. The Supreme Court's legitimacy rests on the ethical behavior of senators and the president in upholding our valued democratic institutions of honesty and transparency. Right now, the Court's legitimacy is hanging by a mangled thread.

The National Organization for Women with its 300 hundred chapters in all states and the District of Columbia asks the committee to request a complete FBI background investigation of Brett Kavanaugh, to look at all allegations of misconduct that have come forward, to question all witnesses of alleged misconduct, to request and obtain for public scrutiny all documents pertaining to Brett Kavanaugh's work, and to further question the nominee based on that additional information.

Failing those actions, the committee must disband efforts to confirm Brett Kavanaugh.

Regards,

Toni Van Pelt

Toni Van Pelt, President

1100 H Street, NW • Suite 300 • Washington, DC 20005 • www.now.org
Phone: 202.628.8669 • now@now.org

national partnership
for women & families
Because actions speak louder than words.

September 13, 2018

Dear Senator:

As an organization that is dedicated to advancing women's equality and dignity by promoting reproductive health and rights, access to quality affordable health care and fairness in the workplace, the National Partnership for Women & Families writes to urge you to oppose the confirmation of Judge Brett Kavanaugh to the United States Supreme Court.

As his judicial record, prior statements, and hearing testimony make abundantly clear, the confirmation of Judge Kavanaugh poses a dire threat to the rights and laws that protect women, workers and others who seek to vindicate their civil rights in court. The cumulative impact of Judge Kavanaugh's elevation to the country's highest court will be the total disempowerment of women across all spheres of life.

Judge Kavanaugh will undermine women's health by overturning or gutting the Affordable Care Act, threatening coverage for the 67 million women and girls with pre-existing conditions,[1] and *Roe v. Wade*, the Supreme Court precedent protecting women's fundamental right to abortion care. He will hinder women's economic security by impeding access to abortion and reproductive health care – itself an economic justice issue as the freedom to choose if, when and how to become a parent has a significant impact on women's educational attainment, career opportunities, financial health and retirement security.[2] Studies show clear links between access to reproductive health care services and a dramatic increase both in women's participation in the workforce and families' reliance on women's earnings.[3] Judge Kavanaugh's record and statements on abortion access pose a significant threat to the economic stability of women and families. He will also hinder women's economic security by siding with corporations over workers.

Judge Kavanaugh's rulings have infringed on the rights of immigrants, LGBTQ people and people with disabilities, and his anti-civil rights record demonstrates that he will allow individuals and employers to discriminate against others, particularly when done in the name of "religious liberty." Through his anti-science and pro-corporation approach, he has opposed regulations that improve access to clean water or air, endangering communities of color, children and our environment.

He will cause particular and lasting harm to women of color and women with low incomes, who disproportionately lack access to abortion and reproductive health care, as well as affordable health care in general; are more likely to experience persistent workplace

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discrimination and harassment: and are at greater risk of exposure to environmental pollutants and gun violence in their communities.

Furthermore, to have trust in the judicial branch we must be able to have confidence in the integrity and truthfulness of its members, especially those who sit on the highest court in the land. But documents that became public during the course of his confirmation process reveal that Judge Kavanaugh has misled the Senate about his beliefs on and prior involvement in issues of national significance.

We therefore urge you to reject Judge Kavanaugh's confirmation.

I. Judge Kavanaugh will undermine abortion rights and deny women autonomy over their own bodies and futures.

President Trump has been clear about his goal from day one: he will *only* appoint justices who will overturn *Roe v. Wade* "automatically"[4] and undo the legal right to abortion care. Judge Kavanaugh was selected specifically because of his anti-abortion views, amongst other equally troubling reasons (such as his views on executive power).[5] Just last year, he made his disdain for *Roe*, and women's fundamental autonomy and rights, clear when he went out of his way to praise former Chief Justice Rehnquist's dissent in the case.[6] Judge Kavanaugh has also ruled against disabled women's right to make their own choices regarding their own reproductive health care – issuing a ruling upholding a DC government policy that had led to two involuntary abortions.[7] Furthermore, less than a year ago, as a member of a three-judge panel, he voted to prevent a young immigrant woman from accessing abortion care she wanted, indicating that he believed the federal government could delay her time-sensitive care past the time when she could legally access abortion in the state where she was being held.[8] When the majority of his colleagues later overruled him, Judge Kavanaugh wrote that the other judges had "badly erred" in allowing the young woman to access the care she sought.[9] His actions show clear disregard for the rights of women, immigrants and communities of color, and women with disabilities. In no instance in Judge Kavanaugh's judicial record has a woman's own need or right to control the decision about whether or not to carry a pregnancy to term been of paramount importance.

Access to reproductive health care is fundamentally about economic security and opportunity. Decisions about whether or when to become a parent or grow one's family are some of the most determinative economic decisions women and families will ever make and are linked to greater educational and professional opportunities and increased lifetime earnings for women.[10] In one study, women who were able to have an abortion had six times higher odds of having positive life plans – most commonly related to education and employment – and were more likely to achieve them than women denied an abortion.[11] When coupled with his hostility to workers (discussed below), Judge Kavanaugh's record on abortion access poses a dire threat to the economic stability of women and families.

While Judge Kavanaugh stated during his hearing that *Roe* is "settled as a precedent of the Supreme Court" this statement is misleading and meaningless – especially in light of a document his time in the Bush administration where he articulated that the "[Supreme] Court can always overrule its precedent, and three current Justices on the Court would do so."[12] There are now four justices on the Court who are poised to overturn *Roe*, and Kavanaugh would undoubtedly provide the fifth and decisive vote. Judge Kavanaugh also

referred to birth control as "abortion-inducing drugs," which is scientifically and medically inaccurate.[13] Judge Kavanaugh would cause grave damage to women's access to safe and legal abortion and contraception, denying women autonomy over their bodies, lives and futures.

II. Judge Kavanaugh will sabotage health care for millions of people.

Another part of President Trump's litmus test for Supreme Court justices is a willingness to gut and eliminate the Affordable Care Act (ACA). This would leave millions more people uninsured and would destroy critical health care protections – such as requiring coverage for pre-existing conditions and maternity care and prohibiting discriminatory practices like gender rating (charging women more than men for the same insurance coverage) – all provisions of the ACA that substantially improve the health of women and children. Recent estimates find that more than half of women and girls nationally – over 67 million – have preexisting conditions.[14] There also are nearly six million pregnancies each year, a common reason for denying women coverage on the individual market before the ACA.[15] Allowing insurers to return to pre-ACA discriminatory practices could mean millions of women being denied coverage or charged more based on their health status. Judge Kavanaugh openly criticized Chief Justice Roberts for his decision to uphold the health care law and, from the bench, repeatedly voiced his opposition to the ACA, including by suggesting that a president could "decline to enforce" this lifesaving legislation if he personally deems it unconstitutional.[16] During his hearing testimony, Judge Kavanaugh repeatedly refused to say that he would uphold protections for people with pre-existing conditions. Health care access for millions of people, and critical programs like Medicaid, hang in the balance. Judge Kavanaugh has shown he cannot be trusted with this responsibility.

III. Judge Kavanaugh will undermine people's rights in the name of religious liberty.

Judge Kavanaugh has promoted a judicial philosophy that the personal beliefs of some should be allowed to dominate the rights and lives of others, granting a license to discriminate against women, LGBTQ people and others. In a public speech, Judge Kavanaugh praised former Chief Justice Rehnquist for rejecting the notion of "a strict wall of separation between church and state."[17] And from the bench, Judge Kavanaugh favored allowing an employer's religious beliefs to override employees' access to birth control, essentially allowing a woman's boss to dictate decisions about her health care.[18] In his hearing testimony, he refused to say that it was immoral to fire an employee based solely on their sexual orientation. Judge Kavanaugh has demonstrated that, under the guise of religious liberty, he would openly encourage employers, health care providers and others to discriminate against women and LGBTQ people, undermining their rights and health.

IV. Judge Kavanaugh is hostile to workers and repeatedly sides with corporations.

In case after case, Judge Kavanaugh has sided against workers, again causing significant harm to women. Judge Kavanaugh's record shows that he has no regard for the rights of workers, consistently ruling against them and the agencies charged with protecting them in cases involving discrimination, worker safety and union representation.[19] Judge Kavanaugh dissented – in favor of the employer and against the worker – in several workplace discrimination cases.[20] Women face persistent workplace discrimination and harassment – including pregnancy discrimination, pay discrimination and sexual harassment – and they must be able to depend on fair adjudication under civil rights law. Judge Kavanaugh has also authored numerous opinions and dissents undermining workers' collective bargaining

rights, eroding the power of unions to advocate for and protect workers.[21] Women – and particularly women of color – benefit greatly from the protection of unions and rely upon the benefits they receive from collective bargaining agreements.[22] With the Supreme Court recently undermining the power of unions to represent workers in *Janus v. AFSCME Council 31*,[23] Judge Kavanaugh will further stack the deck against workers and strengthen corporations' ability to disregard their own workers' safety and dignity and deny them economic opportunity.

V. Judge Kavanaugh sides with big business and big polluters over families.

When corporations have challenged government protections, Judge Kavanaugh has sided with big business and tried to undermine the laws that protect the health and economic security of women and families. He has shielded polluters and opposed Environmental Protection Agency regulations that improve the air we breathe and the water we drink, explicitly prioritizing the financial interests of corporations over the health of families.[24] This endangers communities of color, children and our environment for generations to come. In another dissent, Judge Kavanaugh disparaged the existence of the Consumer Financial Protection Bureau, which was created to protect families' economic security after the largest financial crisis since the Great Depression.[25] His record – which he tried to hide from during his hearing – reflects his hostility toward independent agencies that protect working families. Judge Kavanaugh has repeatedly questioned federal agencies' authority, demonstrating a disregard for scientific integrity and the critical role of government protections.[26]

VI. Judge Kavanaugh has opposed commonsense policies that curb gun violence, making women, families and communities less safe.

When the D.C. Circuit Court upheld a ban on assault weapons, Judge Kavanaugh authored a dissent stating that the Second Amendment guarantees a person's right to own a semi-automatic weapon and rejecting the idea that public safety should be considered when ruling on guns – blatantly ignoring clear evidence that gun safety policies protect the lives of women and children.[27] In his hearing testimony, he reiterated a broad and dangerous view of gun rights that prioritizes his view of "history and tradition" over people's safety. Women in the United States are 16 times more likely to be killed by guns than are women in other developed countries.[28] Judge Kavanaugh does not believe public safety arguments should be considered when deciding on gun matters, making his appointment even more dangerous for the health of our communities.

VII. Judge Kavanaugh believes the president is above the law.

In his personal writing and during his hearing testimony, Judge Kavanaugh has repeatedly demonstrated that he will not stand up to President Trump, allowing President Trump's abuses of power to go unchecked. He has argued that a president should have "absolute discretion" and be able to dismiss any counsel "out to get him,"[29] that a president need not comply with laws that he personally deems to be unconstitutional,[30] and that a president is protected from "criminal prosecution and investigation" while he or she is in office.[31] This is especially troubling given the recent guilty plea of President Trump's former lawyer, Michael Cohen, who implicated the president in federal crimes. Furthermore, in his hearing testimony, Judge Kavanaugh declined to criticize the president's politicization of Justice Department investigations, was evasive about his own conversations regarding the Mueller investigation, and failed to acknowledge the seriousness of the current political moment.

The next justice could decide the scope of executive branch power, and it is essential that the Supreme Court be a check on the president's abuses – not a rubber stamp. This is fundamental to our democracy and our constitutional system of checks and balances. Judge Kavanaugh's confirmation would erode the public's trust in the judicial branch.

VIII. Judge Kavanaugh misled the Senate and the American people during his hearing testimony.

Documents that became public during the course of Judge Kavanaugh's confirmation process reveal that he misled the Senate during his prior confirmation hearings in 2004 and 2006. In addition to the aforementioned email concerning *Roe*, these documents contradict Judge Kavanaugh's prior denials concerning his work during the Bush administration, including his involvement in vetting controversial judicial nominees, his awareness of the theft of secret strategy documents from Democratic senators and his participation in decisions about the warrantless wiretapping program and detainee treatment policy. These are matters of significant importance to the judiciary and to the public, and Judge Kavanaugh's willingness to mislead the Senate should be disqualifying.

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Judge Kavanaugh was handpicked by extreme, right-wing groups to further an anti-choice, anti-LGBTQ, anti-immigrant, anti-worker, anti-civil rights and anti-science agenda.[32] The cumulative impact of Judge Kavanaugh's rulings – by undermining women's rights in every sphere of their lives – would be to completely destabilize the economic security and well-being of women and families. The Senate must reject him for a lifetime appointment on our highest court.

Sincerely,

National Partnership for Women & Families

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[1] National Partnership for Women & Families and the Center for American Progress. (2018). *Moving Backward: Efforts to Undo Pre-Existing Condition Protections Put Millions of Women and Girls at Risk*. Retrieved 14 August 2018, from http://www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf

[2] See, e.g., Sonfield, A., et al. (2013, March). *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children*. Guttmacher Institute. Retrieved 31 August 2018, from https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf (providing an extensive review of studies that document how controlling family timing and size contribute to educational and economic advancements).

[3] See, e.g., Sonfield, A., et al. (2013, March). *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children*. Guttmacher Institute. Retrieved 31 August 2018, from https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf (providing an extensive review of studies that document how controlling family timing and size contribute to educational and economic advancements).

[4] In the final October 2016 presidential debate, Trump replied to a question about whether he would appoint judges to overturn *Roe v. Wade* by saying, "Well, if we put another two or perhaps three justices on, that's really what's going to be — that will happen, . . . And that'll happen automatically, in my opinion, because I am putting pro-life justices on the court. I will say this: It will go back to the states, and the states will then make a determination." Berman, M. (2017, March 21). Trump Promised Judges Who Would Overturn *Roe v. Wade*. *Washington Post*. Retrieved 14 July 2018, from https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/

[5] Compare the Supreme Court nominee shortlist that President-elect Trump released on January 12, 2017, with the shortlist released on November 17, 2017, just weeks after Judge Kavanaugh's dissent in *Garza v. Hargan*. *See* de Vogue, A. (2017, January 12). CNN's Donald Trump Supreme Court Nominee Shortlist. *CNN*. Retrieved 14 July 2018, from https://www.cnn.com/2016/12/06/politics/donald-trump-supreme-court-nominee-shortlist/index.html; White House. (2017, November 17). *President Donald J. Trump's Supreme Court List* [Press release]. Retrieved 14 July 2018, from https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/

[6] American Enterprise Institute. (2017, September 18). *From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist* (pp. 12–13, 20). Retrieved 14 July 2018, from https://www.aei.org/wp-content/uploads/2017/08/from-the-bench.pdf. *See also* Kavanaugh, B. M. (2017, July). Keynote address: Two challenges for the judge as umpire: Statutory ambiguity and constitutional exceptions (p. 1917). *Notre Dame Law Review, 92*(5), 1907–1920.

7 Doe ex Rel. Tarlow v. District of Columbia, 489 F.3d 376, 379 (D.C. Cir. 2007), reversing Jane Does I through III v. District of Columbia, 232 F.R.D. 18 (D.D.C. 2005).

[8] Garza v. Hargan, No. 17–5236, 2017 WL 4707112 (Oct. 19, 2017).

[9] Garza v. Hargan, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018) (claiming that the majority created "a new right for unlawful immigrant minors . . . to obtain immediate abortion on demand . . . .").

[10] See, e.g., Frost, J. & Lindberg, L. (2013, April). Reasons for using contraception: Perspectives of US women seeking care at specialized family planning clinics (p. 465-7). *Contraception, 87*(4), 465-472. Sonfield, supra note 1.

[11] Upadhyay, U., Biggs, M, & Foster, D. (2015, November). The effect of abortion on having an achieving aspirational one-year plans. *BMC Women's Health, 15*(1).

[12] Savage, C. (2018, September 6). Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action. *New York Times*. Retrieved 7 September 2018, from https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html.

[13] American Congress of Obstetricians and Gynecologists. (2017, October). *Facts are Important: Correcting the Record on the Administration's Contraceptive Coverage Roll Back Rule*. Retrieved 12 September 2018, from https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactsareImportantContraceptionRuleFalsehoods.pdf?dmc=1&ts=20180909T2112128808

[14] National Partnership for Women & Families and the Center for American Progress. (2018). *Moving Backward: Efforts to Undo Pre-Existing Condition Protections Put Millions of Women and Girls at Risk*. Retrieved 14 August 2018, from http://www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf

[15] National Partnership for Women & Families and the Center for American Progress. (2018). *Moving Backward: Efforts to Undo Pre-Existing Condition Protections Put Millions of Women and Girls at Risk*. Retrieved 14 August 2018, from http://www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf

[16] *Seven-Sky*, 661 F.3d at 50 n.43 (Kavanaugh, J., dissenting) ("Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.").

[17] See note 3, American Enterprise Institute, p. 10.

[18] Priests for Life v. Dep't of Health & Human Servs., 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[19] *E.g.*, SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202 (D.C. Cir. 2014) (Kavanaugh, J., dissenting); Miller v. Clinton, 687 F.3d 1332 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives, 720 F.3d 939 (D.C. Cir. 2013) (Kavanaugh, J., dissenting); Am. Fed'n of Gov't Emps. v. Gates, 486 F.3d 1316 (D.C. Cir. 2007); Agri Processor Co., Inc. v. NLRB, 514 F.3d 1 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *cert. denied*, 555 U.S. 1031 (2008); Venetian Casino Resort, LLC v. NLRB, 793 F.3d 85 (D.C. Cir. 2015).

[20] *See generally Miller*, 687 F.3d at 1335 (Kavanaugh, J., dissenting from majority opinion in age discrimination case brought against U.S. State Department). *See also Howard*, 720 F.3 at 953 (Kavanaugh, J., dissenting from a majority opinion allowing a Black woman to move forward on her racial discrimination action against a director in an office of the U.S. House of Representatives).

[21] *See Am. Fed'n of Gov't Emps.*, 486 F.3d at 1318–19 (in which Judge Kavanaugh authored majority opinion reversing the lower court's partial blocking of Department of Defense regulations regarding collective bargaining). *See also Agri Processor Co., Inc.*, 514 F.3d at 10 (Kavanaugh, J., dissenting from majority decision ordering company to bargain with undocumented employees).

[22] Institute for Women's Policy Research. (2018, February). *Fact Sheet: The Union Advantage for Women*. Retrieved 14 July 2018, from https://iwpr.org/wp-content/uploads/2018/02/C463_Union-Advantage-Fact-Sheet-February-2018-1.pdf

[23] Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

[24] *See, e.g.*, White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd sub nom.* Michigan v. EPA, 135 S. Ct. 2699 (2015); EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1584 (2013).

[25] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

[26] In a February 2017 speech at Notre Dame Law School, Kavanaugh made it a point to criticize a legal precedent that supports judicial deference to agency actions (known as *Chevron* deference), stating that it "encourages agency aggressiveness on a large scale" and arguing that "Courts [should] no longer defer to agency interpretations of statutes." See note 3, Kavanaugh, pp. 1911–12.

[27] Heller v. District of Columbia, 670 F.3d 1244 (2011) (Kavanaugh, J., dissenting).

[28] National Partnership for Women & Families. (2018, March). *Gun Violence: A Threat to Women and Families* (p. 1). Retrieved 14 July 2018, from http://www.nationalpartnership.org/research-library/health-care/gun-violence-a-threat-to-women-and-families.pdf

[29] Kavanaugh, B. M. (1998, July). The president and the independent counsel: From Watergate to Whitewater and beyond (p. 2151). *Georgetown Law Journal, 86*, 2133–2178.

[30] Kavanaugh, B. M. (2014). Our anchor for 225 years and counting: The enduring significance of the precise text of the Constitution (p. 1911). *Notre Dame Law Review, 89*(5), 1907–1928 ("To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch—at least unless the President deems the law unconstitutional, in which event the President can decline to follow the statute until a final court order says otherwise. In other words, the Executive does have to follow laws regulating the executive branch."); Seven-Sky v. Holder, 661 F.3d 1, 50 n.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *cert. denied*, 567 U.S. 951 (2012) ("Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.").

[31] Kavanaugh, B. M. (2008). Separation of powers during the forty-fourth presidency and beyond (p. 1461). *Minnesota Law Review, 93*, 1454–1486 ("... Congress might consider a law exempting a President – while in office – from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel. Criminal investigations targeted at or revolving around a President are inevitably politicized by both their supporters and critics.")

[32] For example, the Family Research Council (FRC), which has been designated a hate group by the Southern Poverty Law Center, has vocally supported and advocated for Kavanaugh's judicial ascent, including by mobilizing its supporters when Kavanaugh was first nominated to the federal bench. *See, e.g.*, Rev. Dr. Chuck Currie. (2005, May 31). Brett Kavanaugh: Unqualified to sit on a federal court but still supported by the religious right [Blog post]. Retrieved 14 July 2018, from http://chuckcurrie.blogs.com/chuck_currie/2005/05/brett_kavanaugh.html (describing an email alert sent by FRC in 2005 urging subscribers to contact Senators in support of Brett Kavanaugh's nomination to the D.C. Circuit). The Family Research Council has a clear anti-LGBTQ agenda, claiming "homosexuality" is "harmful" and "unnatural," and promoting discrimination against LGBTQ people. For background on the Family Research Council and its designation as hate group, see Southern Poverty Law Center. (n.d.). *Family Research Council*. Retrieved 14 July 2018, from https://www.splcenter.org/fighting-hate/extremist-files/group/family-research-council. Kavanaugh's path to the Supreme Court "short list" and to nomination was also backed by the Heritage Foundation, the Federalist Society and other extremist, right-wing organizations. *See, e.g.*, The Heritage Foundation. (2018, July 10). Trump hits another home run with Supreme Court pick Brett Kavanaugh [Blog post]. Retrieved 14 July 2018, from https://www.heritage.org/courts/commentary/trump-hits-another-home-run-supreme-court-pick-brett-kavanaugh; Barnes, R. (2017, November 18). Federalist Society, White House Cooperation on Judges Paying Benefits. *Washington Post*. Retrieved 14 July 2018, from https://www.washingtonpost.com/politics/courts_law/federalist-society-white-house-cooperation-on-judges-paying-benefits/2017/11/18/4b69b4da-cb20-11e7-8321-481fd63f174d_story.html?utm_term=.88a530e2ce55; Suen, B. (2018, July 11). Extreme Anti-LGBTQ Groups are Uniting Behind Supreme Court Nominee Brett Kavanaugh. *Media Matters*. Retrieved 14 July 2018, from https://www.mediamatters.org/blog/2018/07/11/extreme-anti-lgbtq-groups-are-uniting-behind-trump-supreme-court-nominee-brett-kavanaugh/220638

national partnership
for women & families
Because actions speak louder than words.

September 28, 2018

Dear Senator:

The attached letter details the myriad ways in which confirming Judge Kavanaugh to the United States Supreme Court would pose a dire threat to the rights and laws that protect women, workers and others who seek to vindicate their civil rights in court. However, in the weeks since Judge Kavanaugh's initial hearing before the Senate Judiciary Committee, revelations about Judge Kavanaugh's past behavior – and current willingness to lie about, minimize and dismiss the credible allegations that have been raised – demonstrate even further his lack of fitness to serve on the Supreme Court.

To date, three women – Dr. Christine Blasey Ford, Deborah Ramirez and Julie Swetnick – have come forward publicly to recount credible instances of sexual assault by Judge Kavanaugh. Despite Judge Kavanaugh's attempts to portray himself as someone who respects women and who spent his youthful years in service to others, these three brave women and many people who know Judge Kavanaugh indicate otherwise.

The refusal of the Senate Judiciary Committee and the Trump administration to allow the FBI to thoroughly investigate these matters undermines Judge Kavanaugh's credibility even more. Moving forward to a vote in the absence of such an investigation is insulting to survivors of sexual assault and to the rule of law, and has brought this process to a new low. Republican Senators' reliance on a prosecutor to conduct their questioning of Dr. Blasey Ford during the hearing was a politically calculated maneuver, and the prosecutor's questions were designed to cross-examine and discredit her – despite the fact that she is not on trial. Even in the face of such questions, Dr. Blasey Ford's testimony before the Committee was powerful, compelling and credible.

On the other hand, in Judge Kavanaugh's testimony, he misled the Senate as to his prior behavior, as he has done repeatedly when in front of the Committee. He opened his testimony with conspiracy theories that these allegations are part of an orchestrated, left-wing smear campaign and furthermore, was disrespectful to and combative with a number of Senators. This behavior reveals clearly that Judge Kavanaugh cannot be trusted to be an impartial, non-partisan justice and demonstrates outright contempt for the Senate's constitutionally-mandated role in the confirmation process.

While we firmly believe that the White House should immediately withdraw this tainted nomination, or at a minimum that this sham confirmation process be stopped until a thorough investigation is complete, President Trump and Senate Republican leadership are proceeding to "plow right through" to a vote. Now is the time for democracy and government to meet the will of the people. Women and voters across the country are watching.

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We strongly urge you to oppose the confirmation of Judge Brett Kavanaugh to the United States Supreme Court – because he will undermine women's, workers' and civil rights, because his behavior is not tolerable from a member of the judiciary and because the entire confirmation process has made a mockery of the Senate's constitutional obligation to provide advice and consent.

Sincerely,
National Partnership for Women & Families

national partnership
for women & families
Because actions speak louder than words.

September 13, 2018

Dear Senator:

As an organization that is dedicated to advancing women's equality and dignity by promoting reproductive health and rights, access to quality affordable health care and fairness in the workplace, the National Partnership for Women & Families writes to urge you to oppose the confirmation of Judge Brett Kavanaugh to the United States Supreme Court.

As his judicial record, prior statements, and hearing testimony make abundantly clear, the confirmation of Judge Kavanaugh poses a dire threat to the rights and laws that protect women, workers and others who seek to vindicate their civil rights in court. The cumulative impact of Judge Kavanaugh's elevation to the country's highest court will be the total disempowerment of women across all spheres of life.

Judge Kavanaugh will undermine women's health by overturning or gutting the Affordable Care Act, threatening coverage for the 67 million women and girls with pre-existing conditions,[1] and *Roe v. Wade*, the Supreme Court precedent protecting women's fundamental right to abortion care. He will hinder women's economic security by impeding access to abortion and reproductive health care – itself an economic justice issue as the freedom to choose if, when and how to become a parent has a significant impact on women's educational attainment, career opportunities, financial health and retirement security.[2] Studies show clear links between access to reproductive health care services and a dramatic increase both in women's participation in the workforce and families' reliance on women's earnings.[3] Judge Kavanaugh's record and statements on abortion access pose a significant threat to the economic stability of women and families. He will also hinder women's economic security by siding with corporations over workers.

Judge Kavanaugh's rulings have infringed on the rights of immigrants, LGBTQ people and people with disabilities, and his anti-civil rights record demonstrates that he will allow individuals and employers to discriminate against others, particularly when done in the name of "religious liberty." Through his anti-science and pro-corporation approach, he has opposed regulations that improve access to clean water or air, endangering communities of color, children and our environment.

He will cause particular and lasting harm to women of color and women with low incomes, who disproportionately lack access to abortion and reproductive health care, as well as affordable health care in general; are more likely to experience persistent workplace

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discrimination and harassment; and are at greater risk of exposure to environmental pollutants and gun violence in their communities.

Furthermore, to have trust in the judicial branch we must be able to have confidence in the integrity and truthfulness of its members, especially those who sit on the highest court in the land. But documents that became public during the course of his confirmation process reveal that Judge Kavanaugh has misled the Senate about his beliefs on and prior involvement in issues of national significance.

We therefore urge you to reject Judge Kavanaugh's confirmation.

I. Judge Kavanaugh will undermine abortion rights and deny women autonomy over their own bodies and futures.

President Trump has been clear about his goal from day one: he will *only* appoint justices who will overturn *Roe v. Wade* "automatically"[4] and undo the legal right to abortion care. Judge Kavanaugh was selected specifically because of his anti-abortion views, amongst other equally troubling reasons (such as his views on executive power).[5] Just last year, he made his disdain for *Roe*, and women's fundamental autonomy and rights, clear when he went out of his way to praise former Chief Justice Rehnquist's dissent in the case.[6] Judge Kavanaugh has also ruled against disabled women's right to make their own choices regarding their own reproductive health care – issuing a ruling upholding a DC government policy that had led to two involuntary abortions.[7] Furthermore, less than a year ago, as a member of a three-judge panel, he voted to prevent a young immigrant woman from accessing abortion care she wanted, indicating that he believed the federal government could delay her time-sensitive care past the time when she could legally access abortion in the state where she was being held.[8] When the majority of his colleagues later overruled him, Judge Kavanaugh wrote that the other judges had "badly erred" in allowing the young woman to access the care she sought.[9] His actions show clear disregard for the rights of women, immigrants and communities of color, and women with disabilities. In no instance in Judge Kavanaugh's judicial record has a woman's own need or right to control the decision about whether or not to carry a pregnancy to term been of paramount importance.

Access to reproductive health care is fundamentally about economic security and opportunity. Decisions about whether or when to become a parent or grow one's family are some of the most determinative economic decisions women and families will ever make and are linked to greater educational and professional opportunities and increased lifetime earnings for women.[10] In one study, women who were able to have an abortion had six times higher odds of having positive life plans – most commonly related to education and employment – and were more likely to achieve them than women denied an abortion.[11] When coupled with his hostility to workers (discussed below), Judge Kavanaugh's record on abortion access poses a dire threat to the economic stability of women and families.

While Judge Kavanaugh stated during his hearing that *Roe* is "settled as a precedent of the Supreme Court" this statement is misleading and meaningless – especially in light of a document his time in the Bush administration where he articulated that the "[Supreme] Court can always overrule its precedent, and three current Justices on the Court would do so."[12] There are now four justices on the Court who are poised to overturn *Roe*, and Kavanaugh would undoubtedly provide the fifth and decisive vote. Judge Kavanaugh also

referred to birth control as "abortion-inducing drugs," which is scientifically and medically inaccurate.[13] Judge Kavanaugh would cause grave damage to women's access to safe and legal abortion and contraception, denying women autonomy over their bodies, lives and futures.

II. Judge Kavanaugh will sabotage health care for millions of people.

Another part of President Trump's litmus test for Supreme Court justices is a willingness to gut and eliminate the Affordable Care Act (ACA). This would leave millions more people uninsured and would destroy critical health care protections – such as requiring coverage for pre-existing conditions and maternity care and prohibiting discriminatory practices like gender rating (charging women more than men for the same insurance coverage) – all provisions of the ACA that substantially improve the health of women and children. Recent estimates find that more than half of women and girls nationally – over 67 million – have preexisting conditions.[14] There also are nearly six million pregnancies each year, a common reason for denying women coverage on the individual market before the ACA.[15] Allowing insurers to return to pre-ACA discriminatory practices could mean millions of women being denied coverage or charged more based on their health status. Judge Kavanaugh openly criticized Chief Justice Roberts for his decision to uphold the health care law and, from the bench, repeatedly voiced his opposition to the ACA, including by suggesting that a president could "decline to enforce" this lifesaving legislation if he personally deems it unconstitutional.[16] During his hearing testimony, Judge Kavanaugh repeatedly refused to say that he would uphold protections for people with pre-existing conditions. Health care access for millions of people, and critical programs like Medicaid, hang in the balance. Judge Kavanaugh has shown he cannot be trusted with this responsibility.

III. Judge Kavanaugh will undermine people's rights in the name of religious liberty.

Judge Kavanaugh has promoted a judicial philosophy that the personal beliefs of some should be allowed to dominate the rights and lives of others, granting a license to discriminate against women, LGBTQ people and others. In a public speech, Judge Kavanaugh praised former Chief Justice Rehnquist for rejecting the notion of "a strict wall of separation between church and state."[17] And from the bench, Judge Kavanaugh favored allowing an employer's religious beliefs to override employees' access to birth control, essentially allowing a woman's boss to dictate decisions about her health care.[18] In his hearing testimony, he refused to say that it was immoral to fire an employee based solely on their sexual orientation. Judge Kavanaugh has demonstrated that, under the guise of religious liberty, he would openly encourage employers, health care providers and others to discriminate against women and LGBTQ people, undermining their rights and health.

IV. Judge Kavanaugh is hostile to workers and repeatedly sides with corporations.

In case after case, Judge Kavanaugh has sided against workers, again causing significant harm to women. Judge Kavanaugh's record shows that he has no regard for the rights of workers, consistently ruling against them and the agencies charged with protecting them in cases involving discrimination, worker safety and union representation.[19] Judge Kavanaugh dissented – in favor of the employer and against the worker – in several workplace discrimination cases.[20] Women face persistent workplace discrimination and harassment – including pregnancy discrimination, pay discrimination and sexual harassment – and they must be able to depend on fair adjudication under civil rights law. Judge Kavanaugh has also authored numerous opinions and dissents undermining workers' collective bargaining

rights, eroding the power of unions to advocate for and protect workers.[21] Women – and particularly women of color – benefit greatly from the protection of unions and rely upon the benefits they receive from collective bargaining agreements.[22] With the Supreme Court recently undermining the power of unions to represent workers in *Janus v. AFSCME Council 31*,[23] Judge Kavanaugh will further stack the deck against workers and strengthen corporations' ability to disregard their own workers' safety and dignity and deny them economic opportunity.

V. Judge Kavanaugh sides with big business and big polluters over families.

When corporations have challenged government protections, Judge Kavanaugh has sided with big business and tried to undermine the laws that protect the health and economic security of women and families. He has shielded polluters and opposed Environmental Protection Agency regulations that improve the air we breathe and the water we drink, explicitly prioritizing the financial interests of corporations over the health of families.[24] This endangers communities of color, children and our environment for generations to come. In another dissent, Judge Kavanaugh disparaged the existence of the Consumer Financial Protection Bureau, which was created to protect families' economic security after the largest financial crisis since the Great Depression.[25] His record – which he tried to hide from during his hearing – reflects his hostility toward independent agencies that protect working families. Judge Kavanaugh has repeatedly questioned federal agencies' authority, demonstrating a disregard for scientific integrity and the critical role of government protections.[26]

VI. Judge Kavanaugh has opposed commonsense policies that curb gun violence, making women, families and communities less safe.

When the D.C. Circuit Court upheld a ban on assault weapons, Judge Kavanaugh authored a dissent stating that the Second Amendment guarantees a person's right to own a semi-automatic weapon and rejecting the idea that public safety should be considered when ruling on guns – blatantly ignoring clear evidence that gun safety policies protect the lives of women and children.[27] In his hearing testimony, he reiterated a broad and dangerous view of gun rights that prioritizes his view of "history and tradition" over people's safety. Women in the United States are 16 times more likely to be killed by guns than are women in other developed countries.[28] Judge Kavanaugh does not believe public safety arguments should be considered when deciding on gun matters, making his appointment even more dangerous for the health of our communities.

VII. Judge Kavanaugh believes the president is above the law.

In his personal writing and during his hearing testimony, Judge Kavanaugh has repeatedly demonstrated that he will not stand up to President Trump, allowing President Trump's abuses of power to go unchecked. He has argued that a president should have "absolute discretion" and be able to dismiss any counsel "out to get him,"[29] that a president need not comply with laws that he personally deems to be unconstitutional,[30] and that a president is protected from "criminal prosecution and investigation" while he or she is in office.[31] This is especially troubling given the recent guilty plea of President Trump's former lawyer, Michael Cohen, who implicated the president in federal crimes. Furthermore, in his hearing testimony, Judge Kavanaugh declined to criticize the president's politicization of Justice Department investigations, was evasive about his own conversations regarding the Mueller investigation, and failed to acknowledge the seriousness of the current political moment.

The next justice could decide the scope of executive branch power, and it is essential that the Supreme Court be a check on the president's abuses – not a rubber stamp. This is fundamental to our democracy and our constitutional system of checks and balances. Judge Kavanaugh's confirmation would erode the public's trust in the judicial branch.

VIII. Judge Kavanaugh misled the Senate and the American people during his hearing testimony.

Documents that became public during the course of Judge Kavanaugh's confirmation process reveal that he misled the Senate during his prior confirmation hearings in 2004 and 2006. In addition to the aforementioned email concerning *Roe*, these documents contradict Judge Kavanaugh's prior denials concerning his work during the Bush administration, including his involvement in vetting controversial judicial nominees, his awareness of the theft of secret strategy documents from Democratic senators and his participation in decisions about the warrantless wiretapping program and detainee treatment policy. These are matters of significant importance to the judiciary and to the public, and Judge Kavanaugh's willingness to mislead the Senate should be disqualifying.

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Judge Kavanaugh was handpicked by extreme, right-wing groups to further an anti-choice, anti-LGBTQ, anti-immigrant, anti-worker, anti-civil rights and anti-science agenda.[32] The cumulative impact of Judge Kavanaugh's rulings – by undermining women's rights in every sphere of their lives – would be to completely destabilize the economic security and well-being of women and families. The Senate must reject him for a lifetime appointment on our highest court.

Sincerely,

National Partnership for Women & Families

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[1] National Partnership for Women & Families and the Center for American Progress. (2018). *Moving Backward: Efforts to Undo Pre-Existing Condition Protections Put Millions of Women and Girls at Risk*. Retrieved 14 August 2018, from http://www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf

[2] See, e.g., Sonfield, A., et al. (2013, March). *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children*. Guttmacher Institute. Retrieved 31 August 2018, from https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf (providing an extensive review of studies that document how controlling family timing and size contribute to educational and economic advancements).

[3] See, e.g., Sonfield, A., et al. (2013, March). *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children*. Guttmacher Institute. Retrieved 31 August 2018, from https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf (providing an extensive review of studies that document how controlling family timing and size contribute to educational and economic advancements).

[4] In the final October 2016 presidential debate, Trump replied to a question about whether he would appoint judges to overturn *Roe v. Wade* by saying, "Well, if we put another two or perhaps three justices on, that's really what's going to be — that will happen. . . And that'll happen automatically, in my opinion, because I am putting pro-life justices on the court. I will say this: It will go back to the states, and the states will then make a determination." Berman, M. (2017, March 21). Trump Promised Judges Who Would Overturn *Roe v. Wade*. *Washington Post*. Retrieved 14 July 2018, from https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/

[5] Compare the Supreme Court nominee shortlist that President-elect Trump released on January 12, 2017, with the shortlist released on November 17, 2017, just weeks after Judge Kavanaugh's dissent in *Garza v. Hargan*. *See* de Vogue, A. (2017, January 12). CNN's Donald Trump Supreme Court Nominee Shortlist. *CNN*. Retrieved 14 July 2018, from https://www.cnn.com/2016/12/06/politics/donald-trump-supreme-court-nominee-shortlist/index.html; White House. (2017, November 17). *President Donald J. Trump's Supreme Court List* [Press release]. Retrieved 14 July 2018, from https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/

[6] American Enterprise Institute. (2017, September 18). *From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist* (pp. 12–13, 20). Retrieved 14 July 2018, from https://www.aei.org/wp-content/uploads/2017/08/from-the-bench.pdf. *See also* Kavanaugh, B. M. (2017, July). Keynote address: Two challenges for the judge as umpire: Statutory ambiguity and constitutional exceptions (p. 1917). *Notre Dame Law Review, 92*(5), 1907–1920.

7 Doe ex Rel. Tarlow v. District of Columbia, 489 F.3d 376, 379 (D.C. Cir. 2007), reversing Jane Does I through III v. District of Columbia, 232 F.R.D. 18 (D.D.C. 2005).

[8] Garza v. Hargan, No. 17-5236, 2017 WL 4707112 (Oct. 19, 2017).

[9] Garza v. Hargan. 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018) (claiming that the majority created "a new right for unlawful immigrant minors . . . to obtain immediate abortion on demand . . . ").

[10] See, e.g., Frost, J. & Lindberg, L. (2013, April). Reasons for using contraception: Perspectives of US women seeking care at specialized family planning clinics (p. 465-7). *Contraception, 87*(4), 465-472. Sonfield, supra note 1.

[11] Upadhyay, U., Biggs, M, & Foster, D. (2015, November). The effect of abortion on having an achieving aspirational one-year plans. *BMC Women's Health, 15*(1).

[12] Savage, C. (2018, September 6). Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action. *New York Times*. Retrieved 7 September 2018, from https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html.

[13] American Congress of Obstetricians and Gynecologists. (2017, October). *Facts are Important: Correcting the Record on the Administration's Contraceptive Coverage Roll Back Rule*. Retrieved 12 September 2018, from https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactsareImportantContraceptionRuleFalsehoods.pdf?dmc=1&ts=20180909T2112128808

[14] National Partnership for Women & Families and the Center for American Progress. (2018). *Moving Backward: Efforts to Undo Pre-Existing Condition Protections Put Millions of Women and Girls at Risk*. Retrieved 14 August 2018, from http://www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf

[15] National Partnership for Women & Families and the Center for American Progress. (2018). *Moving Backward: Efforts to Undo Pre-Existing Condition Protections Put Millions of Women and Girls at Risk*. Retrieved 14 August 2018, from http://www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf

[16] *Seven-Sky*, 661 F.3d at 50 n.43 (Kavanaugh, J., dissenting) ("Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.").

[17] See note 3, American Enterprise Institute, p. 10.

[18] Priests for Life v. Dep't of Health & Human Servs., 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[19] *E.g.*, SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202 (D.C. Cir. 2014) (Kavanaugh, J., dissenting); Miller v. Clinton, 687 F.3d 1332 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives, 720 F.3d 939 (D.C. Cir. 2013) (Kavanaugh, J., dissenting); Am. Fed'n of Gov't Emps. v. Gates, 486 F.3d 1316 (D.C. Cir. 2007); Agri Processor Co., Inc. v. NLRB, 514 F.3d 1 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *cert. denied*, 555 U.S. 1031 (2008); Venetian Casino Resort, LLC v. NLRB, 793 F.3d 85 (D.C. Cir. 2015).

[20] *See generally Miller*, 687 F.3d at 1335 (Kavanaugh, J., dissenting from majority opinion in age discrimination case brought against U.S. State Department). *See also Howard*, 720 F.3 at 953 (Kavanaugh, J., dissenting from a majority opinion allowing a Black woman to move forward on her racial discrimination action against a director in an office of the U.S. House of Representatives).

[21] *See Am. Fed'n of Gov't Emps.*, 486 F.3d at 1318–19 (in which Judge Kavanaugh authored majority opinion reversing the lower court's partial blocking of Department of Defense regulations regarding collective bargaining). *See also Agri Processor Co., Inc.*, 514 F.3d at 10 (Kavanaugh, J., dissenting from majority decision ordering company to bargain with undocumented employees).

[22] Institute for Women's Policy Research. (2018, February). *Fact Sheet: The Union Advantage for Women*. Retrieved 14 July 2018, from https://iwpr.org/wp-content/uploads/2018/02/C463_Union-Advantage-Fact-Sheet-February-2018-1.pdf

[23] Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

[24] *See, e.g.*, White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd sub nom.* Michigan v. EPA, 135 S. Ct. 2699 (2015); EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1584 (2013).

[25] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

[26] In a February 2017 speech at Notre Dame Law School, Kavanaugh made it a point to criticize a legal precedent that supports judicial deference to agency actions (known as *Chevron* deference), stating that it "encourages agency aggressiveness on a large scale" and arguing that "Courts [should] no longer defer to agency interpretations of statutes." See note 3, Kavanaugh, pp. 1911–12.

[27] Heller v. District of Columbia, 670 F.3d 1244 (2011) (Kavanaugh, J., dissenting).

[28] National Partnership for Women & Families. (2018, March). *Gun Violence: A Threat to Women and Families* (p. 1). Retrieved 14 July 2018, from http://www.nationalpartnership.org/research-library/health-care/gun-violence-a-threat-to-women-and-families.pdf

[29] Kavanaugh, B. M. (1998, July). The president and the independent counsel: From Watergate to Whitewater and beyond (p. 2151). *Georgetown Law Journal, 86*, 2133–2178.

[30] Kavanaugh, B. M. (2014). Our anchor for 225 years and counting: The enduring significance of the precise text of the Constitution (p. 1911). *Notre Dame Law Review, 89*(5), 1907–1928 ("To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch—at least unless the President deems the law unconstitutional, in which event the President can decline to follow the statute until a final court order says otherwise. In other words, the Executive does have to follow laws regulating the executive branch."); Seven-Sky v. Holder, 661 F.3d 1, 50 n.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *cert. denied*, 567 U.S. 951 (2012) ("Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.").

[31] Kavanaugh, B. M. (2008). Separation of powers during the forty-fourth presidency and beyond (p. 1461). *Minnesota Law Review, 93*, 1454–1486 ("... Congress might consider a law exempting a President – while in office – from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel. Criminal investigations targeted at or revolving around a President are inevitably politicized by both their supporters and critics.")

[32] For example, the Family Research Council (FRC), which has been designated a hate group by the Southern Poverty Law Center, has vocally supported and advocated for Kavanaugh's judicial ascent, including by mobilizing its supporters when Kavanaugh was first nominated to the federal bench. *See, e.g.*, Rev. Dr. Chuck Currie. (2005, May 31). Brett Kavanaugh: Unqualified to sit on a federal court but still supported by the religious right [Blog post]. Retrieved 14 July 2018, from http://chuckcurrie.blogs.com/chuck_currie/2005/05/brett_kavanaugh.html (describing an email alert sent by FRC in 2005 urging subscribers to contact Senators in support of Brett Kavanaugh's nomination to the D.C. Circuit). The Family Research Council has a clear anti-LGBTQ agenda, claiming "homosexuality" is "harmful" and "unnatural," and promoting discrimination against LGBTQ people. For background on the Family Research Council and its designation as hate group, see Southern Poverty Law Center. (n.d.). *Family Research Council*. Retrieved 14 July 2018, from https://www.splcenter.org/fighting-hate/extremist-files/group/family-research-council. Kavanaugh's path to the Supreme Court "short list" and to nomination was also backed by the Heritage Foundation, the Federalist Society and other extremist, right-wing organizations. *See, e.g.*, The Heritage Foundation. (2018, July 10). Trump hits another home run with Supreme Court pick Brett Kavanaugh [Blog post]. Retrieved 14 July 2018, from https://www.heritage.org/courts/commentary/trump-hits-another-home-run-supreme-court-pick-brett-kavanaugh; Barnes, R. (2017, November 18). Federalist Society, White House Cooperation on Judges Paying Benefits. *Washington Post*. Retrieved 14 July 2018, from https://www.washingtonpost.com/politics/courts_law/federalist-society-white-house-cooperation-on-judges-paying-benefits/2017/11/18/4b69b4da-cb20-11e7-8321-481fd63f174d_story.html?utm_term=.88a530e2ce55; Suen, B. (2018, July 11). Extreme Anti-LGBTQ Groups are Uniting Behind Supreme Court Nominee Brett Kavanaugh. *Media Matters*. Retrieved 14 July 2018, from https://www.mediamatters.org/blog/2018/07/11/extreme-anti-lgbtq-groups-are-uniting-behind-trump-supreme-court-nominee-brett-kavanaugh/220638

NRDC

September 4, 2018

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

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

Dear Chairman Grassley and Ranking Member Feinstein:

The Natural Resources Defense Council writes to express its opposition to the nomination of Judge Brett Kavanaugh to a lifetime position on the U.S. Supreme Court.

For more than four decades, NRDC has litigated to enforce federal laws and regulations that protect public health and the environment. We value the importance of an independent federal judiciary and do not oppose judicial nominations lightly. NRDC has opposed only one other Supreme Court nominee in the last twenty-five years.

Judge Kavanaugh's nomination, however, poses a unique threat to the principles and public resources we defend on behalf of our three million members and activists. During his tenure on the U.S. Court of Appeals for the D.C. Circuit, Judge Kavanaugh has consistently favored corporate polluters over clean air and water. He has sought to weaken the ability of federal agencies to protect the American people. And if confirmed to the Supreme Court, he may try to close the courthouse doors to individuals and citizen groups like NRDC who wish to enforce the laws that Congress enacted.

The next Supreme Court justice will likely cast the deciding vote on legal questions that will shape the kind of world we leave to our children. As a result, that justice must be devoted to enforcing Congress's laws that protect public health and the environment from harmful pollution. During his time on the D.C. Circuit, Judge Kavanaugh has demonstrated that he does not fulfill that basic requirement.

1. Prioritizing Corporate Polluters Over Clean Air and Water

Judge Kavanaugh has a consistent track record of ruling against important environmental measures designed to protect clean air and water. For example, in 2012 Judge Kavanaugh sought to strike down in its entirety an EPA rule addressing harmful air pollution that crosses state boundaries. Judge Kavanaugh argued that the Clean Air

Act purportedly precluded EPA from considering cost-effectiveness when determining an upwind state's emission-reduction responsibilities, and asserted—in a telling show of hubris—that he "ha[d] no doubt that the agency chose incorrectly."[1] The Supreme Court reversed Judge Kavanaugh's opinion by a 6-2 vote, however, concluding that his approach ignored the "realities of interstate air pollution," and affirming that EPA's rule was a "permissible, workable, and equitable interpretation" of the Clean Air Act.[2]

The cross-state air pollution ruling exhibits Judge Kavanaugh's one-sided view about the role of cost in environmental regulation—a view that consistently puts corporate polluters' interests ahead of clean air and water. His conclusion that the Clean Air Act somehow *prohibited* EPA from considering costs when allocating emission-reduction responsibilities stands in stark contrast with his dissenting opinions in subsequent cases, where he concluded that EPA was *required* to consider costs before either regulating toxic mercury emissions from power plants or prohibiting a coal company from dumping mining waste into valley streams.[3] Thus, in Judge Kavanaugh's view, costs *cannot* be considered to justify imposing additional measures on laggard polluters, but *must* be considered when they might support weakening restrictions. In other words, Judge Kavanaugh expresses more concern with the economic bottom line of coal companies' "owners and shareholders"[4] than with the clean air and water that Congress enacted the underlying environmental statutes to protect.

Judge Kavanaugh's dissenting opinions in these Clean Air Act and Clean Water Act cases also reflect a bias against environmental protection that appears throughout his judicial record. Dissenting opinions are often the most revealing about a judge's individual views of the law. During his time on the D.C. Circuit, Judge Kavanaugh has authored ten dissents in environmental cases: In each one, he argued against the side that sought to protect public health or the environment.[5] Judge Kavanaugh appears to

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[1] *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 37 (D.C. Cir. 2012) (Kavanaugh, J.).

[2] *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1605, 1610 (2014).

[3] *See White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1258-66 (D.C. Cir. 2014) (Kavanaugh, J., dissenting); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730-35 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

[4] *Mingo Logan Coal*, 829 F.3d at 733-34 (Kavanaugh, J., dissenting).

[5] *See id.; Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting); *White Stallion*, 748 F.3d at 1258-73 (Kavanaugh, J., dissenting); *Texas v. EPA*, 726 F.3d 180, 199-205 (D.C. Cir. 2013) (Kavanaugh, J., dissenting); *Grocery Mfrs. Ass'n v. EPA*, 704 F.3d 1005-08 (D.C. Cir. 2013) (Kavanaugh, J., dissenting from denial reh'g en banc); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 180-92 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); *Coal. for Responsible Regulation, Inc. v. EPA*, Nos. 09-1322+, 2012 WL 6621785, at *14-23 (Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of reh'g en banc); *Howmet Corp. v. EPA*, 614 F.3d 544, 554-56 (D.C. Cir. 2010) (Kavanaugh, J., dissenting); *Sierra Club v. EPA*, 536 F.3d 673, 680-82 (D.C. Cir.

have *never* authored a dissent arguing in favor of environmental protection.

2. Weakening Agencies' Ability to Protect the American People

Consistent with his views in the above cases, Judge Kavanaugh has voted time and again to restrict the ability of administrative agencies like EPA to carry out their statutory missions to protect the public. Indeed, the White House outwardly boasts about this aspect of his record, highlighting to industry trade groups on the night of his nomination that Judge Kavanaugh overruled federal agencies 75 times in cases involving clean air, consumer protections, and other issues, and specifically "helped kill President Obama's ... new environmental rules."[6]

And yet, Judge Kavanaugh often takes a more lenient approach to agency authority when agencies seek to *weaken* environmental protections. For example, during the George W. Bush administration, when other conservative D.C. Circuit judges found that EPA violated the Clean Air Act by weakening requirements for power plants, Judge Kavanaugh dissented and sought to justify the agency's unlawful deregulation.[7] And he did the same last year in the first environmental case to reach the D.C. Circuit during the Trump administration, when he voted in favor of then-EPA Administrator Scott Pruitt's attempt to suspend new emissions restrictions for methane pollution.[8]

Climate change presents a particularly stark example where Judge Kavanaugh has undermined agencies' ability to protect the public. Judge Kavanaugh has voted repeatedly to strike down EPA's efforts to regulate greenhouse gases[9]—notwithstanding the Supreme Court's affirmation that the Clean Air Act authorizes EPA to protect the public from climate pollutants.[10] For example, Judge Kavanaugh last year struck down a sensible EPA rule that required companies to swap out the potent climate pollutants called HFCs for safer, readily available alternatives. His dissenting colleague observed that Judge Kavanaugh's "cramped" interpretation of the Clean Air Act renders EPA

2008) (Kavanaugh, J., dissenting); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1035-37 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

[6] *See* Lorraine Woellert, *Trump Asks Business Groups for Help Pushing Kavanaugh Confirmation*, Politico, July 9, 2018, https://www.politico.com/story/2018/07/09/brett-kavanaugh-business-groups-trump-705800.

[7] *Sierra Club*, 536 F.3d at 680-82 (Kavanaugh, J., dissenting).

[8] *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017), *reh'g denied* Aug. 10, 2017 (Kavanaugh, J., dissenting).

[9] *See, e.g., Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017) (Kavanaugh, J.); *Texas*, 726 F.3d at 199-205 (Kavanaugh, J., dissenting); *Coal. for Responsible Regulation*, 2012 WL 6621785, at *14-23 (Kavanaugh, J., dissenting from denial of reh'g en banc).

[10] *See Am. Elec. Power Co. v. Conn.*, 564 U.S. 410 (2011); *Mass. v. EPA*, 549 U.S. 497 (2007).

"powerless" and "makes a mockery" of Congress's stated purpose to "'reduce overall risks to human health and the environment.'"[11] Judge Kavanaugh's interpretation was so "extreme" that even the industry challengers did not advance it[12], and several major companies—alongside NRDC and seventeen states—have asked the Supreme Court to reverse it.[13]

Judge Kavanaugh has sought to justify his dismal record on climate change by invoking a legal theory he dubs the "major rules doctrine," which—if adopted by the Supreme Court—would have large deregulatory consequences across many fields, from consumer protection and financial regulation, to healthcare and civil rights, to clean air and water. Judge Kavanaugh's theory prohibits federal agencies from taking actions with great economic or political significance absent "*clear* congressional authorization."[14] His view is that while existing law "*allows* an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules."[15] However, longstanding Supreme Court precedent ensures agencies faced with statutory ambiguity can adopt the rules that experts determine to be reasonable based on real-world conditions. Judge Kavanaugh would discard that sensible approach for the most important questions agency experts face.

This theory is deeply troubling in numerous respects. First and foremost, it precludes agencies from using their existing statutory authority to protect the public from "major" new problems. Instead, an agency would have to return to Congress for new legislation, even if the best reading of the earlier statute indicated that Congress intended to empower the agency to address such problems as they arise. Second, it allows judges to pick and choose when they wish to impose this heightened burden on agency regulations. Judge Kavanaugh admitted there is no "bright-line test that distinguishes major rules from ordinary rules," and that his theory "has a bit of a 'know it when you see it' quality."[16] Third, as with much of Judge Kavanaugh's record, the theory has a distinctly one-sided result: it works only to *prevent* agencies from issuing

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[11] *Mexichem Fluor*, 866 F.3d at 468 (Wilkins, J., dissenting) (quoting 42 U.S.C. § 7671k(a)).

[12] *Id.*

[13] *See Honeywell Int'l, Inc. v. Mexichem Fluor, Inc.*, No. 17-1703 (S. Ct.); *NRDC v. Mexichem Fluor, Inc.*, No. 18-2 (S. Ct.).

[14] *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc).

[15] *Id.* at 419.

[16] *Id.* at 422-23.

new rules, while ignoring entirely that agencies' *failure* to regulate pursuant to existing statutory authority often has great economic or political significance as well.

Judge Kavanaugh has also sought to undermine the ability of Congress to entrust certain decision decisions to "independent agencies"—like the Consumer Product Safety Commission, Federal Energy Regulatory Commission (FERC), and Nuclear Regulatory Commission—which Congress has shielded from undue political influence in order to focus on protecting the public. Recently, when voting to strike down the structure of the Consumer Financial Protection Bureau as unconstitutional, Judge Kavanaugh gratuitously questioned the constitutionality of *all* independent agencies.[17] Perhaps the most remarkable—and disturbing—aspect of this ruling is Judge Kavanaugh's apparent eagerness to revisit long-settled Supreme Court precedent that has governed the separation of powers among the branches of our government for more than 80 years.

3. Closing Courthouse Doors to Citizens Who Seek to Enforce the Law

Finally, Judge Kavanaugh has expressed extreme views about access to the courts that could severely restrict the ability of citizens—and citizen groups like NRDC—to enforce the laws that Congress has enacted. The legal doctrine of "standing" requires plaintiffs, at the outset of a lawsuit, to identify injuries caused by the challenged action that could be redressed by a favorable court decision. In cases seeking to enforce environmental protections, plaintiffs often satisfy this requirement by pointing to the increased health risks caused by the challenged action. But Judge Kavanaugh, in a case involving automobile safety regulations, questioned whether these types of "increased-risk-of-harm claims" could *ever* satisfy constitutional standing requirements.[18]

That view, if adopted by the Supreme Court, could foreclose many of the lawsuits that individuals and groups like NRDC bring to enforce Congress's laws protecting public health, safety, and the environment. It would make it exceedingly difficult to challenge unlawful actions that expose the public to increased health risks—such as the use of toxic substances in consumer products, the discharge of pollutants into drinking water, or the release of dangerous emissions into the air. Corporate polluters could take such actions with impunity, knowing that citizen groups could not challenge them in court—no matter how blatantly unlawful their actions might be.

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[17] *PHH Corp. v. CFPB*, 881 F.3d 75, 179 n.7 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); *see also PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (Kavanaugh, J.).

[18] *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1294 (D.C. Cir. 2007) (Kavanaugh, J.) (internal quotation marks omitted).

Meanwhile, Judge Kavanaugh's approach to standing diverges sharply in cases where corporate plaintiffs bring suit based on perceived economic harms. In those cases, unlike with increased-risk-of-harm claims, Judge Kavanaugh applies a more lenient "common sense" approach to determine whether the plaintiff would face *any* impact to its economic bottom line.[19] Indeed, Judge Kavanaugh is even more lenient than his fellow D.C. Circuit judges in allowing corporate plaintiffs to challenge agency regulations.[20] Thus, Judge Kavanaugh's standing jurisprudence—like so many other aspects of his judicial record—favors corporate profits over protections for public health or the environment.

For the foregoing reasons, we urge you and the other Senate Judiciary Committee members to vote against Judge Kavanaugh's nomination. At the very least, given the stakes of a lifetime appointment to the Supreme Court, and the significant questions that Judge Kavanaugh's judicial record raises about his fidelity to the law, the Committee should refrain from sending his nomination to the full Senate until it has had an opportunity to review the complete record of his tenure in the White House.

Sincerely,

Rhea Suh
President
Natural Resources Defense Council

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[19] *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (Kavanaugh, J.).

[20] *See, e.g., Grocery Mfrs. Ass'n*, 693 F.3d at 181-90 (Kavanaugh, J., dissenting); *Morgan Drexen, Inc. v. CFPB*, 785 F.3d 684, 698 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).

NATIONAL SHOOTING SPORTS FOUNDATION, INC.
Headquarters: 11 Mile Hill Road, Newtown, CT 06470-2359
400 N. Capitol Street NW, Suite 490, Washington, D.C. 20001
[redacted]

Lawrence G. Keane
SVP Gov't & Public Affairs
Assistant Secretary & General Counsel

August 30, 2018

The Honorable Chuck Grassley
U.S. Senate Committee on Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
U.S. Senate Committee on Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The National Shooting Sports Foundation® (NSSF®) is the trade association for America's firearms, ammunition, hunting and shooting sports industry, representing manufacturers, distributors, retailers, shooting ranges and endemic media. NSSF's mission is to promote, protect and preserve hunting and the shooting sports. On behalf of our nearly 12,000 members, we respectfully urge your support for President Trump's nomination of Judge Brett Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States.

Judge Kavanaugh is among the most highly qualified individuals ever nominated to serve on our nation's highest court. He has dedicated much of his life to public service. Throughout his impressive career, Judge Kavanaugh has built a strong judicial record and has earned the respect of his peers. He graduated Yale College and Yale Law School. He clerked for Supreme Court Associate Justice Anthony Kennedy, whom he has been nominated to replace, and later for Ninth Circuit Judge Alex Kozinski and Third Circuit Judge Walter Stapleton. In 2006, he was confirmed to the U.S. Court of Appeals for the D.C. Circuit, often referred to as our nation's second most important court. He has issued more than 300 opinions in 12 years on the bench. The Supreme Court has affirmed opinions he authored more than a dozen times, and more than 210 other judges throughout the country have cited to his opinions.

Judge Kavanaugh is an originalist in the mold of Justice Scalia, his role model. His judicial philosophy is straightforward; a judge must be independent and must interpret the law, not make the law. He believes a judge must interpret statutes and the Constitution as written, informed by history and tradition and precedent.

We are confident that because of his excellent qualifications and his steadfast support and respect for the law, Judge Kavanaugh will serve our nation with distinction as an Associate Justice of our nation's highest court and that he will make decisions that will serve to protect the Second Amendment and other Constitutionally guaranteed rights of law-abiding Americans.

As the members of the United States Senate practice their constitutional duty to provide their advice and consent, NSSF strongly urges all members of your committee and the entire distinguished body to vote in favor of Judge Brett Kavanaugh as Associate Justice of the United States Supreme Court.

Sincerely,

Lawrence G. Keane

CC: The Honorable Mitch McConnell, Majority Leader of the United States Senate
The Honorable Chuck Schumer, Minority Leader of the United States Senate
Members of the United States Senate Committee on Judiciary

National Task Force to End Sexual & Domestic Violence

September 4, 2018

Dear Senator:

The National Task Force to End Sexual and Domestic Violence (NTF), comprising national, state, tribal, territorial, and local leadership organizations representing thousands of advocates and others working to end domestic violence and sexual assault, writes to express our deep concern about the nomination of Brett Kavanaugh to fill the vacancy on the US Supreme Court. In addition to concerns noted in a prior letter about the lack of documents shared from Kavanaugh's time in the White House, we are particularly troubled by the impact of this nomination on the safety, health, rights, and well-being of domestic violence and sexual assault survivors as it relates to firearms, reproductive rights, health care, and privacy, as well as larger issues of judicial independence.

Domestic Abusers' Access to Firearms

In America, abused women are five times more likely to be killed if their abuser has access to a firearm, and domestic violence assaults involving a gun are 12 times more likely to end in death than assaults with other weapons or physical harm.[1] In a 2004 survey of female domestic violence shelter residents in California, more than a third reported having been threatened or harmed with a firearm.[2] In nearly two thirds of cases in which a gun was present in a household shared by a domestic abuser and victim, the abuser had used the firearm against the victim, usually threatening to shoot or kill her.[3]

Judge Kavanaugh's record of ruling against gun violence protection measures is a direct threat to survivors of domestic violence. After the Supreme Court decided 5-4 in the 2008 case *District of Columbia v. Heller* that the Second Amendment protects an individual's right to bear arms, Washington, DC passed laws that prohibited assault weapons and high-capacity magazines, and that required certain firearms to be registered. The same plaintiff, Richard Heller, argued again that the new gun laws violated the Second Amendment. In the 2011 case *Heller v. District of Columbia*, a panel of three Republican-appointed judges ruled 2-1 that DC's ban on assault weapons and high-capacity magazines was constitutional. In Judge Kavanaugh's dissent, he held that the ban on assault weapons was

[1] Giffords Law Center. "Domestic Violence & Firearms." 2017. http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/

[2] Susan B. Sorenson et al., *Weapons in the Lives of Battered Women*, 94 Am. J. Pub. Health 1412, 1413 (2004).

[3] Giffords Law Center. "Domestic Violence & Firearms." 2017. http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/

unconstitutional. He wrote: "In *Heller*, the Supreme Court held that handguns — the vast majority of which today are semi-automatic — are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles."[4]

It is troubling that Judge Kavanaugh sees no difference between assault weapons and handguns. As a candidate, President Trump stated: "I'm very proud to have the endorsement of the NRA and it was the earliest endorsement they've ever given to anybody who ran for president.... We are going to appoint justices that will feel very strongly about the Second Amendment." Judge Kavanaugh clearly passes this litmus test. This is deeply alarming given the well-documented intersection of domestic violence and firearms.

Reproductive Rights

We believe that every person has the right to control what happens to their body, free from coercion or fear. This freedom should not be limited to the ability to accept or reject sexual experiences, rather, true bodily autonomy requires that an individual can make informed decisions about involvement in any experience: sexual, medical, or otherwise[5].

The right to access abortion safely and legally in this country will likely disappear if Judge Kavanaugh is confirmed. President Trump has been explicit that he would only nominate someone who would "automatically overturn" *Roe v. Wade*. Judge Kavanaugh was on the list of candidates who met that criteria, compiled by the uber-conservative Federalist Society and Heritage Foundation. In the well-known "Jane Doe" case, Kavanaugh tried to block a young immigrant woman's access to abortion care, claiming that the court was creating "a new right" for immigrants in custody "to obtain immediate abortion on demand." Over Kavanaugh's dissent, the DC Circuit rightly allowed the young woman to seek the medical care she needed. While abortion rights are not a focus of all of our organizations, the right to bodily autonomy and personal decision making is. These concepts are at the heart of our movement to end domestic and sexual violence.

Affordable Care Act

As a DC Circuit Court Judge, Kavanaugh dissented from the opinion upholding the constitutionality of the Affordable Care Act (ACA). And, just weeks before being added to President Trump's aforementioned short list of potential candidates, Kavanaugh criticized Chief Justice Roberts for the reasoning he used in *NFIB v. Sebelius* to uphold the ACA's individual mandate. If Kavanaugh were confirmed, millions of Americans — including survivors of domestic and sexual violence — would likely lose their health care. The ACA not only expanded health insurance coverage to millions of individuals who were previously uninsured, it changed the landscape for women's health insurance coverage and access. Thanks to the ACA, domestic and sexual violence survivors cannot be charged more for, or be

[4] United States Court of Appeals for the District of Columbia. "District of Columbia v. Heller." 2011. Page 47. https://www.cadc.uscourts.gov/internet/opinions.nsf/DECA496973477C748525791F004D84F9/$file/10-7036-1333156.pdf

[5] California Coalition Against Sexual Assault (CALCASA), May 2, 2017.

turned away from, health coverage.

Prior to the ACA, insurance companies denied coverage to women based upon "pre-existing conditions," such as receiving medical treatment for domestic or sexual violence. In fact, seven states allowed health plans to deny coverage based on a history of domestic violence — and only 22 states had limited protections against plans using domestic violence as a pre-existing condition.[6]

Privacy and Technology:
Judge Kavanagh has made disturbing comments about expectations of privacy on smartphones in criminal law cases. He has expressed the opinion that phone companies operate as "third parties" that destroy any expectation of privilege or privacy — an opinion that is in opposition to existing Supreme Court holdings on the issue. This would be a terrifying outcome if this position became the standard in the law for survivors of domestic and sexual violence. Survivors use their smartphones to search for and access confidential help in fleeing abuse. Abusers routinely try to obtain this information by seeking discovery regarding their confidential communications with victim advocacy organizations. If Judge Kavanagh's position is adopted, survivors will have no ability to seek help confidentially.

Judicial Deference to Federal Agencies
In a February 2017 speech at Notre Dame Law School, Kavanaugh made it a point to criticize a legal precedent that supports judicial deference to agency actions (known as the *Chevron* doctrine), stating that it "encourages agency aggressiveness on a large scale" and arguing that "Courts [should] no longer defer to agency interpretations of statutes." Such disregard for scientific integrity, subject matter experts, and the critical role of government protections is concerning. For more than three decades, since 1984, the Supreme Court has required judges to defer to administrative agencies' interpretations of federal law in most cases where the law is "ambiguous" and the agency's position is "reasonable." Conservative Justice Antonin Scalia defended the Chevron doctrine as an important rule-of-law principle.

Federal agencies issue regulations addressing a wide array of issues, including firearm protections by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Overturning the *Chevron* precedent would return that ultimate decision-making authority to judges rather than the subject-matter experts, inviting a challenge to every regulation and rule in the federal government. Kavanaugh's confirmation would invite attacks on the regulations that govern protection orders and misdemeanor crimes of domestic violence prohibitors, and other protections and programs directly impacting domestic and sexual violence.

Knowledge of Ongoing Sexual Assault by a Federal Judge
Judge Kavanaugh clerked for Judge Alex Kozinski of the Ninth Circuit and has reportedly remained close to his former boss, who left the Ninth Circuit in late 2017 after over a dozen allegations of sexual harassment by his former clerks. Long before the Washington Post exposed the allegations against him

[6] https://www.futureswithoutviolence.org/3-things-at-stake-aca/, January 10, 2017.

in 2017[7], Kozinski's sexualized and abusive behavior was an open secret in the legal profession.[8] Kavanaugh and Kozinski reportedly worked together for years as "screeners" for Justice Kennedy, essentially hiring the Justice's clerks for him. This process led to many applicants who had previously clerked for Kozinski obtaining clerkships with Justice Kennedy. As a result, Kavanaugh helped maintain the prestige of a Kozinski clerkship, which no doubt had the effect of encouraging many young attorneys to continue to seek Kozinski clerkships despite the widespread rumors of abusive behavior.

The White House has asserted that Judge Kavanaugh "had never heard any allegations of sexual misconduct or sexual harassment" by Kozinski prior to the story becoming public last year, but some in the legal community have asserted that this strains credulity. Judge Kavanaugh must speak fully to the question of what he knew about Kozinski's abusive behavior, when he learned of it, and what actions he took in response. Too much is at stake for women for the Senate to move forward on his nomination without a thorough vetting of these questions.

Belief that the President is Above the Law

The overreach of the Trump Administration — as well as President Trump's unabashed disrespect for independent judges — underscores why we need a Supreme Court that will serve as a check on politicians in all branches of government. Judge Kavanaugh's writings demonstrate that he would be anything but an independent check on the executive branch. He wrote that a sitting president should never be able to be criminally indicted, and that the president "should have absolute discretion" to decide whether and when he can be investigated, as well as decide who can conduct that investigation. As if that weren't enough, he thinks any special prosecutor should be removable at will by the president. The president isn't above the law — but Judge Kavanaugh thinks he is.

The nomination of Judge Brett Kavanaugh to the US Supreme Court threatens women's reproductive rights and access to healthcare for all Americans. The Supreme Court is the ultimate arbiter of our most cherished rights, and it is no place for someone so far outside of the mainstream who will roll back the clock on hard-won freedoms and rubber stamp the Trump Administration's dangerous agenda. In addition to our specific concerns as advocates for the safety, health, rights and well-being of survivors of domestic and sexual violence and their families, we join many others in raising broader concerns about Judge Kavanaugh's extreme views on issues of key importance to all Americans.

For questions or more information, please contact:

Jody Rabhan, Director of Washington Operations, National Council of Jewish Women
JRabhan@ncjw.org

Lisalyn R. Jacobs, CEO, Just Solutions
lrjust.solutions@gmail.com

[7] Prominent appeals court Judge Alex Kozinski accused of sexual misconduct. (Washington Post) December 8, 2017.
[8] More Women Speak Out About Judge Kozinski's Behavior: Say It Was An 'Open Secret' (Above the Law) December 11, 2017

National Task Force to End
Sexual & Domestic Violence

September 18, 2018

The Honorable Chuck Grassley
Chairman
Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Judiciary Committee
331 Hart Senate Office Bldg.
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The member organizations of the National Task Force to End Sexual and Domestic Violence (NTF) represent millions of survivors of domestic violence, dating violence, sexual assault and stalking, the professionals who serve these survivors, the faith organizations that support them, the schools that educate them, and the businesses and communities that care about them throughout the United States and territories. The NTF has worked for twenty years to ensure that federal, tribal, state, and local governments and communities address the pervasive and insidious crimes of domestic violence, dating violence, sexual assault and stalking. We are dedicated to keeping survivors safe and free from continuing trauma, while holding perpetrators accountable.

We write to express our opposition to the reported new process for assessing Judge Kavanaugh's fitness to serve as a Supreme Court Justice given recent reports of his sexual assault against a fellow high school student. We understand the Judiciary Committee's keen interest in speaking to Dr. Christine Blasey Ford, the woman who shared her story with a Member of Congress earlier this summer. However, we respectfully request that you consult with her as to the best time and manner for her to speak with you.

Importantly, with regard to your process, Dr. Ford is not on trial. She is a survivor of sexual assault who may or may not choose to share her story publicly. Your process is not a trial. It is an effort to gather information about the fitness of a man poised to receive a lifetime appointment to the Supreme Court. As advocates for victims of sexual assault and domestic violence, we must strongly request you treat her in a victim-centered, trauma-informed manner.

Specifically:

We ask that you slow down the nomination process and allow a comprehensive, bipartisan investigation of the allegations out of the public eye. Dr. Ford was courageous in sharing her story. We are outraged to learn that some are suggesting she be cross-examined at an upcoming hearing by Judge Kavanaugh's attorney; speak on the phone or be interviewed by staff about the incident; and/or be immediately called to testify before the committee. This suggests a rushed, adversarial process designed to intimidate or discredit her. Not only is this problematic for your process, it would also be deeply traumatizing for any survivor. A thorough investigation, wherein she is listened to objectively and any other relevant witnesses are spoken to, must be completed before any hearing is scheduled.

We strongly encourage you to consult with experts on the issues of sexual violence and trauma before deciding how to proceed with a future public hearing and to include expert witnesses on these issues at any public hearing.

Finally, we urge you to adhere to some basic tenets of a trauma-informed approach. For example:

- Providing Dr. Ford as much input as possible into the time, date, and format of questioning.
- Ensuring a safe and comfortable environment (emotionally and physically) for any questioning or hearing.
- Allowing Dr. Ford to have support people with her and take breaks as needed.
- Repudiating any personal attacks on Dr. Ford.
- Providing clear information to Dr. Ford about the process and encouraging and allowing her to ask questions and ask for clarification as needed ahead of time and throughout the process.
- Refraining from inaccurate, stereotypical assumptions and negative judgments that have been refuted by research such as a suggestions that delayed reports of sexual assault are not credible; attacking credibility based on gaps in memory; and suggesting emotional presentation reflects on credibility.

Thank you for considering our requests. We stand ready to assist you in ensuring the process is fair. Please contact Terri Poore at terri@endsexualviolence with any questions.

Sincerely,

The National Task Force to End Sexual and Domestic Violence

September 4, 2018

VIA EMAIL

The Honorable Charles Grassley
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C., 20510

Senator Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C., 20510

Dear Senators Grassley and Feinstein,

On behalf of the National Women's Law Center, an organization that has fought to protect women's legal rights and protections for 45 years, I write in strong opposition to the nomination of Brett Kavanaugh as an Associate Justice of the United States Supreme Court. The Center's review of Judge Kavanaugh's record has led it to conclude that his confirmation to the Supreme Court would shift the balance of the Court against our core civil and constitutional rights. The bases for the Center's conclusions are set forth in more detail in the Center's report on Judge Kavanaugh's record on women's legal rights.

As an initial matter, Judge Kavanaugh's nomination and confirmation process are irreparably tainted, and we firmly believe this sham process should not move forward. President Trump's nomination of Judge Kavanaugh followed Trump's repeated and unprecedented commitments as to the kind of individual he would nominate as a Supreme Court Justice. First, Trump repeatedly committed to nominate only individuals who would vote to overturn *Roe v. Wade* and dismantle the Affordable Care (ACA), even declaring that if he were elected *Roe* would be overturned "automatically." Second, he said that he would nominate a Justice "in the mold" of the late Justice Scalia, a justice who, in addition to consistently voting to overturn *Roe v. Wade*, voted to strip legal and constitutional antidiscrimination protections from women and girls at work, at school, and in their communities. Third, Trump promised to only select someone who appeared on lists approved by the Heritage Foundation and the Federalist Society – in effect, outsourcing the vetting of his Supreme Court nominees to these right-wing groups. Judge Kavanaugh, in turn, effectively auditioned to have his name added to this short list. Judge Kavanaugh gave speeches signaling his hostility to the Constitution's protections for personal liberty and disdain for the Affordable Care Act and voted to block a young, immigrant woman from getting an abortion. Within weeks of these actions, he was added to President Trump's short list.

In addition, although it is critical that all senators thoroughly scrutinize Judge Kavanaugh's entire record in order to properly fulfill their constitutional duty of advice and consent on this highly unusual nomination, the hearing is proceeding when only a fraction of Judge Kavanaugh's documents have been released to the Committee and even fewer have been made available to the public. Finally, this nomination is being expedited in the shadow of an ongoing criminal investigation involving President Trump. Any nominee confirmed under this extraordinary process carries the taint of this illegality, and confirmation of such a nominee in this moment would taint the Supreme Court itself.

Given Trump's explicit promises, it is especially important to scrutinize Judge Kavanaugh's fitness to serve on this most important court. It is crucial this Committee only advance a nominee who demonstrates an affirmative commitment to precedent and to core constitutional protections, including the right to liberty. Yet, as set forth in the Center's report, our review of Judge Kavanaugh's record reveals a troubling pattern of hostility to the fundamental constitutional rights and legal protections that allow women to make decisions about their own bodies and health care, give women equal opportunity at work and at school, and enable women to live their lives with dignity. Judge Kavanaugh has a very limited view of the right to liberty and the Constitution's protections for women's personal decision-making, including the right abortion and contraception. He has criticized protections that ensure access to quality, affordable health care, including by expressing animosity to the Affordable Care Act and voting to allow employers' religious beliefs to override the right to birth control coverage. He has repeatedly argued to deprive entire categories of workers of critical workplace protections with no regard for the consequences to the workers. And his approach to the law would severely weaken core workplace rights and antidiscrimination protections. In addition, Judge Kavanaugh shows a shocking disregard for Supreme Court precedent, twisting it, and even ignoring it, in order to reach the outcome he desires.

The country needs justices on the Supreme Court who respect core constitutional values of liberty, equality, and justice. Yet, Judge Kavanaugh's record shows his confirmation would pose a dire threat to the core constitutional and legal protections women and girls rely on. We urge you to vote against Judge Kavanaugh's nomination.

Sincerely,

Fatima Goss Graves

Fatima Goss Graves
President and CEO
National Women's Law Center

September 4, 2018 *VIA EMAIL*

The Honorable Charles Grassley
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C., 20510

Senator Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C., 20510

Dear Senators Grassley and Feinstein,

As Native women leaders of North Dakota who understand fully the decisions we make today will not only affect us, but seven generations ahead of us, we urge this Committee to vote no on the nomination of Judge Brett Kavanaugh to the Supreme Court. This Committee must closely examine Judge Kavanaugh's record regarding Native peoples. We believe that as both a lawyer and as a judge, Judge Kavanaugh has failed consistently to acknowledge the sovereignty, natural resources, and unique history and heritage of Native People.

Judge Kavanaugh's views on voting rights and racial justice in America are extremely troubling- in light of the fact that right now Native voters in North Dakota are fighting for their voting rights in *Brakebill v. Jaeger*, which is headed to the U.S. Supreme Court.

His actions and writings reveal a lack of understanding about the rights of Native People. Additionally, it is unlikely he will support access to affordable health care through the provisions of the Affordable Care Act (ACA) or advocate for the health care rights of women.

In 2012, Judge Kavanaugh ruled against the Obama Justice Department's challenge to a South Carolina voter ID law that claimed significant racial disparities in the law's photo ID requirement in *South Carolina v. United States*, 898 F.Supp.2d 30 (D.C. Cir. 2012). In writing the opinion for the three-judge panel, Kavanaugh refused to acknowledge the importance of Section 5 of the Voting Rights Act, which provides the review process for new voting laws – and without which the South Carolina law would have been even more restrictive.

We agree with the concerns expressed by the National Congress of American Indians (NCAI) over Judge Kavanaugh's tribal sovereignty views, particularly as they relate to voting rights and health care.

"Voting rights are first-generation rights along with freedom of speech, the right to a fair trial, and freedom of religion. Yet American Indian and Alaska Native voters continue to encounter language barriers, enormous distances to polling places, arbitrary changes in voter identification laws, purged voter rolls, and intimidation and animosity in reservation border towns that disenfranchise Native voters. Equal access to voting is not only a matter of fairness, but it is a fundamental civil right afforded to all citizens, including American Indians and Alaska Natives."
- NCAI Executive Director, Jacqueline Pata

In 1999, Kavanaugh co-wrote an amicus brief, as an attorney, (on behalf of a group that opposes minority rights and affirmative action) he argued that a Hawaii law allowing only Native Hawaiians to vote for trustees of a state office, an original treaty between the US and Native

Hawaiians to compensate Native Hawaiians for land that had been taken from their ancestors, was unconstitutional [Rice v. Cayetano, 528 U.S. 495 (D.C. Cir. 2000)].

He said in an interview that the case "is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of government" (The Christian Science Monitor, 1999). Kavanaugh's misleading use of language and law, such as utilizing the veneer of "equality" to obliterate treaty obligations, is a deeply troubling indication he is opposed to critical civil rights protections and to equal opportunity programs that are designed to advance diversity and remedy past discrimination.

Our concerns are grounded in human and Native rights, not partisan politics. Supreme Court Justice Neil Gorsuch, another appointee of President Trump, has a good record with regard to Native People, we supported him, and he has sided with Tribes in two of three cases since he joined the court. We have no such confidence in Judge Kavanaugh.

Finally, as mothers, daughters and grandmothers, we believe Judge Kavanaugh is a significant threat to the ACA and its important protection for pre-existing conditions, as well as to women's reproductive and health care rights.

Native People deserve better. We all do.

For the above reasons, we urge the Senate Judiciary Committee to vet Judge Kavanaugh thoroughly and to vote NO for his selection to the Supreme Court of the United States.

Respectfully,

Chairwoman Myra Pearson
Spirit Lake Nation

Mary Baker
MHA Nation

Twyla Baker
MHA Nation

Sandra Bercier
Turtle Mountain Band of Chippewa

Melissa Brady
Spirit Lake Nation

Ruth Buffalo
MHA Nation

Anita Charging
MHA Nation

Danielle Finn
Standing Rock Sioux Tribe

Cedar Gillette
MHA Nation & Turtle Mountain
Band of Chippewa

Lillian Jones
MHA Nation

Cheryl Kay
Standing Rock Sioux Tribe

Hillary Kempenich
Turtle Mountain Band of Chippewa

Denise Lajimodiere
Turtle Mountain Band of Chippewa

Sheridan Seaboy-McNeil
Standing Rock Sioux Tribe

Linda Bradfield Gourneau, MD
MHA Nation

Tawny Cale
Turtle Mountain Band of Chippewa

Sunshine Carlow
Standing Rock Sioux Tribe

Kelly Charging
MHA Nation & Turtle Mountain
Band of Chippewa

Stephanie DeCoteau
Turtle Mountain Band of Chippewa

Lisa DeVille, MHA Nation

Nicole Donaghy
Standing Rock Sioux Tribe

Alayna Eagle Shield
Standing Rock Sioux Tribe

Amber Finley
MHA Nation

Bill Jo Gravseth
Standing Rock Sioux Tribe

Natasha Gourd
Spirit Lake Nation

Ashly Hall
MHA Nation

Tammy Hammer
MHA Nation

Andrea Denault
Turtle Mountain Band of Chippewa

Tonya Hertel
Standing Rock Sioux Tribe

Marlo Hunte-Beaubrun
Standing Rock Sioux Tribe

Margaret Landin
MHA Nation

Amanda Myrhe
Standing Rock Sioux Tribe

Melanie Nadeau, PhD
Turtle Mountain Band of Chippewa

Prairie Rose Seminole
MHA Nation & Northern Cheyenne

Jodi Spotted Bear
Indigenous Media Freedom Alliance

Joyce Shining One Side
Turtle Mountain Band of Chippewa

Wendi R. Wells
MHA Nation

Kandi White
MHA Nation

Angel Young
Standing Rock Sioux Tribe

LaDonna Allard
Standing Rock Sioux Tribe

Glenda Rush
MHA Nation

OCA - Asian Pacific American Advocates
ADVOCATE EMBRACING THE HOPES AND ASPIRATIONS OF ASIAN PACIFIC AMERICANS

September 4, 2018

Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and members of the Senate Judiciary Committee:

I write on behalf of OCA – Asian Pacific American Advocates and our 100 chapters and affiliates across the country to express our opposition to the nomination of Judge Brent Kavanaugh as the next member of the Supreme Court. OCA is a national membership-driven organization of community advocates dedicated to advancing the social, political, and economic well-being of Asian Americans and Pacific Islanders ("AAPIs"). Our organization has not traditionally taken positions on many judicial or administrative nominees. However, Judge Kavanaugh's record show that his nomination would bring irreparable harm to Asian American and Pacific Islander communities to such an extent that we felt it necessary to express our opposition to his nomination.

Asian Americans and Pacific Islanders ("AAPI") are the fastest growing racial group in the United States and encompass more than one hundred languages and fifty ethnicities. As such, our communities are comprised of individuals who encompass some of the highest and lowest rates of higher education degree attainment within the country, along with disparate economic, technological, and social divides based on ethnic subgrouping. For example, despite aggregated data showing that 49 percent of Asian Americans have college degree, disaggregated data show that only 12 percent of Laotian and 14% of Hmong and Cambodian individuals over the age of 25 have at least a bachelor's degree. The nominee's record of opposition to whole-person diversity initiatives in higher education is extremely concerning given the cases and complaints against these admissions programs in colleges like Harvard University.

For the reason above and the reasons detailed in the coalition letter enclosed here, OCA – Asian Pacific American Advocates opposes the nomination of Brett Kavanaugh. We reiterate that this is the first time our organization has taken such a position on a judicial nominee because we feel strongly that Judge Kavanaugh's appointment would irreparably harm the broader AAPI community. We urge the Senate to vote no on this nominee. If you have any questions or comments about our suggestions, please contact Kham S. Moua, OCA Associate Director of Policy and Advocacy, at [redacted] or at [redacted].

Sincerely,

Kenneth Lee

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September 24, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

RE: Nomination of Judge Brett Kavanaugh to the U.S. Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein,

The Office of Hawaiian Affairs (OHA) greatly appreciates this opportunity to provide comments regarding the nomination of Judge Brett Kavanaugh to be an Associate Justice of the United States Supreme Court. In particular, given that Supreme Court precedent pertaining to OHA has become the subject of questions during Judge Kavanaugh's nomination hearing, our agency is compelled to clarify the record as it pertains to our organization, our work to better the conditions of Native Hawaiians, and the rights and status of our beneficiaries as Indigenous people.

By way of background, OHA is an independent state agency and public trust established by the Hawai'i State Constitution. OHA's purpose is to better the conditions of Native Hawaiians, the Indigenous people of Hawai'i. OHA holds substantial obligations to advocate for Native Hawaiians, and to assess policies and practices as they may impact Native Hawaiian rights and resources. Hawai'i State law designates OHA as the "principle public agency in [the] State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians."[1] Additionally, under federal law OHA is a recognized Native Hawaiian Organization with standing to enter into consultation with the federal government for the purposes of the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act.

As Judiciary Committee Member Mazie K. Hirono indicated during Judge Kavanaugh's nomination hearing, Native Hawaiians are the original, first people of the Hawaiian Archipelago, who exercised sovereignty for at least a thousand years prior to recorded contact with the Western world. Congress has acknowledged that ". . . prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion."[2] The Native Hawaiian people established and maintained the Kingdom of Hawai'i, first as a united monarchical government, and later as a constitutional monarchy, at all times under the leadership of a Native Hawaiian head of state.[3]

During the time of the Native Hawaiian-led and established Hawaiian Kingdom, Hawai'i developed a robust diplomatic relationship with the United States. This included full diplomatic recognition, as evidenced by treaties and conventions entered into in 1826, 1842, 1849, 1875, and 1887.[4] The United States later violated the friendship and peace it promised to the Native

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[1] Haw. Rev. Stat. §10-3 (2017).

[2] Apology Resolution, Pub. Law No. 103-150, 107 Stat. 1510 (1993).

[3] *See id.* (summarizing the history of the Kingdom of Hawai'i from 1778 through 1893).

[4] *See id.*

Hawaiian people when the federal government assisted in the overthrow of the Hawaiian Kingdom in 1893. One hundred years later, Congress acknowledged that despite the overthrow and subsequent transitions, "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum . . . ."[5]

While the United States failed to acknowledge the will of the Native Hawaiian people during the process in which Hawai'i fell under U.S. jurisdiction, Congress has, repeatedly, acknowledged Native Hawaiians as a distinct Indigenous people, and treated them in a manner similar to American Indians and Alaska Natives. The record is rich with examples of this, dating back to the early years of the U.S. Territory of Hawai'i, during which time Congress included Native Hawaiians among Indigenous subjects to be studied under the Smithsonian's U.S. Bureau of American Ethnology.[6] Recognition of Native Hawaiians continued during Hawai'i's admission as a State of the Union, with the Admission Act declaring the betterment of the conditions of Native Hawaiians as a trust purpose for the State's public land trust, and requiring the State to fulfill the purposes of the federal Hawaiian Homes Commission Act, established to provide lands for homesteading to certain Native Hawaiians, as a condition of statehood.[7]

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[5] *Id.*

[6] *See, e.g.*, Pub. L. No. 61-266, 26 Stat. 703, 718 (1910); Pub. L. No. 69-600, 44 Stat. 1069, 1079 (1927); Pub. L. No. 71-158, 46 Stat. 229, 241 (1930). In providing justification for extending the research of the Bureau of American Ethnology to include Hawai'i, William H. Holmes, Chief of the Bureau, compared the status of Native Hawaiians to that of Native Americans and acknowledged that the U.S. government had a trust responsibility for Native Hawaiians. As he wrote to Smithsonian Institute Secretary S.P. Langley on March 12, 1904: "The reasons for recommending the extension of the work to the natives of these islands are, first, that although these people are our wards in the same sense that the Indians are we know very little regarding them. It would seem the part of wisdom to acquire a working knowledge of their history, racial affinities, and physical and mental characteristics; and a record of their native arts and industries, their manners and customs, before it is finally too late. In a dozen years little will be left of either the people or their culture for study. Unless the government undertakes this work now, nothing can be done, and future generations can justly accuse us of neglecting opportunities presented now for the last time." Letter on file in Smithsonian Institution Archives.

[7] The public land trust is a portion of the Hawaiian Kingdom lands that were transferred to the State for management at the time of Hawaii's admission into the union. *See* An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959).

Starting in the 1960s and moving forward more comprehensively in the 1970s, U.S. policy towards Indigenous people shifted into what scholars and practitioners commonly refer to as the Era of Self-Determination. During this era, U.S. policy came to be characterized by a posture towards affirming the inherent sovereignty of Indigenous people by acknowledging their right to determine their own affairs. As U.S. policy towards American Indians and Alaska Natives became friendlier and more robust, Congress even more explicitly acknowledged Native Hawaiians as an Indigenous people with a unique legal and political relationship with the federal government. In 1974, Native Hawaiians were included in the Native American Programs Act, and in a litany of legislation thereafter Congress treated Native Hawaiians in a manner similar to other Indigenous people of the United States.

Later that same decade, in 1978, Hawai'i held a constitutional convention. Native Hawaiian community leaders had been organizing and discussing ideas for institutional change for years before the convention, but it proved to be a powerful platform for many State-level advancements in the area of Native Hawaiian rights. As University of Hawai'i Professors Melody MacKenzie and Davianna McGregor note, this included the establishment of OHA:

> One amendment established the Office of Hawaiian Affairs (OHA) with a nine-member board of trustees elected by all Native Hawaiian residents of the State of Hawai'i. As a result, Native Hawaiians were able to elect a governing body that truly represented their interest as a people distinct from the general population of Hawai'i.[8]

As OHA developed from a fledgling entity, Congress continued to treat Native Hawaiians as Indigenous people, even more deliberately and directly affirming its relationship with them. This included the passage of the Native Hawaiian Education Act[9] and the Native

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[8] Melody MacKenzie & Davianna McGregor, Mo'olelo Ea O Nā Hawai'i, Off. of Hawaiian Aff. 1, 56 (Aug. 19, 2014), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/McGregor-and-MacKenzie-History_of_Native_Hawaiian_Governance.pdf.

[9] Native Hawaiian Education Act, 20 U.S.C. § 7512 (2018) ("Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.... Congress has also

Hawaiian Health Care Act,[10] both of which included express affirmation of the United States-Native Hawaiian relationship. Congress also included Native Hawaiian organizations alongside federally-acknowledged American Indian and Alaska Native governments in laws like the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act. Both Acts established processes by which Native Hawaiians must be consulted in matters related to historic and cultural resources, and the disposition of ancestors and their belongings.[11]

While the establishment of OHA had been approved through a statewide vote open to all of the citizens of the State of Hawai'i, some objected to Native Hawaiians having exclusive control over electing the trustees who managed their trust resources. In 1996, rancher Harold "Freddy" Rice sued over OHA's elections, arguing that the voting system for trustees was unconstitutional. This suit gave rise to *Rice v. Cayetano*.[12] While the lower courts found the voting system constitutional, in 2000 the U.S. Supreme Court issued a 7-2 opinion invalidating OHA's elections on the grounds that they were not consistent with the Fifteenth Amendment of the U.S. Constitution. The majority's ruling was limited to OHA's Native Hawaiian-only elections, and expressly declined to comment on other matters such as OHA's mission to better the conditions of Native Hawaiians, or its use of its resources for Native Hawaiians pursuant to its state constitutional and statutory purpose.

OHA raises these facts because during the nomination hearing earlier this month, Judge Kavanaugh's description of the *Rice* decision may have left some Committee Members and observers with another impression. Senator Hirono asked the nominee about an amicus brief he submitted in *Rice*, as well as an op-ed he wrote for *The Wall Street Journal*, in which he argued

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delegated broad authority to administer a portion of the Federal trust responsibility to the State of Hawaii....").

[10] Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11701 (2018) ("The authority of the Congress under the United States Constitution to legislate in matters affecting aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native people of Alaska and Hawaii").

[11] National Historic Preservation Act, 54 U.S. C. § 300101 (2018); Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3010 (2018).

[12] 528 U.S. 495, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000).

that OHA's very purpose was inconsistent with the principles and language of the U.S. Constitution. When asked to explain these views, Judge Kavanaugh stated that by a vote of 7-2, the majority of the U.S. Supreme Court had agreed with him, and that the Court found violations of both the Fourteenth and Fifteenth Amendments.

This is erroneous.

As stated earlier, the majority's decision was limited to the manner in which OHA's trustees were elected under the Fifteenth Amendment. To quote U.S. Supreme Court Justice John Roberts, then an attorney representing the State of Hawai'i in the *Rice* case, ". . . the majority's opinion was very narrowly written and expressly did not call into question the Office of Hawaiian Affairs, the public trust for the benefit of Hawaiians and native Hawaiians, but only the particular voting mechanism by which the trustees are selected."[13] In limiting its holding to OHA's means of electing trustees, the majority chose not to adopt arguments and conclusions made by then-practicing attorney Brett Kavanaugh, with respect to OHA's purpose and mission.

The extreme nature of Judge Kavanaugh's arguments, both his examples and his conclusions, may have played a role in the majority's failure to incorporate them in *Rice*. For example, he compared OHA's mission of serving Hawaii's Indigenous people to an interracial marriage ban to maintain white supremacy.[14] He argued that allowing Native Hawaiians to elect their own trustees to manage their trust ". . . could usher in an extraordinary racial patronage and spoils system" of national consequence. Little explanation is given as to why treatment of the Indigenous people of Hawai'i in a manner similar to the treatment of other Indigenous people in the United States would have such dramatic consequences. At the time of his writing, Judge Kavanaugh may not have been familiar with Congress's clear legislative understanding that its

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[13] Helen Altonn & Christine Donnelly, *Top court backs Rice in OHA vote challenge*, Honolulu Star-Bulletin (Feb. 23, 2000), http://archives.starbulletin.com/2000/02/23/news/story1.html.

[14] Brief for Center for Equal Opportunity et al. as Amici Curiae Supporting Petitioner, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818) 1999 WL 345639, at *24.

relationship with Native Hawaiians is based on its recognition of Native Hawaiians as an Indigenous people and not based on race.[15]

Through the process of the Committee's review of a portion of Judge Kavanaugh's writings during his time with the Bush Administration, we learned that he continued to hold and advance extreme views against Native Hawaiian rights after *Rice*. Disregarding the Court's decision not to adopt his arguments against the constitutionality of Native Hawaiian programs, Judge Kavanaugh offered the same arguments as legal advice when reviewing administration testimony on legislation. Given his reported acknowledgement of his lack of exposure to Indigenous people's law,[16] it is concerning that he has held so tightly to arguments hostile to Native Hawaiians.

His past actions and the recent nomination hearing leave OHA with many doubts. We sincerely hope that if a case concerning Native Hawaiian rights comes before Judge Kavanaugh's court, be it the D.C. Circuit or the U.S. Supreme Court, he will look more closely at the facts before the court. Facts that include the actions that Congress, the Executive, and the State of Hawai'i have all taken, within the framework of the U.S. Constitution, in recognizing the unique status of Native Hawaiians. During his hearing, Judge Kavanaugh acknowledged Congress's "substantial" authority to deal with matters concerning Native people, though he offered few specifics beyond that statement. Judge Kavanaugh may find it interesting that in the years following *Rice*, Congress and the Executive have continued to pass legislation and establish programs to benefit Native Hawaiians, regularly with the acknowledgement of the legal and political relationship OHA has articulated throughout this letter.

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[15] *See, e.g.*, Native Hawaiian Education Act, 20 U.S.C. § 7512 (2018) ("Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship....).

[16] Geof Koss & Ellen M. Gilmer, *Murkowski to mull Kavanaugh's record on tribes*, E&E News (Sept. 13, 2018), https://www.eenews.net/stories/1060096949 (statement of Senator Lisa Murkowski) ("[Kavanaugh] was the first to admit that in terms of broader Indian law he hasn't had that much opportunity in the D.C. Circuit court to really engage on these issues, so this is not a body of law that he is often exposed to....").

In closing, OHA hopes that this letter has brought some clarity to questions raised as part of the process of considering Judge Kavanaugh's nomination. OHA hopes that the Committee understands the need we feel to clarify the record about *Rice*, and to address certain arguments espoused by Judge Kavanaugh prior to his taking the bench, which are not only inaccurate, but threaten the rights and resources of the beneficiaries that OHA exists to serve. Until and unless Judge Kavanaugh is able to correct the aforementioned misunderstandings and misconceptions, should a case involving the rights or political status of Native Hawaiians come before him, perhaps a recusal would be in order. Finally, OHA wishes to bring to the Committee's attention concerns voiced by American Indian and Alaska Native groups, who share our concerns with Judge Kavanaugh's record on Native law.

Sincerely,

Colette Y. Machado

Colette Y. Machado
OHA Board of Trustees Chair

September 6, 2018

Dear Senator Feinstein,

I am writing to request in the strongest possible terms that you not only oppose the nomination of Judge Kavanaugh to the Supreme Court, but that you do everything in your power procedurally to delay a vote until Democrats have access to Kavanaugh's full record and time to review it.

We further hope you will make a strong public case in the media about the unfairness of vetting a nominee without proper documentation, and the need for American citizens to oppose this dangerous, unfair appointment.

Anything you can do to convince undecided Democratic Senate colleagues to oppose the nomination as well will also be of tremendous import.

Kavanaugh's history of partisan politics and the fact that his beliefs are to the far right of those of the American people — particularly when it comes to protecting women's rights and safeguarding people from the NRA — are troubling enough. But the fact that President Trump, named in court as an unindicted co-conspirator, expects Kavanaugh to indemnify or exonerate the president no matter what he may be guilty of makes this a four-alarm fire for our democracy.

Considering the above, along with the facts that 1) because of Russian interference and voter suppression, the very legitimacy of Trump's election victory is suspect; 2) Republicans withheld consideration of Merrick Garland's nomination until after an election, denying President Obama his rightful choice for the court; 3) the possibility that the missing Kavanaugh records may show that he lied to the Senate in his past confirmation hearing; we strongly believe that Judge Kavanaugh should not be confirmed as a Justice to the Supreme Court. We therefore thank you deeply for everything you've done and will do to oppose him.

With gratitude,
Erika Feresten, President, PPDC
On behalf of the board of the Pacific Palisades Democratic Club

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Voices for Progress WDNACTION

RESPONSIBLE WEALTH resource generation PATRIOTIC MILLIONAIRES

Senator Dianne Feinstein
331 Hart Senate Office Building
Washington, D.C. 20002

Dear Senator Feinstein:

As members of Patriotic Millionaires, Resource Generation, Responsible Wealth, Voices for Progress, Women Donors Network Action, and other business owners, entrepreneurs, philanthropists, and influential leaders, we write in opposition to Judge Brett Kavanaugh's nomination to the U.S. Supreme Court.

The stakes could not be higher: Kavanaugh's nomination would tip the balance of the Supreme Court and put civil and human rights at risk. The future of access to health care, reproductive rights, environmental protections, voting rights, LGBTQ rights, immigrant justice, workers' rights, campaign finance, racial justice, and more hang in the balance. Kavanaugh lacks the impartiality and independence on these matters that the American people expect and deserve.

We have already seen the damage President Trump's first nominee, Justice Neil Gorsuch, has done to fair elections, workers' rights, women's access to health care, and other important issues. He has proven unwilling to respect precedent he disfavors, most recently in the *Janus v. AFSCME* decision. Another partisan justice would cement Trump's extreme agenda and values for the next several decades, and have devastating impacts on the future of our country.

It is clear that Kavanaugh will favor the interests of corporations and the powerful rather than that of all Americans, as his judicial record includes:

- dissenting in multiple cases upholding aspects of the Affordable Care Act (ACA);
- actively working to block access to safe, legal abortion;
- repeatedly ruling against protections for workers, including those fighting discrimination and mistreatment on the job;
- attacking protections for clean air and clean water; and
- siding with telecom companies over consumers on net neutrality.

He also believes the president should be above the law and has said that a sitting president should not be criminally indicted. He has written that the president should have "absolute discretion" on appointing or firing a special counsel like Robert Mueller.

We need an open-minded, fair, and independent justice who will recognize and protect everyone's civil and human rights, and serve as a check on the executive branch. Brett Kavanaugh is not that person. He has passed Trump's litmus tests on overturning *Roe v. Wade* and dismantling the ACA. He was vetted and selected by the Heritage Foundation and the Federalist Society.

We strongly urge you to oppose Kavanaugh's extreme nomination, use every tool at your disposal to slow down this nominee, and insist on a consensus nominee moving forward.

Thank you,

Naomi Aberly
Boston, MA

Sally Arnold
Santa Cruz, CA

Elyse Arnow-Brill
Pound Ridge, NY

Janet Axelrod
Cambridge, MA

Noreen Bagley
Encino, CA

Richard Baldwin
Seattle, WA

Katie Barnett
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Kathleen Barry
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Anne Bartley
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Thomas Bennigson
Oakland, CA

Kay Berkson
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Larry Birenbaum
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Sally Dunning
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Cathy Duvall
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Helen Engelhardt
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Stephen Prince
Brentwood, TN

Susan Pritzker
San Francisco, CA

Jason Rae
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Don Ralston
Milford, OH

Catherine Raphael
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New York, NY

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Michael Rothman
Chicago, IL

Bonnie Rothman
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Francesco Scattone
New York, NY

Michael Schur
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Daniel Simon
New York, NY

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Ann Sink
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Naomi Sobel
Jamaica Plain, MA

Daniel Solomon
Washington, DC

Garry Spanner
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Seattle, WA

Mary Ann Stein
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Mill Valley, CA

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Santa Cruz, CA

Lally Stowell
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Michelle Zygielbaum
Santa Rosa, CA

Paul Zygielbaum
Santa Rosa, CA

August 30, 2018

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and Committee Members:

On behalf of our hundreds of thousands of members throughout the United States, People For the American Way strongly opposes the confirmation of Brett Kavanaugh for the Supreme Court. His record on the D.C. Circuit shows that he approaches cases not with an open mind, but with a political agenda. In addition, his statements both on and off the bench demonstrate that he would not be an independent check on presidential power.

The genius of our Constitution is its structural protections of liberty: Power is divided among three branches, each of which has the ability to check abuses by another. But Kavanaugh's vision of the Constitution gives the president enormous authority, essentially placing him above the law.

Off the bench, Kavanaugh has made clear his belief that the unanimous and foundational case of *Nixon v. United States*—requiring President Nixon to comply with an order to hand over the Watergate tapes—was wrongly decided; that the president has the authority to fire a special prosecutor without cause; and that a president engaged in criminal behavior cannot be indicted while in office. It is no surprise that Donald Trump would want this person as one of his judges in any upcoming litigation involving the Mueller investigation.

Kavanaugh brought that ideology with him to the bench as a judge on the D.C. Circuit. He has written that Congress cannot insulate an agency from politics by restricting the president's ability to fire its chair at will (*PHH Corp. v. Consumer Finance Protection Bureau*); that the president can unilaterally designate someone arrested on U.S. soil as an "enemy combatant" and thereby remove them from the constitutional protections of the federal judicial system (*Bahlul v. United States*); and that a president can simply choose not to enforce a law he disagrees with even if a court has upheld it. (*Seven-Sky v. Holder*)

That last assertion came in the context of the Affordable Care Act, an ominous statement both in terms of untrammeled presidential power and for its implications for access to health care. Indeed, a commitment to overturning the ACA is one of the litmus tests that President Trump has for potential Supreme Court nominees. Kavanaugh's dissent in *Seven Sky v. Holder* concluded that the court could not yet address the merits of the case; but he then proceeded to sharply criticize the individual mandate, the lynchpin of guaranteeing coverage to people with pre-existing conditions. With yet another challenge to the mandate currently in the lower courts (*Texas v. United States*), he could cast the vote leading families across the country to financial ruin, illness, and death.

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He also threatens women's constitutional right to abortion, having passed the president's litmus test on overruling *Roe v. Wade*. This is no surprise, given his high praise for the dissent in that case.

Indeed, not only Kavanaugh's radical dissents but also his overall judicial record show that in important cases that concern hotly contested policy and political issues, Kavanaugh consistently favors conservative Republican positions that reflect his conservative Republican political background. This includes cases on the rights of working people, voting rights, environmental protection, LGBTQ equality, and a host of other issues that shape the lives of everyday Americans.

There is more than enough in the public record to warrant our opposition to this nomination. However, even putting the content of the record aside, so much of it is being concealed that no responsible senator should even consider voting for confirmation. Because of the corrupt manner in which records are being filtered by Kavanaugh's fellow Republicans before being given to the Judiciary Committee, the nominee should not even be having a hearing. Making matters worse, the chairman has refused to even request records from Kavanaugh's three years as staff secretary in the George W. Bush White House, years that Kavanaugh himself has called among the most important in his career and relevant to his qualifications to the federal bench.

We urge senators to oppose confirmation.

Sincerely,

Marge Baker
Executive Vice President for Policy and Program

September 21, 2018

PHYSICIAN WOMEN FOR DEMOCRATIC PRINCIPLES

The Honorable Senator Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

Dear Senator Feinstein,

We thank you for your lifetime work fighting for equity for women, immigrants, and minorities. We thank you, also, for your insistence on maintaining the integrity of due process and transparency in the Senate Judiciary Committee Proceedings on the nomination of Judge Brett Kavanaugh to the Supreme Court of the United States. Physician Women for Democratic Principles (PWDP) is a political action and fundraising group, comprised of over 9000 women physicians, working together to mobilize and take action to restore Democratic principles in the United States. In line with our mission, we have raised over $1.35 million since 2017 for progressive political candidates and organizations working for social justice.

The members of PWDP are pleased to present you with a letter authored by members of our group and signed by over 1000 women physicians across the country. As physicians across a range of medical fields, we present these considerations as first-hand observers of the immediate and lifelong trauma of sexual assault and as authorities in our role as providers of care for survivors. The letter expresses support for Dr. Christine Blasey Ford, demands a full investigation regarding her sexual assault allegations against Supreme Court nominee Brett Kavanaugh, and states our opposition to Brett Kavanaugh's elevation to a lifetime appointment on the Supreme Court. The letter is supported by personal testimonials of countless women physicians, educated professionals who shared their own stories of sexual assault and disincentives to reporting: "I did not report because....".

As your constituents in California and on behalf of PWDP, we are privileged to forward our letter to you. We sincerely appreciate your consideration of our concerns, of our personal testimonials, and of our specific Asks. We ask the same of you, all Judiciary Committee members, and all U.S. Senators who represent us.

Thank you for your ongoing service to all your constituents, for your tireless efforts demanding justice and equality for all, and for making us proud to be Californians.

Sincerely,
Dawn Hagan, MD (92037)
Kelly Motadel, MD (92067)

Physicians for Reproductive Health

Jodi Magee
President/CEO

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Senator Chuck Grassley, Chairman
Senate Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Senator Dianne Feinstein, Ranking Member
Senate Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

September 26, 2018

Re: Nomination of Brett Kavanaugh to the U.S. Supreme Court

Dear Chairman Grassley, Ranking Member Feinstein:

Physicians for Reproductive Health strongly opposes the nomination of Judge Brett Kavanaugh for appointment to the Supreme Court. As an organization deeply concerned about reproductive health, rights, and justice in our country, we believe the next Justice on the Supreme Court should respect reproductive autonomy and protect and uphold the Constitution. Based on his judicial record and answers provided during his confirmation hearings, Judge Brett Kavanaugh does not meet this standard and we oppose his nomination on behalf of health providers and their patients.

Physicians for Reproductive Health (Physicians) is a doctor-led national advocacy organization that uses evidence-based medicine to promote sound reproductive health policies. Our members include physicians of all specialties from across the country. Physicians unites the medical community and concerned supporters. Together, we work to improve access to comprehensive reproductive health care, including contraception and abortion, especially to meet the health care needs of economically disadvantaged patients.

As health care providers, we believe our patients should have access to the full range of reproductive health care services, including abortion. We fundamentally believe that access to reproductive health care is vital not only to our patients' health and well-being, but also to that of the overall community. Our patients deserve care that is rooted in evidence, compassion, and based on the needs of our patients and their families. We expect that actions taken by government officials should be based on what is in the best interest and safety of patients seeking health care, and the government should be working to actively reduce barriers to care. We support the Affordable Care Act, which improved health insurance coverage and guarantees access to critical reproductive health services such as well-woman visits, contraception without cost-sharing, and maternity care. Access to medical care is fundamental to the well-being of the patients we care for every day and such access is made possible by affordable health insurance. Our patients deserve to have health care coverage that meets their needs, including their reproductive health care needs. The confirmation of Judge Kavanaugh will place women's health, rights, and autonomy in jeopardy.

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Tel: 646-366-1890 • Fax: 646-366-1897 • www.prh.org • info@prh.org

When President Donald Trump was asked about who he would nominate for the Supreme Court vacancy, he repeatedly asserted that any nominee would have to pass his litmus test of being pro-life and opposed to *Roe v. Wade*[1]. Brett Kavanaugh's record indicates that he does not believe in reproductive autonomy and will rule against reproductive rights if confirmed to the Supreme Court. Judge Kavanaugh's judicial philosophy, writings, and judicial record show a hostility towards reproductive health rights. The Supreme Court represents an important line of defense against the relentless attacks against reproductive health rights, particularly access to abortion care. Since President Trump has promised that any judge he nominates will overturn *Roe v. Wade*, we are concerned that Judge Kavanaugh as his nominee would vote to overturn one of the most important reproductive rights and abortion access cases in our history.

Despite his numerous claims that he follows precedent, Judge Kavanaugh demonstrated during the confirmation hearings that he only selects hand-picked precedent which allows him to arrive at his desired conclusion. For example, Judge Kavanaugh's order and dissenting opinion in *Garza v. Hargan*[2] showed that he is willing to ignore the precedent established with the recent *Whole Woman's Health v. Hellerstedt*[3] decision by not acknowledging the additional undue burdens the government was imposing on a young immigrant woman seeking an abortion who was in the government's care. Despite the fact that she complied with all the regulations required at both the state and federal level in order to access her abortion, Judge Kavanaugh did not apply the appropriate precedent established by *Roe*, *Planned Parenthood v. Casey*[4], and *Whole Woman's Health*, and instead wanted to impose even more burdens on access to abortion care. Judge Kavanaugh cannot be trusted to respect the autonomy of people to make their own decisions regarding their reproductive health.

In addition to his opposition to abortion access, Judge Kavanaugh has also demonstrated his opposition[5] to access to contraceptive coverage and believes that employers should be able to restrict access to contraception for their employees, based on religious objections. He issued a dissent that outlined his support for allowing employers' religious beliefs to override employees' right to birth control coverage, arguing that the Affordable Care Act's existing accommodation allowing employers with objections to birth control coverage to opt-out of the contraceptive coverage requirement still placed a substantial burden on the employers' beliefs, even if those beliefs are factually incorrect or misguided. To be clear, contraceptives are not abortifacients – they work by preventing pregnancy, not disrupting pregnancy. Judge Kavanaugh's recitation of these mistaken beliefs at his hearing does not accord with medical fact and is deeply alarming. Employees should not have their access to contraception restricted by their employers' religious beliefs. They deserve a Supreme Court Justice who values an individual's right to determine their own health care. Judge Kavanaugh clearly does not respect a patient's right to make their own reproductive health care decisions.

Our commitment to advocating for comprehensive reproductive health care is rooted in focusing on the needs of our patients. Physicians for Reproductive Health was founded in 1992 by a small committee of concerned physicians in New York City, where we opened our first national office in 1995. The founders of Physicians saw incredible suffering when abortion was illegal, and women were unable to get the safe care they needed. Those doctors were forever marked by their experiences treating patients who had

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[1] Roe v. Wade, 410 U.S. 113 (1973).

[2] *Garza v. Hargan*, No. 17-5236, 2017 WL 9854552, at *1 (D.C. Cir. Oct. 20, 2017); *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (Kavanaugh, J. dissenting).

[3] *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___ (2016).

[4] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

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

perforated uteruses from knitting needles and wire coat hangers. Seeing this anguish made our founders determined to advocate for legal abortion across the country. It is with this understanding of the importance of the Supreme Court and the role it plays in protecting access to safe abortion care that we oppose Judge Kavanaugh's confirmation.

Any Supreme Court nominee must hold views consistent with the Constitution and settled law about the ability to make our own reproductive health decisions. That must include upholding *Roe v. Wade*—the law of the land for over 45 years. Brett Kavanaugh's record indicates that he does not believe in reproductive autonomy and will rule against reproductive rights if confirmed to the Supreme Court. Not only do we need a justice who will preserve *Roe v. Wade*, we need someone who will focus on the evidence of what is and is not beneficial to reproductive health, based on medical fact, not personal belief. We urge you to vote against Judge Brett Kavanaugh's nomination to the Supreme Court.

We are also very concerned the Senate Judiciary Committee is rushing the investigation of sexual misconduct allegations against Judge Kavanaugh without giving the necessary time and consideration this type of process requires. The committee should ensure that there is a thorough, independent, and impartial investigation before voting on confirming Judge Kavanaugh. As medical professionals, we have seen the long-term mental and physical health effects of sexual violence. It's a pervasive public health issue that disproportionately impacts women and their ability to thrive, and allegations must be taken seriously. Coming forward to accuse someone can often be retraumatizing, so it is also imperative that victims be treated with the respect and dignity that all survivors deserve.

Sincerely,

Willie J. Parker, MD, MSc, MPH
Chair, Board of Directors

September 28, 2018

Dear Members of the Senate Judiciary Committee:

Planned Parenthood believes survivors of sexual assault. Dr. Christine Blasey Ford is not on trial. Rather, the hearing is part of Brett Kavanaugh's job interview to sit on the nation's highest court. He is not entitled to a seat on the Supreme Court, and his judicial record and the multiple allegations of sexual violence against him cement that his nomination must be withdrawn. While the country is rallying around survivors,men in power—from the Republicans on the Senate Judiciary Committee to the White House—have ignored and discredited Dr. Christine Blasey Ford in there transparent effort to "plow through" the multiple allegations of sexual violence against Kavanaugh to confirm him. Now is the time for these men in power to listen to survivors and reject Brett Kavanaugh's nomination. **As the Senate Judiciary Committee prepares to vote on the nomination of Brett Kavanaugh, Planned Parenthood urges the members of the committee to vote no**.

Dr. Blasey Ford, Deborah Ramirez and Julie Swetnick have courageously come forward with their experiences and have been bullied, shamed and threatened for speaking out. They have nothing to gain by telling their stories publicly. Every senator and the entire country owes them respect and gratitude for coming forward. Whether a woman is a high school student at a house party or an adult just trying to access reproductive health care, their body should most certainly be their own. And if it is not, women cannot be free and equal in society.

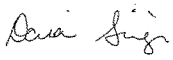
This is a moment of truth for every member of the Senate. What senators do with this Supreme Court nomination will determine whether they stand with women and survivors or against them. Today's committee vote is the moment for Senators to demonstrate they are actually listening to the people they are tasked to serve.

It was already clear that Brett kavanaugh was not fit to serve on the Supreme Court based on his record of hostility toward reproductive rights. His words and judicial actions show that if confirmed to the Supreme Court, he would use his power to further control women's bodies, including gutting people's constitutional right to safe, legal abortion. Kavanaugh has already ruled to limit access to both abortion and birth control while praising Justice Rehnquist's dissent in *Roe v. Wade*. Kavanaugh's threat to women's reproductive rights is far from theoretical. There are currently thirteen cases involving abortion pending in the federal courts of appeals that are one step from the Supreme Court—all of which threaten *Roe v. Wade* and a woman's liberty to control her body and future. There is no question that women's rights and bodies will be in imminent danger if Kavanaugh is confirmed.

Kavanaugh also poses a threat to the Affordable Care Act. Kavanaugh questioned the legitimacy of the Affordable Care Act by calling it "unprecedented on the federal level in American history" and questioned whether Congress had the authority to enact it during a dissenting opinion on the D.C. Circuit Court. If the ACA is invalidated, 62 million women will lose access to essential services with women of color being disproportionately impacted due to the threats to Medicaid coverage.

Sexual assault can be a traumatic, life-changing event. The unfortunate truth is that too many people who come forward with an experience of sexual assault suffer further hurt and humiliation by having their story dismissed, their integrity doubted, or their motives questioned. Brett Kavanaugh has demonstrated through his rulings, words and action that he does not respect the bodily autonomy and rights of women. Anyone who calls themselves a champion for women's health must not only vote "no" but must call for his immediate withdrawal.

Sincerely,



Dana Singiser
Vice President
Public Policy and Government Affairs

Prairie Band Potawatomi Nation
Government Center

September 10, 2018

The Honorable Charles Grassley, Chairman
The Honorable Dianne Feinstein, Vice-Chairwoman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Judge Brett Kavanaugh

Dear Chairman Grassley and Vice-Chairwoman Feinstein:

Thank you very much for the opportunity to provide you with the thoughts and request of the Prairie Band Potawatomi Nation on the confirmation of Judge Brett M. Kavanaugh for the seat of Associate Justice of the United States Supreme Court.

The nomination and confirmation of a United States Supreme Court Justice is of the utmost importance to Indian Nations throughout this country. This body of justices interpret and determine what constitutes the law that governs and regulates much of Native American life. While state citizens primarily look to state legislature for laws and rules that govern them, the Prairie Band Potawatomi Nation and other sovereign Tribal Nations, are subject to the U.S. Supreme Court interpretation of the expansiveness or limitations of tribal sovereignty and authority. A confusing pattern of federal laws regulates so many activities of Native Americans living on their reservation and/or homelands. Although the federal government has supported tribal self-determination over the past several decades, at the same time, the U.S. Supreme Court has ruled against tribal interests in most cases. Thus, the confirmation of an unknown for a lifetime position at the highest level of the U.S. Supreme Court is of great significance and concern to all Tribal Nations.

The Prairie Band Potawatomi Nation joins the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF) in their dismay that the Senate Judiciary Committee hearings have moved forward without the complete records of Kavanaugh's White House work experience available for review. To forge ahead with confirmation hearings despite the lack of opportunity to fully vet Kavanaugh's White House records, puts the Judiciary Committee in the tenuous position of confirming a Judge for whom they lack sufficient information. The Prairie Band urges the Committee to vote no and oppose the confirmation of Judge Kavanaugh.

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Furthermore, Senator Tom Udall, Vice Chairman of the Senate Committee on Indian Affairs, also wrote a letter voicing his concerns and requested documents in the Senate Judiciary Committee's possession, without which he and the other senators are unable to "adequately consider Judge Kavanaugh's views on Indian Affairs issues." There is time to vote "No" on the confirmation of Judge Brett Kavanaugh and we respectfully ask you to consider Indian Country when you cast your vote.

Respectfully,

Joseph P. Rupnick
Tribal Council Chairman
Prairie Band Potawatomi Nation

Cc: Members of the Senate Judiciary Committee

Congress of the United States
Washington, DC 20515

October 2, 2018

Dear Senator,

As members of the Pro-Choice Caucus, a coalition of the House of Representatives working to preserve, protect, and advance women's constitutionally protected reproductive rights, we write to express our strong opposition to the confirmation of Judge Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

There have now been multiple reports that Judge Kavanaugh sexually assaulted and harassed young women as a young man. We therefore urge the Senate to consider the Judge's attitudes towards women and their constitutionally protected rights before elevating him to a lifetime appointment. Nearly one in three women will survive sexual assault or violence in their lifetimes. And according to the Rape, Abuse & Incest National Network (RAINN), two out of three sexual assaults go unreported, and survivors often choose not to report the assault out of fear of retaliation, escalation, shame, or not being believed.[1] That is why we believe that there must be a full and independent investigation conducted into the allegations against the nominee. These accusations must be taken seriously and taken into account as part of his long judicial record of undermining women's autonomy.

It is clear from Judge Kavanaugh's record that he does not support a woman's constitutional right to choice. We are therefore extremely concerned about how he would rule on cases involving reproductive health care access and decision-making, including abortion care. The President campaigned on a promise to only nominate justices who would overturn *Roe v. Wade*[2] "automatically"[3] and Judge Kavanaugh has a record that demonstrates a hostility toward abortion, birth control, and the Affordable Care Act (ACA). For many communities, such as low-income, rural, immigrant, and communities of color, access to abortion care is already out of reach given significant barriers to care and state level restrictions. Based on Judge Kavanaugh's past rulings, speeches and writings, we firmly believe that Judge Kavanaugh will turn the balance of the Supreme Court against women's constitutional rights, including abortion– a constitutionally protected right since 1973.

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[1] Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2014 (2015); at bottom of page here: https://www.rainn.org/statistics/criminal-justice-system

[2] *Roe v. Wade*, 410 U.S. 113 (1973).

[3] Mark Berman, Trump promised judges who would overturn Roe v. Wade, Wash. Post (Mar. 21, 2017), https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/?utm_term=.755638cbe7d.

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While every Supreme Court vacancy is significant, the stakes could not be higher in deciding who will replace Justice Kennedy. Without a fair-minded and independent nominee, the Court's balance will shift dramatically and threaten a host of hard won rights and liberties. While Kennedy did not always rule on the side of women, he played an historic role as the deciding vote in many important decisions. Not only did he help cement a person's right to continue or end a pregnancy in *Planned Parenthood v. Casey*,[4] but he was the critical vote in 2016's *Whole Woman's Health v. Hellerstedt*,[5] the most important abortion rights case in a generation. Justice Kennedy served as the deciding vote in a majority of the momentous cases of the past dozen years, so this nomination puts the rights of women across the country in danger. The next Supreme Court justice will cast the key vote in decisions that will shape people's freedom and opportunity to control their lives at the most basic level: their bodies, their families, and their future.

Just last year, Judge Kavanaugh voted to allow the federal government to block Jane Doe, an unaccompanied young woman in the Office of Refugee Resettlement's custody, from obtaining an abortion. Sitting on a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit in *Garza v. Hargan*,[6] Judge Kavanaugh signed an order allowing the federal government to continue blocking Jane Doe from accessing an abortion. Despite the time sensitive nature of her case, the government continued to delay her access to care for almost a month. When the full Court of Appeals heard the case and reversed the panel, Judge Kavanaugh authored a dissent in which he used the incendiary and notoriously anti-choice phrase "abortion on demand" and accused the majority of creating a "new right." The Court, however, was applying the undue burden standard to an egregiously unconstitutional ban, holding that it is "settled, binding Supreme Court precedent" that "[s]etting up substantial barriers to the woman's choice violates the Constitution." This is a clear example of how Judge Kavanaugh has ruled in favor of government overreach to deny a person's access to safe, legal abortions.

In the 2015 *Priests for Life v. United States Department of Health and Human Services*,[7] Judge Kavanaugh wrote a dissent that would have allowed employers' religious beliefs to override people's access to health care. *Priests for Life* involved a challenge to the process for opting out of the ACA's contraceptive coverage requirement, which requires health plans to cover the full range of FDA-approved birth control methods, alongside other women's preventive services, without out-of-pocket costs to the individual. The eight federal circuit courts of appeals to consider the issue, including Kavanaugh's own D.C. Circuit, flatly rejected the objecting organizations' challenges to the existing opt-out process. And yet, Judge Kavanaugh disagreed, accepting the

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[4] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).
[5] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).
[6] *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017), vacated and remanded with instructions to dismiss individual claim for relief as moot, 138 S.Ct. 1790 (June 4, 2018) (Kavanaugh dissenting from opinion reinstating temporary restraining order that had prevented government from interfering with undocumented minor's access to abortion); *Garza v. Hargan*, 2017 WL 4707112 (D.C. Cir. Oct. 19, 2017) (Kavanaugh joining per curium panel order vacating district court's TRO).
[7] *Priests for Life v. United States Department of Health and Human Services*, 808 F.3d 1 (D.C. Cir. 2015) (dissenting from a denial of rehearing en banc of a panel decision upholding the ACA's contraceptive mandate).

claims that using the opt-out form to give notice to the insurer was a substantial burden on religious beliefs. Judge Kavanaugh's ruling would have left women without the birth control coverage they need. Judge Kavanaugh poses a great threat to an individual's right to basic health care.

Judge Kavanaugh has questioned an individual's right to autonomous medical decision-making. In 2007, Kavanaugh authored *Doe ex rel. Tarlow v. D.C.*,[8] holding that the plaintiffs, women with intellectual disabilities, had no liberty right to medical decision-making rooted in their right to bodily integrity. In that opinion, Judge Kavanaugh took a narrow approach to defining liberty, holding that the plaintiffs' right to express their wishes about whether to have surgery was not "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," and their claim was thus "meritless." Two of the plaintiffs had been forced to have an abortion without any consideration of their wishes. In rejecting their claims, Kavanaugh did not address nor acknowledge in his opinion the nation's reprehensible history of government actions that deprive persons with disabilities of their rights of reproductive autonomy and medical decision-making. Kavanaugh's opinion shows that a narrow approach to liberty impacts rights across the board: not just the right to abortion, but also the right to make decisions about family and the right to bodily integrity, protected by the 14th Amendment.

Judge Kavanaugh's record also raises significant concerns about the future of health care access for millions of people. Because of the ACA, millions now have access to maternity care, prescription drugs, and guaranteed coverage for no-cost preventive services—and millions of people are no longer denied coverage or charged higher premiums because of their gender or pre-existing conditions. Judge Kavanaugh has demonstrated that he cannot be trusted with the responsibility of protecting this crucial program. Judge Kavanaugh's judicial record, as well as a law review article he wrote about the Supreme Court's decisions, make clear Judge Kavanaugh's contempt for the Affordable Care Act. In *Seven Sky v. Holder*, Kavanaugh characterized the law as a significant expansion of federal power, calling it "unprecedented on the federal level in American history."[9] Judge Kavanaugh also endorsed an expansive view of presidential authority, arguing that the president has the power to unilaterally decline to enforce provisions of the ACA.[10] In a law review article authored by Judge Kavanaugh, he criticized the Supreme Court's decision in *King v. Burwell*.[11] Under Kavanaugh's strict reading of the law, more than 6 million people in 34 states would be cut off from financial assistance to pay for health insurance.[12]

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[8] *Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376 (D.C. Cir. 2007).
[9] *Seven-Sky v. Holder*, 661 F 3d 1, 51 (D.C. Cir 2011)
[10] *Id* at 49.
[11] Brett M. Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, 129 HARV. L. REV. 2118 (2016) (reviewing Robert A. Katzmann, FIXING STATUTORY INTERPRETATION JUDGING STATUTES (2014))
[12] *State-by-State Effects of a Ruling for the Challengers in King v. Burwell*, Kaiser Family Foundation (June 2, 2016), https://www.kff.org/interactive/king-v-burwell-effects/

Moreover, the hearing to fill the vacancy on the Supreme Court was scheduled in haste, before Senators received full information about Judge Kavanaugh's record. This prevented Senators from fulfilling their "advice and consent" duties and deprived them of their authority to perform a critical check on both the judiciary and executive branches. More than one million pages from Judge Kavanaugh's time as White House staff secretary were excluded from the records request, including material from a time when President Bush signed a federal abortion ban. It is imperative that Senators meet their obligation to review and question a nominee in an unhurried and careful manner. Anything less sets a dangerous precedent for the future of the Supreme Court and the spirit of open inquiry that sustains it. The recent reports of sexual assault by multiple women underscores this point, and further suggests that Judge Kavanaugh would not have women's best interests in mind should he serve on the highest court in the land.

Given the President's litmus test, and Judge Kavanaugh's well documented record restricting reproductive health, it is clear that a vote for Judge Kavanaugh is a vote against women's autonomy and reproductive health. We therefore strongly oppose any vote confirming Judge Kavanaugh to the Supreme Court.

Sincerely,

Judy Chu, Ph.D.
Member of Congress

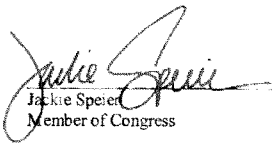
Barbara Lee
Member of Congress

Diana DeGette
Member of Congress

Marcia L. Fudge
Member of Congress

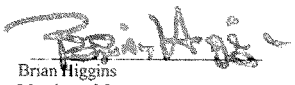
Lois Frankel
Member of Congress

Eddie Bernice Johnson
Member of Congress



Jackie Speier
Member of Congress

Dina Titus
Member of Congress



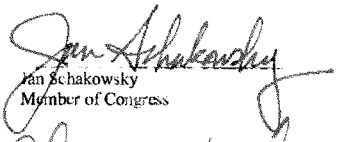
Brian Higgins
Member of Congress

Mike Quigley
Member of Congress

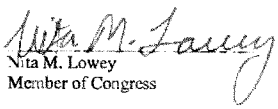
Rosa L. DeLauro
Member of Congress

Steve Cohen
Member of Congress

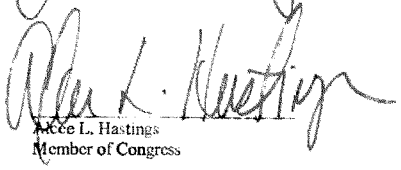
Adam B. Schiff
Member of Congress



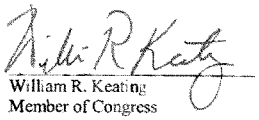
Jan Schakowsky
Member of Congress



Nita M. Lowey
Member of Congress

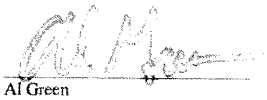


Alcee L. Hastings
Member of Congress



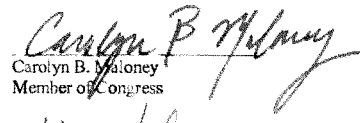
William R. Keating
Member of Congress

Joe Courtney
Member of Congress



Al Green
Member of Congress

Doris Matsui
Member of Congress



Carolyn B. Maloney
Member of Congress

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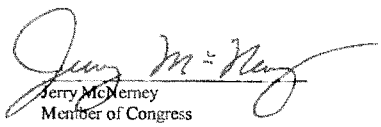
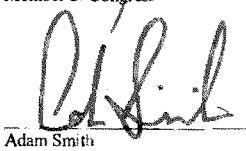
Member of Congress

Nydia Velazquez
Member of Congress

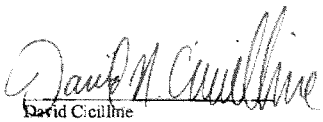


Jerry McNerney
Member of Congress



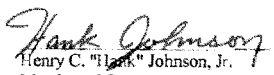
Adam Smith
Member of Congress

Gwen Moore
Member of Congress



David Cicilline
Member of Congress

Karen Bass
Member of Congress



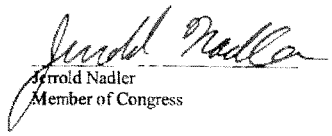
Henry C. "Hank" Johnson, Jr.
Member of Congress

Elijah E. Cummings
Member of Congress

Danny K. Davis
Member of Congress

Eleanor Holmes Norton
Member of Congress

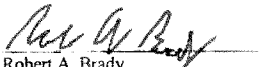
André Carson
Member of Congress

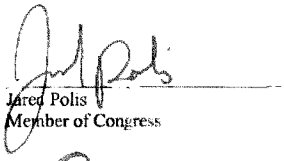


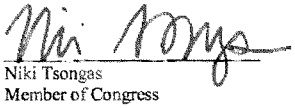
Jerrold Nadler
Member of Congress

Yvette D. Clarke
Member of Congress

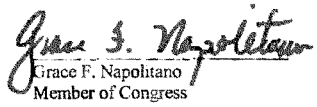
Kathy Castor
Member of Congress

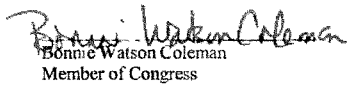

Robert A. Brady
Member of Congress

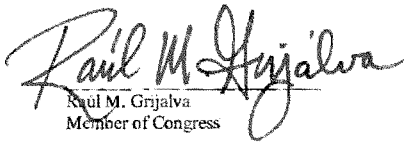

Jared Polis
Member of Congress


Niki Tsongas
Member of Congress

Adriano Espaillat
Member of Congress


Grace F. Napolitano
Member of Congress

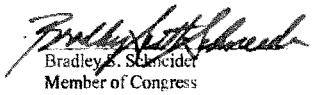

Bonnie Watson Coleman
Member of Congress


Raúl M. Grijalva
Member of Congress

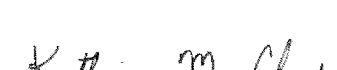
Kathleen M. Rice
Member of Congress

Mark Takano
Member of Congress

Anthony G. Brown
Member of Congress


Bradley S. Schneider
Member of Congress

Mark Pocan
Member of Congress

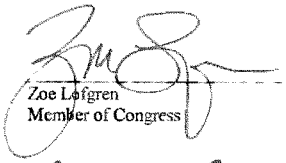


Katherine Clark
Member of Congress

Ed Perlmutter
Member of Congress

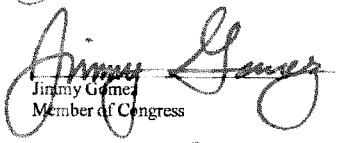
Seth Moulton
Member of Congress

Jared Huffman
Member of Congress

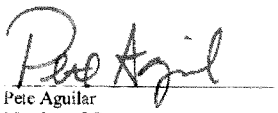


Zoe Lofgren
Member of Congress

Grace Meng
Member of Congress



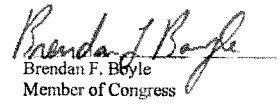
Jimmy Gomez
Member of Congress



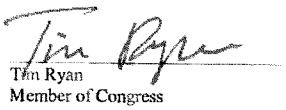
Pete Aguilar
Member of Congress

Ruben Gallego
Member of Congress

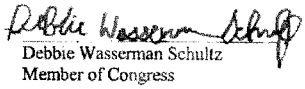
Brenda L. Lawrence
Member of Congress



Brendan F. Boyle
Member of Congress

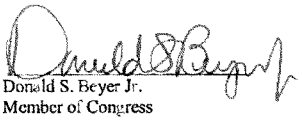


Tim Ryan
Member of Congress

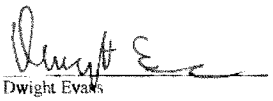


Debbie Wasserman Schultz
Member of Congress

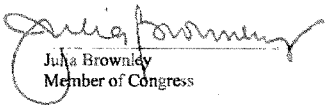
Earl Blumenauer
Member of Congress



Donald S. Beyer Jr.
Member of Congress

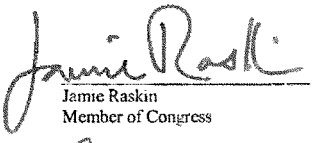


Dwight Evans
Member of Congress

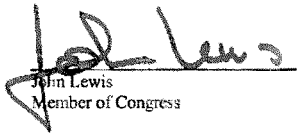


Julia Brownley
Member of Congress

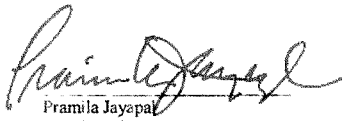
Joseph P. Kennedy, III
Member of Congress



Jamie Raskin
Member of Congress



John Lewis
Member of Congress



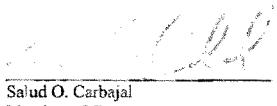
Pramila Jayapal
Member of Congress

Ted W. Lieu
Member of Congress

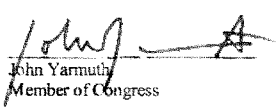
Mike Thompson
Member of Congress

Daniel T. Kildee
Member of Congress

Alma S. Adams, Ph.D.
Member of Congress

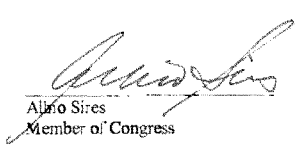


Salud O. Carbajal
Member of Congress

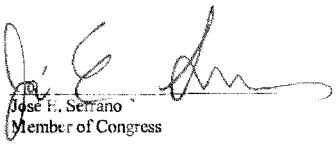


John Yarmuth
Member of Congress

Alan Lowenthal
Member of Congress



Albio Sires
Member of Congress



José E. Serrano
Member of Congress

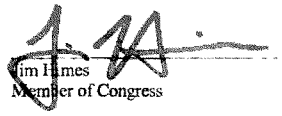
Suzanne Bonamici
Member of Congress

Paul Tonko
Member of Congress

Robert C. "Bobby" Scott
Member of Congress

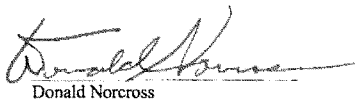
Jacky Rosen
Member of Congress

Ro Khanna
Member of Congress



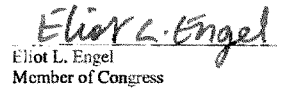
Jim Himes
Member of Congress

Chellie Pingree
Member of Congress



Donald Norcross
Member of Congress

Tim Walz
Member of Congress



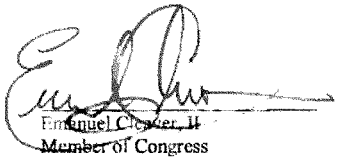
Eliot L. Engel
Member of Congress

Derek Kilmer
Member of Congress

Dave Loebsack
Member of Congress

Ann McLane Kuster
Member of Congress

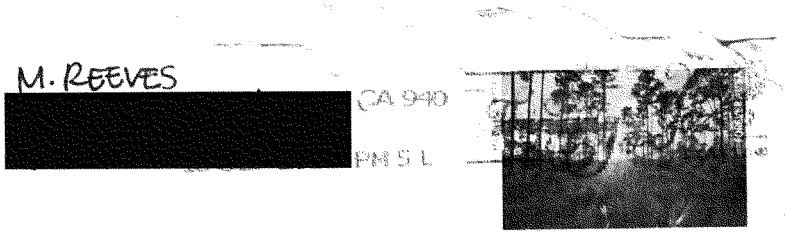
Peter A. DeFazio
Member of Congress



Emanuel Cleaver, II
Member of Congress

Susan K. DelBene
Member of Congress

David E. Price
Member of Congress



OFFICE OF DIANE FEINSTEIN
ONE POST STREET, SUITE 2450
SAN FRANCISCO, CA 94104

9/19/2018

Dear Senator Feinstein,,
I am one of your constituents. I have known Dr. Christine Ford and her husband Russell for many years and would like to vouch for their character. I know them to be sincere, genuine, and of the highest integrity. I 100% believe Christine and ask that you help protect her and help her truth make a difference in preventing Kavanaugh's confirmation Sincerely,
Mona Reeves

Religious Coalition *for* Reproductive Choice

Dear Senator:

On behalf of the Religious Coalition for Reproductive Choice (RCRC), we are writing to express our strong opposition to the nomination of Brett Kavanaugh to the U.S. Supreme Court.

The Religious Coalition for Reproductive Choice (RCRC) is a broad-based, national, interfaith movement that brings the moral force of religion to protect and advance reproductive health, choice, rights and justice through education, prophetic witness, pastoral presence and advocacy.

RCRC values and promotes religious liberty which upholds the human and constitutional rights of all people to exercise their conscience to make their own reproductive health decisions without shame and stigma. RCRC challenges systems of oppression and seeks to remove the multiple barriers that impede individuals, especially those in marginalized communities in accessing comprehensive reproductive health care with respect and dignity.

We joined nearly 40 other national organizations in a letter expressing our concern about Judge Kavanaugh's writing and opinions that indicate his disregard for the separation of church and state which is the linchpin of religious freedom and one of the hallmarks of American democracy.

Judge Brett Kavanaugh appears to reject the commonly accepted legal principle that the First Amendment's Establishment Clause creates a "wall of separation." In a 2017 lecture given to the American Enterprise Institute, he praised former Chief Justice William Rehnquist for, in Judge Kavanaugh's words, "convincing the Court that the wall metaphor was wrong as a matter of law and history." In addition, he issued a dissent in *Priests for Life v. U.S. Department of Health and Human Services*, siding with a religious organization that argued that filling out a form to request a religious exemption burdened its religious exercise. His opinion which would have made it more difficult for the government to ensure that women had access to birth control, is at odds with eight of the nine federal appeals courts that heard challenges to the same religious exemption. This raises concerns that Judge Kavanaugh could require the government to carve out religious exemptions even when they would cause real harm to other people.

Judge Brett Kavanaugh was nominated by President Trump who assured voters that whomever he nominated to the Supreme Court would overturn *Roe v. Wade*, the landmark 1973 decision that recognized the constitutional right to access a safe and legal abortion in the United States. Based on his record, it appears that Judge Kavanaugh would likely do just that. Last year, he tried to prevent a young, undocumented woman in U.S. custody from accessing abortion care and attempted to delay the procedure by a month, pushing her into the second trimester. Fortunately, the full court allowed the young woman access to the health care she needed.

We are concerned that the Senate Judiciary Committee is rushing ahead with Brett Kavanaugh's hearing despite the fact that his full record has not been made available to the senators.

Although we hope that the Senate Judiciary Committee will fully probe Judge Kavanaugh's record and views on the issue of religious freedom, including the separation of church and state and the importance of ensuring every individual's right to make personal decisions about their reproductive health based on their own beliefs without interference from government, employers, or any other entity that seeks to impose their religious views on others, RCRC believes that Judge Kavanaugh's record in this area is troubling and should disqualify him from a seat on the Supreme Court.

Thank you for the opportunity to share our views on this important matter.

Sincerely,

Lisa Weiner-Mahfuz

Lisa Weiner-Mahfuz
Executive for Programs and Strategic Partnerships

Religious Coalition *for* Reproductive Choice

September 20, 2018

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
226 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Diane Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
425 Hart Senate Office Building
Washington, DC 20510

Re: Call for a full investigation of the allegations by Dr. Blasey Ford against Judge Kavanaugh

Dear Chairman Grassley and Ranking Member Feinstein:

The Religious Coalition for Reproductive Choice (RCRC) is deeply concerned by the serious allegations of sexual assault raised by Dr. Christine Blasey Ford against Judge Brett Kavanaugh. We urge conducting an independent investigation of this matter before moving to another hearing. Considering Dr. Ford's serious allegations and the national upheaval around sexual misconduct, rushing to a vote on this nomination would be highly inappropriate.

The Religious Coalition for Reproductive Choice has long trained interfaith clergy to provide non-judgmental counseling to women making their own independent decisions about their reproductive lives. We understand the deeply personal, complex nature of the process women go through in sorting out the impact of experiences such as the encounter Dr. Ford has described with Judge Kavanaugh. Intense public scrutiny in Dr. Ford's case only makes this more complicated for her.

In case you are unfamiliar with our organization, we are a broad-based, national, interfaith movement that brings the moral force of religion to protect and advance reproductive health, choice, rights and justice through education, prophetic witness, pastoral presence and advocacy.

We trust women and respect their ability to discern their own proper courses of action.

Once Dr. Ford's confidential accusations became public, she courageously decided to tell her story. We hope the Committee will show its respect for Dr. Ford by conducting an investigation by professionals who have worked with survivors of trauma.

Few Senate responsibilities carry more lasting effects than evaluating a nominee for a lifetime seat on our highest court. We urge you to conduct a fair, non-partisan and thorough process.

Sincerely,

Delia Allen-O'Brien Rev. Dr. Cari Jackson Lisa Weiner-Mahfuz

Executive Directors

Religious Coalition for Reproductive Choice

August 31, 2018

The Honorable Charles Grassley
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Judge Brett Kavanaugh to Associate Justice of the Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein,

The undersigned religious, religiously affiliated and faith-centered organizations and communities collectively represent millions of people of faith committed to ensuring that all women have equitable and affordable access to healthcare and that their individual reproductive choices are respected. We write to express our concern regarding the nomination of Judge Brett Kavanaugh to the Supreme Court of the United States.

We are deeply troubled by Judge Kavanaugh's record of statements and decisions on issues related to reproductive health and the right to make private decisions without impediment or imposition. President Trump promised to appoint Justices who will overrule *Roe v. Wade;* Judge Kavanaugh's history suggests he may rule in favor of eroding the rights fortified in *Roe* and reaffirmed in *Planned Parenthood v. Casey* (1992) and *Whole Woman's Health v. Hellerstedt* (2016). We fear that Judge Kavanaugh, if confirmed, will not uphold the right of each pregnant woman to make the best choice for her circumstance — including the choice to seek an abortion — by her own conscience in consultation with her doctor, faith and values.

Religious leaders and many in our communities have a long history of supporting women regardless of their choice to continue or to terminate a pregnancy. Both before *Roe* and since that decision, clergy have counseled women as they make a decision regarding pregnancy, and many people of faith have worked to ensure that abortion is safe, legal, and accessible to all who need it. We support the constitutional right to privacy, including the right to choose abortion, because of and not in spite of our religious values. We are extremely concerned that this right and these values are at risk should Judge Kavanaugh be confirmed.

Our varied religious traditions support the moral authority of women to make their own decisions about abortion, and we all share a dedication to helping those who are vulnerable. The vast majority of people of faith believe that all women — regardless of income — are moral agents. We believe this entitles each person to follow her own inner compass when making decisions about her reproductive health, free from undue constraint or impediment. Although we come from diverse traditions, we are united in our alarm that, should the Supreme Court turn back the clock on a woman's right to choose the reproductive healthcare that best suits her particular needs — including abortion — the consequences for society will be devastating, especially for women of color, LGBTQ women, and low-income women. Judge Kavanaugh's views on the civil right to choose abortion and the sacred right to bodily autonomy give us great pause over his confirmation to the highest court in our land.

The Supreme Court's jurisprudence establishing a constitutional right to access abortion protects the moral decision making and religious liberty that benefit both people of faith and non-theists alike. Judge Kavanaugh's record indicates that this precedent may be undone if he is confirmed to the Supreme Court. His recent record of blocking the autonomous decision of a young immigrant trying to obtain an abortion in the 2017 case *Garza v. Hargan* is gravely troubling and further indicative of his disregard for religious freedom, legal precedent and the fundamental values of moral agency and social justice that we hold dear. By siding with the government when it blocked an unaccompanied minor immigrant woman from getting an abortion, Judge Kavanaugh upheld an outrageous subjugation of the women's will and violated her right to exercise her conscience-based decision to seek an abortion. His remarks and decisions do not represent the beliefs of the majority of people of faith, including his fellow Catholics, who recognize and affirm the importance of legal, safe and affordable access to abortion.

Moreover, if *Roe* were to be overturned or undermined, it is the most vulnerable of our society who would be disproportionately affected — low-income women, women of color, rural women, young women, women in abusive relationships, LGBTQ women, and women unable to travel to obtain abortion care. Our commitment to them and to the principles of social justice demand that we fight with and beside them to ensure their decision making and health needs are respected. Any nominee to the Supreme Court has the potential to enormously impact women's lives and health, and could severely restrict the individual autonomy we are all given by our Creator; therefore, each nominee must be carefully considered in light of these principles.

It would be a travesty — and contrary to the wishes of the majority of Americans and people of faith — if Judge Kavanaugh and other conservatives on the Court were to overturn *Roe.* Eliminating the right to abortion, or reading *Roe*, *Casey* and *Whole Woman's Health* so narrowly as to provide no meaningful access to abortion, would weaken the foundation for other critical constitutional rights. *Roe* protects rights to liberty, equality, dignity, autonomy, intimate personal decision making and religious pluralism.

As organizations and communities committed to the protection of religious freedom for every individual, we both expect respect for our own sincerely held beliefs and believe it is wrong to impose those beliefs on others. We are deeply troubled by Judge Kavanaugh's misinterpretation of the foundational principle of religious liberty as that which protects only the expression of one narrow set of religious beliefs. We strongly believe, as people of faith, that it is wrong to allow the imposition of one set of beliefs on society as a whole at the behest of a powerful few. The religious freedom guaranteed by our Constitution encompasses both freedom of religion and the freedom from any one set of religious beliefs being encoded into public law.

In light of President Trump's explicit promise to nominate Justices who will overrule *Roe*, and of Judge Kavanaugh's past statements and rulings, we urge the Committee to carefully scrutinize Judge Kavanaugh's entire record and demand clear, direct and substantive answers. We further hope the Senate will reject any nominee who will not safeguard individual moral agency or the fundamental principles of religious freedom enshrined in our Constitution.

Respectfully,

A Critical Mass: Women Celebrating Eucharist
Auburn Theological Seminary
Bend the Arc: Jewish Action
Call To Action
Catholics for Choice
Central Conference of American Rabbis
Colorado Religious Coalition for Reproductive Choice
Concerned Clergy for Choice
CORPUS
Disciples for Choice
Disciples Justice Action Network
Illinois Affiliate - Religious Coalition for Reproductive Choice
Jewish Alliance for Law and Social Action
Jewish Women International
Keshet
Metropolitan Community Church of New York
Michigan Unitarian Universalist Social Justice Network
Muslims for Progressive Values
National Council of Jewish Women
Ohio Religious Coalition for Reproductive Choice
Planned Parenthood Federation of America Clergy Advocacy Board
Presbyterian Feminist Agenda Network
Presbyterians Affirming Reproductive Options (PARO)
Reconstructionist Rabbinical Association
Quixote Center / Catholics Speak Out
Religious Coalition for Reproductive Choice
Religious Institute
The Global Justice Institute
Union for Reform Judaism
Unitarian Universalist Women's Federation
Women's Alliance for Theology, Ethics, and Ritual (WATER)
Women of Reform Judaism

CC: Members of the U.S. Senate Committee on the Judiciary

For additional information on this letter, please contact Glenn Northern at 202-986-6093; gn_nikrn@catholicsforchoice.org or Caroline Ostro at 202-802-0116; costro@rcrw.org.

Senator Chuck Grassley, Chairman
Senate Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Senator Dianne Feinstein, Ranking Member
Senate Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Re: Nomination of Brett Kavanaugh
Associate Justice of the Supreme Court Hearing

August 31, 2018

Dear Chairman Grassley, Ranking Member Feinstein and Members of the Senate Committee on the Judiciary:

The National Latina Institute for Reproductive Health, In Our Own Voice: National Black Women's Reproductive Justice Agenda, the National Asian Pacific American Women's Forum and over 30 reproductive justice organizations and allies who joined an amicus brief in *Azar v. Garza*, appeal to you to oppose the confirmation of Judge Kavanaugh to the United States Supreme Court.

Reproductive Justice is a framework rooted in the human right to control our bodies, our sexuality, our gender, and our reproduction. Reproductive Justice will be achieved when all people, of all immigration statuses, have the economic, social, and political power and resources to define and make decisions about our bodies, health, sexuality, families, and communities in all areas of our lives with dignity and self-determination.

Many of us joined an amicus brief in *Azar v. Garza,* a D.C. Circuit Court case concerning an immigrant minor whom the federal government blocked from accessing abortion care. As reproductive justice organizations and allies of reproductive justice, we demand people of all ages and immigration statuses have access to the comprehensive health services they need and desire, including abortion care. We are horrified by the facts in the *Garza* case and the positions Judge Kavanaugh took when the case reached his court. Therefore, we cannot remain silent as Judge Kavanaugh is considered for a seat on the highest court in our country.

Judge Kavanaugh's order and dissenting opinion in *Garza v. Hargan* show he is willing to strip power from immigrants by taking away their control over their personal autonomy and that of their families.[1] Under

[1] *Garza v. Hargan*, No. 17-5236, 2017 WL 9854552, at *1 (D.C. Cir. Oct. 20, 2017); *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (Kavanaugh, J. dissenting).

the current President, thousands of children and pregnant people are detained under dangerous and unlawful conditions.[2] Confirming Judge Kavanaugh would further this administration's complete disregard for the health, safety, and humanity of immigrants.

Garza involved an unaccompanied immigrant minor, Jane Doe, who discovered she was pregnant while she was detained in a federally-funded Office of Refugee Resettlement shelter in Texas.[3] Jane requested an abortion and, as required for minors under Texas law, applied for a judicial bypass with the help of an attorney and appointed guardian.[4] A judge granted her application, determining that Jane could consent to the abortion herself.[5] The federal government nonetheless refused to allow Jane to travel to a clinic.[6]

Jane filed a constitutional challenge, and Judge Kavanaugh had the opportunity to weigh in when it was appealed to a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit. Judge Kavanaugh voted to block Jane's abortion for at least 11 more days. He argued that the government could block her abortion if it could find a sponsor who would remove her from custody "expeditiously,"[7] despite the fact that the government had already failed to find a sponsor for six weeks. His decision would have forced Jane to continue an unwanted pregnancy for nearly two additional weeks, after the government had already forced her to continue the pregnancy for four weeks. Thus, Judge Kavanaugh's decision was cruel and inhumane. It was a violation of Jane's constitutional and human rights, and demonstrates his willingness to allow the government to callously exploit its power to control immigrant's bodies.

Jane immediately appealed to the full D.C. Circuit Court. The full Court of Appeals reversed the panel and ordered that she be permitted to obtain the abortion without additional delay.[8] However, Judge Kavanaugh's dissent insisted that the government's policies and actions did not violate Jane's constitutional right to an abortion. He ignored that Jane had already been blocked from obtaining an abortion for almost four weeks; that finding a sponsor was often a lengthy process and that two possible sponsors had fallen through; that Jane had already successfully gone through the judicial bypass process; and that the government would play no role in facilitating the abortion. All the government needed to do was simply allow Jane to use private funds and logistical support that she already arranged for herself to receive abortion care. Judge Kavanaugh's decisions demonstrate that his confirmation would gravely endanger both reproductive rights and the constitutional rights of immigrants.

In coming years, the Supreme Court will address an array of immigration cases with long-term effects. Judge Kavanaugh's extensive judicial record shows anti-immigrant bias and has the potential of penetrating far-reaching aspects of our lives—specifically the lives of communities of color and immigrant families.[9]

---

[2] *See* Devlin Barret, Trump admin. May seek to detain migrant families longer than previously allowed, Washington Post (Jun. 29, 2018), available https://www.washingtonpost.com/world/national-security/trump-administration-plans-to-detain-migrant-families-for-months/2018/06/29/f89fec86-7bf7-11e8-93ee-6d3becedf7a3_story.html?utm_term=.b6d59c848b53; *see also* Amy Taxin, *Immigrant children describe treatment in detention ctr.*, AP News (Jul. 18, 2018) available https://apnews.com/1a8db84a88b6d0f4955889d1e50dcc83.

[3] *Garza*, 874 F.3d at 753.

[4] *Id.* at 737.

[5] *Id.*

[6] *Id.*

[7] *Garza v. Hargan*, No. 17-5236, 2017 WL 9854552, at *1 (D.C. Cir. Oct. 20, 2017), vacated in part on reh'g en banc, 874 F.3d 735 (D.C. Cir. 2017).

[8] See supra note 3.

[9] *See e.g., Fogo de Chao Inc. v. Dep't of Homeland Sec.*, 769 F.3d 1127 (D.C. Cir. 2014) (Kavanaugh, J., dissenting); *Agri Processor Co. v. N.L.R.B.*, 514 F.3d 1 (D.C. Cir. 2008).

In addition to his decision in *Azar v. Garza*, Judge Kavanaugh's dissents in other cases regarding immigrants concern us. In his dissent in *Fogo De Chao Inc. v. Department of Homeland Security*, Judge Kavanaugh opposed granting special visas for Brazilian workers with specific culinary skills, claiming they had no specialized knowledge for the purpose of the visa program and that immigrant workers displace U.S. workers.[10] His argument wrongfully framed hiring practices that are inclusive of immigrants as being at the expense of U.S. citizens.[11] In *Agri Processor Company v. National Labor Relations Board,* Judge Kavanaugh argued a union election was void because undocumented immigrant workers who voted in the election "tainted" the election with their vote.[12] Contending that undocumented immigrant workers are not "employees" protected under the National Labor Relations Act, Kavanaugh's opinion reflects a disregard for the rights of immigrant workers. We are concerned that he will soon unfavorably weigh in on the future of the Deferred Action of Childhood Arrivals program, the indefinite detention and separation of immigrant children and families, and raids on immigrant communities. These issues are extremely important to our communities and would tremendously impact our ability to live with dignity and without fear of violence or family separation.

Our communities already face extreme disparities, including high rates of uninsurance and poverty, barriers to linguistically and culturally competent care, and other inequities.[13] Additionally, our communities experience bias and discrimination due to language, religion, immigration status, race, ethnicity, gender identity, sexual orientation, as well as other forms of discrimination.

The government should value the lives of all people, including people of all ages, immigrants, and people living with low-incomes. The government should not have the power to intimidate or coerce anyone seeking abortion care. Yet, the current administration has grossly exploited its power and has interfered with the rights of immigrants and young people to make decisions about their health, families, and futures with dignity. Judge Kavanaugh has condoned these assaults on fundamental rights and must be held responsible for his record in this area.

The stakes keep growing for people of color, immigrants, and people living with low-incomes. We hope you share our deep concerns regarding the harmful impact his confirmation will have on our communities, and we request that you oppose the nomination of Judge Kavanaugh.

Sincerely,

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[10] *Fogo de Chao Inc. v. Dep't of Homeland Sec.*, 769 F.3d 1127, 1152 (D.C. Cir. 2014) (Kavanaugh, J., dissenting).
[11] *Id.*
[12] *Agri Processor Co. v. N.L.R.B.*, 514 F.3d 1, 11 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).
[13] *See e.g.*, National Women's Law Center, Despite Job Growth, Black and Latina Women are Still being Left Behind (Mar., 10, 2017) available https://nwlc.org/blog/despite-job-growth-black-and-latina-women-are-still-being-left-behind/; *See also,* Nat'l Asian Pacific Am. Women's Fourm, Achieving Pay Equity for Asian Am. & Pacific Islanders (Mar. 2017) available https://www.napawf.org/uploads/1/1/4/9/114909119/epd_fact-sheet_final.pdf; *See*, Nat'l Asian Pacific Am. Women's Form, Ensuring Health Access and Equity for Immigrant Asian. Am. & Pacific Islander Women (Mar. 2015) available https://www.napawf.org/uploads/1/1/4/9/114909119/aapiwomenhealthaccessequity_issuebrief2015.pdf; *See also*, Henry J Kaiser Family Foundation, Uninsured Rates for the Nonelderly by Race/Ethnicity (2016) available https://www.kff.org/uninsured/state-indicator/rate-by-raceethnicity/?currentTimeframe=0&selectedDistributions=black&sortModel=%7B"colId":"Location","sort":"asc"%7D.

Advocates for Youth
American Association of University Women (AAUW)
Black Women for Wellness Action Project
Black Women's Health Imperative
California Latinas for Reproductive Justice
Colorado Organization for Latina Opportunity and Reproductive Rights
Center for Reproductive Rights
Desiree Alliance
Forward Together
Hispanic Federation
If/When/How: Lawyering for Reproductive Justice
In Our Own Voice: National Black Women's Reproductive Justice Agenda
LatinoJustice PRLDEF
Legal Voice
NARAL Pro-Choice America
National Abortion Federation
National Asian Pacific American Women's Forum
National Institute for Reproductive Health (NIRH)
National Latina Institute for Reproductive Health
National Network of Abortion Funds
National Partnership for Women & Families
National Women's Law Center
New Voices for Reproductive Justice
Oklahoma Call for Reproductive Justice
Positive Women's Network - USA
SIA Legal Team
SisterReach
SisterSong Women of Color Reproductive Justice Collective
Southwest Women's Law Center
Tewa Women United
URGE: Unite for Reproductive & Gender Equity
Women With A Vision, Inc
Women's Law Project
Young Women United

Atheists. Agnostics. Humanists.
Americans.

July 26, 2018

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Secular Groups Oppose Brett Kavanaugh Supreme Court Nomination

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned organizations representing the secular community, including atheists, agnostics, humanists, and the religiously unaffiliated, as well as all Americans who value true religious freedom and equality, write to urge you to reject the nomination of Judge Brett Kavanaugh to fill the Supreme Court vacancy created by the retirement of Associate Justice Anthony Kennedy.

The responsibility of the Senate to confirm a nominee for a seat on the Supreme Court is one of the most impactful powers enumerated in the Constitution. The Supreme Court, as the final interpreter of federal law, is charged with the most absolute decision-making authority. Nine Justices alone hold the responsibility of protecting civil rights for all Americans by striking down those laws that they deem unconstitutional, enforcing limitations on power for both Legislative and Executive branches, and administering justice through impartial and meticulous analysis of the US Constitution.

The importance of the Senatorial role in this confirmation process laid out under the Constitution cannot be overstated. The Senate, as the most deliberative legislative body, must keep the Judiciary independent and away from the vagaries of partisanship, to protect the People of the United States from ill-considered or biased decisions on the part of the president, which may have repercussions on our Nation for decades. The Senate's duty of advice and consent of the president's nominee for the Supreme Court was intended by the Founders to be perhaps the most important check on both presidential and judicial power. As organizations dedicated to our constitutional order and to the

proper functioning of our Republic, it is therefore our hope and expectation that the nomination of Judge Brett Kavanaugh be given due process and thorough consideration.

A single seat on the Supreme Court, especially in these politically divided times, can determine outcomes so monumental in the scheme of individual rights and constitutional interpretation that it can reshape what it means to be an American citizen. Landmark 5-4 decisions have accomplished everything from establishing due process rights during arrest,[1] to clarifying how educational institutions should consider equality of opportunity and race,[2] to defining the bounds of our rights under the Second Amendment,[3] to determining how money and free speech interact with elections.[4] One of the most fundamental liberties regularly brought before the Supreme Court is the separation of religion and government, which is the very bedrock of our religious liberty.

Our historical understanding of religious liberty is built on the idea that government entanglement with religion can be a great threat to individual rights, often leading to religious oppression and tyranny.[5] Grounded in the understanding that freedom of belief is an essential component of religious liberty, the principle of separation between religion and government has deep roots in both theology and political philosophy, and it prospered in colonial America due to a shared history of religious persecution.

Roger Williams, the Baptist theologian and founder of Rhode Island, preached that in order for religious belief to be genuine, people must come to realize it on their own free will. Coerced belief was antithetical to religion, and religious practices themselves were sinful and ingenuine unless performed "with faith and true persuasion that they are the true institutions of God."[6] This historical understanding of every individual's right to religious liberty was built into our Republic though the Establishment and Free Exercise clauses in the First Amendment.

The Founders, who understood that they were creating a government for people of diverse origins and faiths, knew that the separation of religion and government was essential to the newborn nation's survival. Thomas Jefferson explained that "the clergy, by getting themselves established by law & ingrafted into the machine of government, have been a very formidable engine against the civil & religious rights of man."[7] James Madison concluded that the establishment of state religions

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[1] *Miranda v. Arizona*, 384 US 436 (1966).

[2] *Regents of the University of California v. Bakke*, 438 US 265 (1978).

[3] *District of Columbia v. Heller*, 554 US 570 (2008).

[4] *Citizens United v. Federal Election Commission*, 558 US __ (2010).

[5] "What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries. A just Government instituted to secure & perpetuate it needs them not." James Madison, Memorial and Remonstrance Against Religious Assessments § 8 (1785).

[6] Roger Williams, The Bloudy Tenent, of Persecution for Cause of Conscience (1644), reprinted in 3 Complete Writings of Roger Williams 12 (Samuel L. Caldwell ed., 1963).

[7] Letter from Thomas Jefferson to Jeremiah Moore (August 14, 1800), http://bit.ly/2y9nvNn.

historically led to "ignorance and servility in the laity; in both, superstition, bigotry, and persecution."[8]

Religious freedom means the right to choose a religion, or none at all, without interference by the government, and simultaneously prevents religious authorities from interfering with our system of government and law. Religious practices, if used to excuse oneself from the law, would "make the professed doctrines of religious belief the law of the land, and in effect to permit every citizen to become a law unto himself."[9] Historically, the Supreme Court, like the Founders before them, has believed such a system to be unworkable, and so the Court has acted as the ultimate protector of the separation of religion and government and thereby of religious liberty within our system of governance.

We are disappointed to say that the nomination by President Donald Trump of Judge Brett Kavanaugh is a threat to this constitutional order and to the religious liberty of all Americans. We dearly wish we could say otherwise -- as believers in the constitutional order, we firmly believe in the president's power to nominate qualified candidates for the Supreme Court -- but in this instance, we are forced to ask the Senate to exercise its power and to deny this nomination. Judge Kavanaugh's record and writings demonstrate support for the entanglement of religion and government, and he has continuously argued in favor of religious coercion above the constitutional guarantees of religious freedom and individual liberty.

In 2010, when non-theists challenged prayers said before the Presidential inauguration, Judge Kavanaugh declared the prayers constitutional, going so far as to say that "inaugural prayers are traditionally inclusive and largely non-sectarian," despite references to "Lord," "God," and "Jesus."[10] His concurrence demonstrated a clear preference for Christian sects and beliefs at the expense of minority religions and nonbelievers.

Judge Kavanaugh repeated the same discriminatory ideology in a brief submitted to the US Supreme Court in a case challenging prayer before a high school football game. He argued that the Constitution requires schools to permit students to deliver prayers, as they are a fundamental part of national tradition, completely ignoring the impact that those prayers have on the adherents of minority religions and the non-religious. He stated his belief that long-standing constitutional precedent prohibiting the diversion of taxpayer dollars to pay for religious activities "is of questionable validity and is inconsistent with the thrust of the Court's modern jurisprudence."[11] He even went so far as to describe a world in which official prayer proscribed in public schools as "Orwellian" in nature.[12] The Supreme Court did not agree with his arguments, ruling that public schools could not circumvent constitutional restrictions on school-sponsored prayer through students.

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[8] James Madison, Memorial and Remonstrance Against Religious Assessments § 7 (1785).
[9] *Reynolds v. United States,* 98 U.S. 145, 166-167 (1878).
[10] *Newdow v. Roberts,* 603 F.3d 1002, 1021 (D.C. Cir. 2010).
[11] Brief of Amici Curiae Congressman Steve Largent and Congressman J.C. Watts in Support of Petitioner, at *18, *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000), No. 99-62, 1999 WL 1272963.
[12] *Id.* at *22.

In a speech delivered just last year, Judge Kavanaugh advocated that religious schools and institutions should be able to "receiv[e] funding or benefits from the state so long as the funding [i]s pursuant to a neutral program that, among other things, include[s] religious and nonreligious institutions alike."[13] However, he did not acknowledge the possibility, supported by many clear examples, that religious belief is sometimes used as an excuse to discriminate. His robust advocacy for the use of taxpayer dollars to support majoritarian religious sects and religious activities shows that he is not able to treat parties of differing beliefs neutrally and without bias, an essential component of our constitutional order.

Moreover, Judge Kavanaugh has demonstrated that he would likely allow religious freedom laws to be used to harm others. In 2015, he authored a dissent arguing that a requirement for religious organizations to fill out a form merely to inform the government that they would not be providing their employees, many holding differing religious beliefs, coverage for contraception was a substantial burden on the organization's Free Exercise. This is a fringe opinion, at odds with the opinions of eight of the nine federal appeals courts that heard challenges to the accommodation and upheld it.[14]

In the same case, Judge Kavanaugh asserted that the Religious Freedom Restoration Act prohibits the government from requiring religious employers to notify their insurer of the objection, or even merely reveal to the government the identity of the insurer. In his view, women employed by the objecting organizations are entitled to contraceptive coverage only if the government can divine, without indication, who the insurance provider is. His dissent shows a clear preference for certain religious beliefs and for the religious liberty of organizations over that of individuals, who the First Amendment is meant to protect. Moreover, he shows a disdain for the equal rights and health care of women, demonstrating that he prioritizes religious coercion at the expense of civil rights.

Judge Kavanaugh's speeches and writings reveal a level of biased, ideological fervor that is incompatible with service on the Supreme Court. His clear preference for particular religious sects, promotion of prayer and religious coercion in public settings, and relentless pursuit of ideology over established judicial precedents should disqualify this nomination from further consideration. His appointment would cause grave harm to the wall of separation between religion and government and true realization of religious liberty within our society.

For these reasons, we urge you to reject the President's nomination of Judge Brett Kavanaugh for Associate Justice of the Supreme Court.

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[13] Brett Kavanaugh, Address at The American Enterprise Institute (Sept. 18, 2017).

[14] R. Robin McDonald, *Eleventh Circuit Ruling Squares with Seven Other Circuits*, Daily Report, (February 22, 2016 at 12:00 AM), https://www.law.com/dailyreportonline/almID/1202750202109/Eleventh-Circuit-Contraceptive-Ruling-Squares-With-Seven-Other-Circuits/.

If you should have any questions about this issue or our position, please contact Alison Gill, American Atheists Legal and Policy Director, at [redacted] or by phone at (908) 276-7300 Ext. 9.

Sincerely,

Larry T. Decker
Executive Director
Secular Coalition for America
www.secular.org

Ed Buckner
Interim President
American Atheists

Bart Worden
Executive Director
American Ethical Union
www.aeu.org

Roy Speckhardt
Executive Director
American Humanist Association
www.americanhumanist.org

CW Brown
Executive Director and Social Media Director
Atheist Alliance of America
www.atheistallianceamerica.org

Mandisa Thomas
President and Founder
Black Nonbelievers, Inc.
www.blacknonbelievers.wordpress.com

Kim Newton
Executive Director
Camp Quest
www.campquest.org

Robyn Blumner
President and Chief Executive Officer
Center for Inquiry
www.centerforinquiry.net

Terry Waslow
Executive Director
Congress of Secular Jewish Organizations
www.csjo.org

Sarah Haider
Executive Director
Ex-Muslims of North America
www.exmna.org

Noelle George
Executive Director
Foundation Beyond Belief
www.foundationbeyondbelief.org

Annie Laurie Gaylor
Co-President
Freedom from Religion Foundation
www.ffrf.org

Margaret Downey
Executive Director
Freethought Society
www.ftsociety.org

David Tamayo
Executive Director
Hispanic Americans Freethinkers
www.hafree.org

Jennifer D. Kalmanson
President
Institute for Humanist Studies
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Jason Torpy
President
Military Association of Atheists and Freethinkers
www.militaryatheists.org

Gayle Jordan
Executive Director
Recovering from Religion
www.recoveringfromreligion.org

Kevin Bolling
Executive Director
Secular Student Alliance
www.secularstudents.org

Paul Golin
Executive Director
Society for Humanistic Judaism
www.shj.org

CC: Members of the United States Senate Judiciary Committee
Congressional Freethought Caucus

August 29, 2018

The Honorable Charles E. Grassley
Chairman
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley, Ranking Member Feinstein, and members of the Senate Judiciary Committee:

MARY KAY HENRY
International President

GERRY HUDSON
International Secretary Treasurer

NEAL BISNO
Executive Vice President

LUISA BLUE
Executive Vice President

HEATHER CONROY
Executive Vice President

LESLIE FRANE
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Executive Vice President

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INTERNATIONAL UNION
CTW, CLC

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www.SEIU.org

On behalf of the 2 million members of the Service Employees International Union (SEIU), I am writing to express our grave concern that the Judiciary Committee is moving forward with hearings on Judge Brett Kavanaugh's nomination to the Supreme Court without his full record being available to Senators and the public as a whole. The next Associate Justice will play an incredibly important role in shaping laws that will impact working families every day for generations to come. In the balance hangs, among other issues, our rights in the workplace, our rights at the doctor's office including pre-existing condition protections and women's access to reproductive health, and our rights at the ballot box ensuring all Americans can vote and be counted. But the list is too long to fully enumerate – almost every aspect of American life, human rights, personal liberties, and freedom is at stake. For this reason it is impossible for Senators to fulfill their constitutional obligation to advise and consent on this nomination without having the nominee's full record, which would provide concrete information on his judicial philosophy and how he will consider these important issues rather than platitudes that are derived from carefully crafted talking points written by Washington insiders. In addition, a fully transparent and thorough examination of Judge Kavanagh's work and positions are especially critical given the seriousness of ongoing criminal investigations, in which the President, his associates, and members of his Administration are central actors, that the President's own lawyers have openly stated may result in Supreme Court review on questions of executive power.

Throughout the 115th Congress, the process for Senators to thoroughly examine judicial nominees' records has been eroded. Numerous nominations have been rushed through without following procedural safeguards that ensure that the nominees are qualified to serve in the judiciary. There have been several instances of nominees being voted down by the full Senate after information came to light about their record that clearly displayed they were unfit to serve on the federal bench. These occurrences prove, unfortunately, that the Judiciary Committee has failed to obtain the full records of nominees under consideration before moving towards consideration by the full Senate.

Regrettably, the Committee seems to be following this same disturbing pattern by failing to obtain all the documents requested by the Committee prior to the hearings for the Supreme Court nominee. Additionally, the Committee has taken the unprecedented step of allowing a private attorney,

who has clear conflicts of interest, to pre-screen documents that have been requested. Combined, these two actions mean Senators will not have the full record of the nominee available to them when they are set to ask questions, and will only receive hand-picked information that could potentially leave out critical information germane to the nomination. Furthermore, the American people will not have access to critical documents that may help them better understand the ramifications of this nomination for their lives.

Lastly, it is impossible to ignore the other circumstances and context in which this nomination is being advanced. Former Trump Campaign Manager Paul Manafort's conviction and former Trump family personal attorney and "fixer" Michael Cohen's guilty plea, which identified under oath in federal court the President as an unindicted co-conspirator in a criminal case involving violations of campaign finance law, made clear that the President is a central figure in a serious criminal investigation and should not be nominating anyone to the Supreme Court, especially not someone who thinks the President is above the law. Constitutional questions surrounding these investigations, which may be before the Supreme Court in the near future, will have significant implications for the future of executive authority and separation of powers, which are at the very foundation of our nation's democracy. It is more important than ever for each branch of government to take their roles seriously rather than trying to score political points.

Therefore, we strongly and respectfully ask the Senate Judiciary Committee to delay the nominations hearings, obtain all relevant documents, including the nominee's time as White House Staff Secretary, and have them made available to all Senators and the public before voting on the nomination. At this moment in our nation's history, the Senate must rise above party politics and assert itself as a co-equal branch of government. If you need any additional information, please contact Rebecca Wasserman, Government Relations Director, at Becky.Wasserman@seiu.org or 202-730-7815.

Sincerely,

Mary Kay Henry
International President

MKH:BW:jf
opeiu#2
afl-cio, clc

cc: Members of the Senate Judiciary Committee

Senator Chuck Grassley, Chairman
Senate Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Senator Dianne Feinstein, Ranking Member
Senate Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

September 4, 2018

Dear Senators:

The Sexuality Information and Education Council of the United States (SIECUS) writes to express our strong opposition to the confirmation of Judge Brett Kavanaugh to the Supreme Court. SIECUS has served as the national voice for sex education, sexual health, and sexual rights for over 50 years. SIECUS asserts that sexuality is a fundamental part of being human, one worthy of dignity and respect. We advocate for the rights of all people to accurate information, comprehensive sexuality education, and the full spectrum of sexual and reproductive health services. SIECUS works to create a world that ensures social justice inclusive of sexual and reproductive rights.

SIECUS opposes Judge Kavanaugh's confirmation because he represents a unique threat to the rights of millions of people across this nation. He is the fulfillment of President Trump's campaign promise to "appoint judges that will be pro-life."[1] Through his previous decisions, Judge Kavanaugh has proven he is unfit to serve on the highest court in the land.

Judge Kavanaugh has flouted Supreme Court precedent and ignored the sexual and reproductive health and rights of young women by arguing that an undocumented young woman should, after going through an extremely long and burdensome process to seek abortion care, have to suffer through even more unreasonable delays before making the decision to seek an abortion.[2] He again ignored the health and rights of women by arguing that women's employers should be allowed to impede women's access to necessary, preventive health care, including birth control.[3] He has opposed one of the founding principles of our democracy – a wall of separation between church and state.[4] He was hand-picked by anti-abortion extremist Leonard Leo, who crafted a list of potential nominees, including Judge Kavanaugh, who would end the constitutional right to abortion.[5]

The Constitution requires our senators to advise and consent the President on Supreme Court nominees.[6] And yet, mere hours before the start of Judge Kavanaugh's hearings before the Senate Judiciary Committee, 42,000 pages of documents from Judge Kavanaugh's time working in the White House were released.[7] There was no opportunity for senators to review these documents before hearings began. Of the documents turned over to the Committee before September 3, more than a quarter have been withheld from the public.[8] President Trump has used executive privilege to withhold the release of another 100,000 pages of documents,[9] in order to protect a candidate who radically departs from current law by arguing that executive privilege is absolute.[10]

This lack of transparency in the nomination and confirmation process is unprecedented, especially as compared to the nomination process for Justice Elena Kagan.[11] It is impossible for the Senate to fulfill their constitutional duty without a complete understanding of Judge Kavanaugh's tenure in the White House. The confirmation of Judge Kavanaugh would undoubtedly threaten the health and rights of millions of people. The American people deserve accurate and complete information about Judge Kavanaugh, and all confirmation hearings should halt until the public has the opportunity to examine his entire record and decide for themselves whether a man who threatens their livelihood should be given a lifetime opportunity to transform our nation's legal landscape.

SIECUS's opposition to Judge Kavanaugh's nomination is both substantive, given his record of threatening sexual and reproductive health and rights, and procedural, given the Senate's inability to fulfill their constitutional duty without complete documentation of Judge Kavanaugh's record. For these reasons, we vehemently urge you to oppose Judge Kavanaugh's confirmation to the Supreme Court.

Sincerely,

Chitra Panjabi
President & CEO
SIECUS

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[1] Peter Sullivan, "Trump promises to appoint anti-abortion Supreme Court justices," *The Hill*, May 11, 2016, http://thehill.com/policy/healthcare/279535-trump-on-justices-they-will-be-pro-life.
[2] *Garva v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).
[3] *Priests for Life v. HHS*, 808 F.3d 1, 2 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).
[4] Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, Remarks to the American Enterprise Institute, http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.
[5] David G. Savage, "Leonard Leo of the Federalist Society is the man to see if you aspire to the Supreme Court," *Los Angeles Times*, July 6, 2018, http://www.latimes.com/politics/la-na-pol-leo-court-search-20180706-story.html.
[6] U.S. Const., art. II, § 2.
[7] Fred Barbash and Seung Min Kim, "Hours before Kavanaugh nomination hearings, Bush lawyer releases 42,000 pages of documents to Judiciary Committee," *Washington Post*, September 3, 2018, https://www.washingtonpost.com/news/morning-mix/wp/2018/09/03/hours-before-kavanaugh-nomination-hearings-bush-lawyer-releases-42000-pages-of-documents-to-judiciary-committee/?utm_term=.3fc868423077.
[8] Ibid.
[9] Ibid.
[10] Robert Barnes, "Kavanaugh papers offer new clues into his views on executive power," *Washington Post*, July 21, 2018, https://www.washingtonpost.com/politics/kavanaugh-papers-offer-new-clues-into-his-views-on-executive-power/2018/07/21/c48e7316-8cfc-11e8-a345-a1bf7847b375_story.html.
[11] Sheryl Gay Stolberg, "Glimpses of Kagan's Views in Clinton White House," *New York Times*, June 4, 2010, https://www.nytimes.com/2010/06/05/us/politics/05kagan.html.

SIERRA CLUB

July 24, 2018

RE: Opposition to Nomination of Brett Kavanaugh to the Supreme Court of the United States

Dear Senators:

On behalf of the Sierra Club and its more than 3 million members and supporters, I write to express our opposition to the confirmation of Brett Kavanaugh and urge you to reject Donald Trump's Supreme Court nominee. Kavanaugh's troubling record raises serious concerns about where he stands on issues like the climate crisis, women's rights, civil rights, privacy, and health and safety in the workplace. The nation deserves a nominee who will consistently honor and protect the rights of the people, and Brett Kavanaugh has proven he will not.

In decision after decision, Kavanaugh has shown that he believes the right of corporations and billionaires to pollute supersedes the right of the public to breathe clean air, drink clean water, and live in safe communities. With the addition of Kavanaugh, an even more extreme Supreme Court would threaten our nation's bedrock public health and environmental laws like the Clean Air Act, the Clean Water Act, and the Endangered Species Act.

In *EME Homer City Generation v. EPA*, Kavanaugh wrote an opinion overturning an EPA rule aimed at controlling the vexing problem of air pollution drifting across state lines, also known as the Good Neighbor Rule, which would have lowered sulfur dioxide emissions by 73 percent and nitrogen oxide emissions by 54 percent, and prevented 34,000 premature deaths.[i] In *Mexichem Fluor v. EPA*, Kavanaugh demonstrated his consistent inclination to block the authority of the EPA and invalidate crucial environmental safeguards by arguing that EPA cannot require companies to replace potent heat-trapping chemicals, hydrofluorocarbons (HFCs), with other substances.[ii]

Also, in *Mingo Logan Coal v. EPA*, Kavanaugh insisted on prioritizing costs to industry over costs to safety and human and environmental health, undeterred by studies that concluded dumping waste from mountaintop removal coal mining into streams would have an "unacceptable adverse effect" to the environment. Kavanaugh's dissenting opinion would have allowed the company to continue to devastate the waterways and wildlife on which local Appalachian communities depend.[iii] These are just three of many examples of Kavanaugh's misguided insistence on putting corporations before people--validating our fear that he will continue to seek to weaken and limit our abilities to tackle the climate crisis and protect public health in our communities.

Furthermore, Kavanaugh has resolved to support the super wealthy and corporations over everyday people, undermining working-class citizens on issues like healthcare, consumer protection, net

neutrality, and business practice regulations.[iv] On multiple occasions, Kavanaugh's decisions disenfranchised workers seeking basic protections, employer accountability, and a working environment safe from discrimination and mistreatment.

In order to protect our communities, it is crucial that the people's interests are represented in all three branches of government. Based on a review of his writings and opinions, Kavanaugh is likely to expand executive power and appears unconcerned about holding the President accountable, despite the explicit purpose of the Supreme Court to be a check and balance on the other branches of government.[v]

The Supreme Court has the great and solemn responsibility to uphold the values of our Constitution, and keep faith with the letter and spirit of the nation's core public health, environmental, civil rights, and labor laws. Therefore, the Court must protect the rights of women, workers, the LGBTQ community, immigrants, and people of color. The Court must protect healthcare for millions, secure clean air and clean water for all, ensure action to tackle the climate crisis, guarantee the right to vote, and safeguard the very strength of our democracy. The decision on the next Supreme Court Justice will shape the direction of our country and whether the promises enshrined in our Constitution and our laws are upheld or rolled back.

For the above reasons, we urge you to oppose Brett Kavanaugh's nomination to serve as an Associate Justice on the Supreme Court. You must ensure that the vacant seat on the nation's highest court is filled by a nominee who will faithfully apply the laws meant to serve the best interest of everyone who lives in the United States, not just corporate polluters, right wing ideologues, and the wealthiest.

Sincerely,

Michael Brune

Michael Brune
Executive Director
Sierra Club

[i] *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7 (D.C. Cir. 2012), *reversed*, 134 S.Ct. 1584 (2014).
[ii] *Mexichem Fluor, Inc. v. E.P.A.*, 866 F.3d 451 (D.C. Cir. 2017).
[iii] *Mingo Logan Coal Co. v. E.P.A.*, 829 F.3d 710 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).
[iv] <https://www.afj.org/scotus-nominee-brett-kavanaugh>.
[v] <https://www.afj.org/wp-content/uploads/2018/06/SYMPOSIUM_-CONTRIBUTION_-The-President-and-the-Independ.pdf>

September 6, 2018

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
Chairman
United States Senate Judiciary Committee
135 Hart Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
United States Senate Judiciary Committee
331 Hart Senate Office Building
Washington, DC 20510

Re: Nomination of the Hon. Brett Kavanaugh to serve as an Associate Justice of the Supreme Court of the United States

Dear Senators McConnell, Schumer, Grassley, and Feinstein:

As the solicitors general of our states, we write in our personal capacities to express our strong support for the confirmation of Judge Brett Kavanaugh as an Associate Justice of the Supreme Court of the United States. Not all states have a solicitor general; for those that do, the solicitor general serves as the state's chief appellate litigator. Thus, we represent our states in the U.S. Supreme Court, carefully study the work of the Court, and have a keen appreciation for the role that the Court plays in safeguarding the rule of law, including vital federalism and separation-of-powers principles. In our view, Judge Kavanaugh would make an outstanding addition to the Nation's highest court.

Judge Kavanaugh is an exceptionally well qualified nominee. He is a graduate of Yale College and the Yale Law School. He completed three federal appellate clerkships, including one for Justice Kennedy. For the last 12 years, he has served as a judge on the U.S. Court of Appeals for the District of Columbia Circuit, which is often described as the second most important federal court in the country. During that time, he has authored 307 opinions and heard more than 2,000 cases. Based on those and other considerations, the American Bar Association unanimously gave him its highest rating.

Throughout his distinguished career, Judge Kavanaugh has demonstrated an unwavering commitment to preserving the rule of law and advancing the legal profession. He is a co-author of a leading book on judicial precedent, has published nine articles in academic journals, and has taught the separation of powers at Harvard and Yale. Of particular interest to state solicitors general, Judge Kavanaugh's record reflects his profound respect for the role played by the states in our constitutional system of dual sovereignty.

Judge Kavanaugh's views are well within the mainstream of American jurisprudence. He voted with the majority in 97 percent of the cases he has heard during his tenure on the D.C. Circuit. On 13 different occasions, the Supreme Court has adopted positions that Judge Kavanaugh has articulated in his opinions.

Finally, Judge Kavanaugh's character and temperament are beyond reproach. He approaches each case with an open mind, carefully considers the arguments on both sides of any issue, and invariably treats litigants and colleagues with respect.

In short, Judge Kavanaugh would make an outstanding Justice of the Supreme Court, and we enthusiastically support his prompt confirmation.

Thank you very much for taking the time to consider our views.

Sincerely,

Amit Agarwal

Nicholas J. Bronni

Thomas M. Fisher

Tyler Green

Scott Keller

Mithun Mansinghani

Elizabeth Baker Murrill

D. John Sauer

Dale Schowengerdt

Misha Tseytlin

Lawrence VanDyke

Fred Yarger

State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

July 12, 2018

Via Certified Mail & Email

The Honorable A. Mitchell McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510
senator@mcconnell.senate.gov

The Honorable Charles Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510
senator@schumer.senate.gov

The Honorable Charles Grassley
Chairman
United States Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C. 20510
chuck_grassley@grassley.senate.gov

The Honorable Dianne Feinstein
Ranking Member
United States Senate Judiciary Committee
331 Hart Senate Office Building
Washington, D.C. 20510
senator@feinstein.senate.gov

Re: A communication from the States of West Virginia, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin, and Wyoming regarding the nomination of Judge Brett M. Kavanaugh to the Supreme Court of the United States

Dear Senators McConnell, Schumer, Grassley, and Feinstein:

As the chief legal officers of our States, we write to urge the United States Senate to promptly hold a hearing on and confirm the nomination of Judge Brett M. Kavanaugh to the Supreme Court of the United States. Judge Kavanaugh is an outstanding jurist with a proven commitment to upholding the Constitution and the rule of law. We have no doubt that he possesses the qualifications, temperament, and judicial philosophy to be an excellent Associate Justice.

Throughout his career, Judge Kavanaugh has demonstrated an abiding commitment to the principles and freedoms on which our country was founded, and an unshakable respect for the proper role of the courts within our constitutional structure. The Senate should confirm Judge Kavanaugh without delay.

Confirmation of Judge Kavanaugh to the Supreme Court will have profound and long-lasting consequences for the people in our States. For too long we have suffered the ill effects of federal overreach as all three branches have at times exceeded the constitutional limits on their authority. Judge Kavanaugh will help reverse that trend by reviewing challenged laws and regulations with an eye to ensuring that all branches of our government act within their constitutionally assigned roles—regardless of which party is in power. A judiciary committed to the fundamental principles enshrined in the Constitution can ensure that the work being done now is safeguarded for decades to come.

As the Attorneys General of our respective States, we have a special interest in ensuring that the federal government respects the important role of the States in crafting and tailoring regulatory policy on matters of local concern. Federal judges, including the next Associate Justice of the United States Supreme Court—must respect principles of federalism and the balance of power reflected in our Constitution. We are confident Judge Kavanaugh appreciates that balance, and that he will protect the prerogatives of the States to manage their own regulatory framework.

Judge Kavanaugh is particularly well-suited to enforce the Constitution's structural limitations and safeguard the freedoms of the States and the People. In a speech two years ago commemorating the late Justice Scalia, he emphasized that the role of a judge "is to interpret the law, not to make the law or make policy." Just as judges must not "shy away from enforcing constitutional rights that are in the text of the Constitution," so too they cannot "make up new constitutional rights that are not in the text." Of great importance to the States, he also underscored that "the structure of the Constitution—the separation of powers and federalism—are not mere matters of etiquette or architecture, but are at least as essential to protecting individual liberty as the individual rights guaranteed in the text."

Judge Kavanaugh has lived up to these ideals during his tenure on the D.C. Circuit. As one of the nation's most distinguished jurists, his nearly 300 opinions highlight his principled and consistent judicial philosophy. Time and again, he has upheld the judiciary's obligation to act as a meaningful check on government interference—from championing religious freedom and other individual rights, to checking federal agencies that overstep their authority. We are convinced that, as the next Associate Justice, Judge Kavanaugh will continue this commitment to protecting individual liberties, resisting unlawful government overreach, and respecting the democratic process.

We strongly urge all Senators—and particularly the home-state Senators of the undersigned Attorneys General—to express their public support for the prompt confirmation of Judge Kavanaugh to the Supreme Court of the United States.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Steve Marshall
Alabama Attorney General

Mark Brnovich
Arizona Attorney General

Leslie Rutledge
Arkansas Attorney General

Cynthia H. Coffman
Colorado Attorney General

Pam Bondi
Florida Attorney General

Christopher M. Carr
Georgia Attorney General

Lawrence Wasden
Idaho Attorney General

Curtis T. Hill, Jr.
Indiana Attorney General

Derek Schmidt
Kansas Attorney General

Jeff Landry
Louisiana Attorney General

Bill Schuette
Michigan Attorney General

Josh Hawley
Missouri Attorney General

Tuesday, October 2nd, 2018

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
Washington, DC 20510

Dear Senate Majority Leader McConnell and Minority Leader Schumer,

We, the undersigned, stand with the American Bar Association and fully support its call for the United States Senate to delay voting on Judge Kavanaugh's nomination to the United States Supreme Court. Regardless of our political views, we find the allegations made by multiple women about Judge Kavanaugh to be deeply troubling. At this time, we believe our nation would not be well served by a Justice clouded by accusations such as those made by Dr. Ford.

We, thus, seek a full inquiry by the Federal Bureau of Investigations into Judge Kavanaugh's conduct, and request that no votes on his nomination be taken by the United States Senate until the completion of such an investigation.

Supreme Court Justices play a significant role in interpreting the law in our country. It is crucial that nominees be not only highly professionally qualified, but of the highest personal character. In light of Justices' lifetime tenure, the prudent thing for the Senate to do is to delay the vote until such time that Judge Kavanaugh's conduct has been thoroughly reviewed.

More than any period in our lifetimes, the rule of law and due process is threatened. Today, Americans disagree not only on what party to belong to and whom to vote for in an election, but on the very facts which underlie our political process. On this basis, an expert-led, neutral, non-partisan, investigation into Judge Kavanaugh's background is more important than ever—without it, his nomination will be forever tainted in the eyes of a substantial number of Americans, no matter the outcome.

Article II, section two of the constitution empowers the Senate to advise and consent on presidential appointments. This is both a privilege and a duty. To maintain the separation of powers between the branches, which has ensured the survival of our government for the last 230 years, the Congress must carefully evaluate every nominee put forward by the Executive. Until all information relevant to that evaluation has been collected and reviewed, we respectfully request that no further action be taken on Judge Kavanaugh's nomination to our Highest Court.

Nicholas Monck
Student Bar Association, President
University of Colorado School of Law

QuenDesmond Kellum
Student Bar Association, President
Howard University School of Law

Xeris Gregory
Student Bar Association, President
University of Alabama School of Law

Max Engel
Student Bar Association, President
University of California, Davis School of Law

Joshua Reznik
Student Bar Association, President
Michigan State University College of Law

Stephanie Deolarte
Student Bar Association, President
City University of New York School of Law

Jevan Hutson
Student Bar Association, President
University of Washington School of Law

Tanyell Cooke
Student Bar Association, President
Fordham University School of Law

Luis Vasquez
Student Bar Association, President
UCLA School of Law

Jackson G. O'Brien
Student Bar Association, President
Drake University Law School

Kristina Hurley
Student Bar Association, President
Cornell Law School

Kyle Scott Clauss
Student Bar Association, President
Vermont Law School

Miranda Steed
Student Bar Association, President
William S. Richardson School of Law
University of Hawai'i at Mānoa

Christopher Joo Hyung Im
Student Bar Association, President
Loyola Law School, Los Angeles

Caroline M. Moos
Student Bar Association, President
Mitchell Hamline School of Law in St. Paul, Minnesota

Julianna A. Koster
Student Bar Association, President
Rutgers Law School, Camden

Ava Jahanvash
Student Bar Association, President
Pepperdine School of Law

Charles C. Hickman
Student Bar Association, President
WMU Cooley Law School

Daniel J. Trujillo Esmeral
Student Bar Association, President
Antonin Scalia Law School

John Fogarty
Student Bar Association, President
University of Maine School of Law

Brian Gibbons
Student Bar Association, President
Loyola University Chicago School of Law

Jake Miller
Student Bar Association, President
Washburn University School of Law

Erika Simonson
Student Bar Association, President
Syracuse University College of Law

Jahid Mowla
Student Bar Association, President
Georgetown University Law Center

Brenna Culliton
Student Bar Association, President
American University Washington College of Law

Allison Ramsey
Student Bar Association, President
University of San Francisco School of Law

Kaitlyn Holzer
Student Bar Association, President
University of Maryland Francis King Carey School of Law

Katie Gross
Student Bar Association, President
University of California Hastings College of the Law

Alexandra Simels
Student Bar Association, President
New York Law School

Kyle Bunnell
Student Bar Association, President
University of Kentucky College of Law

Daniel Cortes
Student Bar Association, President
Florida International University College of Law

Genghis X. Shakhan
Student Bar Association, President
Atlanta's John Marshall Law School

Thomas M. Ybarra
Student Bar Association, President
Willamette University College of Law

Guillermo J. Lopez Segarra
Student Bar Association, President
Florida Coastal School of Law

Stacie Damazo
Student Bar Association, President
Lewis & Clark Law School

Naomi M. Butler
Student Bar Association, President
Thomas Jefferson School of Law

Candice Green
Student Bar Association, President
Case Western Reserve University School of Law

Alex Bernstein
Student Government Association, President
Boston University School of Law

Ashley G. Kennedy Ph.D.
Student Bar Association, President
University of Illinois College of Law

Benjamin de Seingalt
Student Bar Association, President
Tulane University Law School

Ali Kingston
Student Bar Association, President
The George Washington University Law School

Elsa Linares
Student Bar Association, President
University of Missouri-Kansas City School of Law

Haley Harlan
Student Bar Association, President
Washington University in St. Louis School of Law

Andrew Cutillo
Law School Student Senate, President
University of Michigan Law School

pillsbury

Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, NW | Washington, DC 20036 | tel 202.663.8000 | fax 202.663.8007

William M. Sullivan, Jr.
[redacted]

September 26, 2018

Via E-Mail and Federal Express

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Re: Brett Kavanaugh Confirmation

Dear Chairman Grassley and Ranking Member Feinstein:

My name is William M. Sullivan, Jr. and I am a partner with the law firm of Pillsbury Winthrop Shaw Pittman LLP. I represent Christopher C. Garrett.

As I indicated in my September 21, 2018 public statement on behalf of Mr. Garrett (Attachment A), and consistent with Dr. Christine Blasey Ford's own recent statement, I write to express Mr. Garrett's categorical denial of Edward Whelan's baseless and irresponsible suggestions and insinuations that Mr. Garrett is somehow the subject of Dr. Ford's allegations. In fact, Mr. Garrett has no knowledge or information relating to her claims.

I further note Mr. Whelan's recently released statement of apology in which he acknowledges his "appalling and inexcusable mistake of judgment" in attempting to wrongfully implicate Mr. Garrett in connection with Dr. Ford's allegations.

Neither I nor Mr. Garrett will be making any further statement regarding this matter.

On behalf of Mr. Garrett, I respectfully request that my September 21, 2018 statement, as well as this letter, be included in the Senate Judiciary Committee's record.

Very truly yours,

William M. Sullivan, Jr.
Counsel for Christopher G. Garrett

Enclosure

Statement of William M. Sullivan, Jr., partner, Pillsbury Winthrop Shaw Pittman LLP, on behalf of his client Mr. Christopher C. Garrett

NEWS PROVIDED BY
Pillsbury Law →
Sep 21, 2018, 17:55 ET

WASHINGTON, Sept. 21, 2018 /PRNewswire/ -- Consistent with Dr. Ford's own recent statement, Mr. Garrett categorically denies the baseless and irresponsible suggestions and insinuations that he is somehow the subject of Dr. Ford's allegations. In fact, he has no knowledge or information relating to her claims.

Mr. Garrett will not be making any further statements regarding this matter.

SOURCE Pillsbury Law

August 27, 2018

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We write to express our strong support for the nomination of Judge Brett M. Kavanaugh to be an Associate Justice of the United States Supreme Court. Each of us is a member of the Supreme Court Bar and has had an active practice in appellate matters before that Court and throughout the country. We hold a broad range of political, policy, and jurisprudential views, but we speak as one in supporting Judge Kavanaugh's nomination.

Judge Kavanaugh has a well-deserved reputation as an outstanding jurist. His opinions are clear, rigorous, and thoughtful. Those of us who have appeared before him appreciate his impressive ability to distill complex legal issues to their essence, the incisiveness of his questions, and the unfailing courtesy he extends to his colleagues and to counsel who appear before him. Based on our experience with Judge Kavanaugh and his work over 12 years of distinguished judicial service, we are confident that he possesses the character, temperament and intellect that will make him an asset to our Nation's highest Court.

We hope this information will be of assistance to the Committee in its consideration of Judge Kavanaugh's nomination. We thank you for your time and attention, and urge you to support his confirmation.

Very truly yours,

Lisa S. Blatt
Miguel A. Estrada

J. Scott Ballenger
Richard P. Bress
Michael A. Carvin
Paul D. Clement
William S. Consovoy
Thomas H. Dupree, Jr.
Shay Dvoretzky
H. Bartow Farr, III
Jonathan S. Franklin
Gregory G. Garre
Jeffrey M. Harris
Dan Himmelfarb
Allyson N. Ho
Benjamin J. Horwich
William M. Jay
Peter D. Keisler
Michael K. Kellogg
Jeffrey Lamken
Christopher Landau
Paul J. Larkin, Jr.
Traci L. Lovitt
Maureen E. Mahoney
Ronald Mann
Roman Martinez
Deanne E. Maynard
Thomas R. McCarthy
Matthew D. McGill
Erin E. Murphy
Glen D. Nager
Theodore B. Olson
Aaron M. Panner
Mark A. Perry
Carter G. Phillips
Richard H. Seamon
Mark T. Stancil
Kathleen M. Sullivan
Amir C. Tayrani
Helgi C. Walker
Christopher J. Wright

September 18, 2018

Dear Senator,

The Constitution entrusts all 100 Senators with the responsibility to independently consider nominations to the Supreme Court. In light of the revelation that the Senate Judiciary Committee noticed a hearing without Dr. Christine Blasey Ford's consent and agreement, we call for the Senate Judiciary Committee to postpone the scheduled hearing on Monday, September 24, 2018. It is imperative that each member of the Senate clearly commit to providing a process to consider these very serious and credible allegations that is fair, thorough, and nonpartisan for all parties involved. A rushed process without a fair and independent investigation is unacceptable.

Survivors of sexual assault are often reluctant to tell their stories. As Dr. Blasey Ford stated in the *Washington Post*, "Why suffer through the annihilation if it's not going to matter?" It is up to each of you to be sure that it matters. The Senate must show that this distinguished body recognizes the severity of sexual assault and that it has learned critical lessons from the way Anita Hill was treated by the Senate in 1991. Senators must make clear that you will not be complicit in a process that silences or retraumatizes a survivor. The Senate has a responsibility to establish an atmosphere and process that ensures Dr. Blasey Ford's safety and treats her with the utmost dignity and respect.

To ensure that the process meets this important threshold, first and foremost, the Senate Judiciary Committee hearing scheduled for Monday must be postponed. This process cannot be rushed and driven by arbitrary deadlines rather than by the needs of a meaningful inquiry and a recognition of the gravity of sexual assault. Second, before any hearing with Judge Kavanaugh and Dr. Blasey Ford takes place, there must be an investigation led by independent, trauma-informed professionals who have the training and experience necessary to appropriately and respectfully handle a matter involving sexual assault. We have been disturbed to learn that the Senate Judiciary Committee plans to proceed with a hearing without even an inquiry into the matter by the FBI. Third, the Senate Judiciary Committee should rely on the investigators' conclusions and advice from relevant experts in framing their hearing questions for Judge Kavanaugh and Dr. Blasey Ford. Finally, because testimony of other individuals is relevant to the Senate's inquiry, it is inappropriate to preemptively assert that Dr. Blasey Ford and Judge Kavanaugh will be the only witnesses heard by the Committee. For instance, the hearing should also include testimony from Mark Judge who Dr. Blasey Ford notes was present at the time of the assault, as well as experts in sexual assault and trauma. It would be unfair to Dr. Blasey Ford, the American people, and contrary to our nation's highest ideals to let politics or myths about sexual assault guide the hearing.

When Anita Hill courageously came forward to share with the Senate Judiciary Committee that she was sexually harassed by Clarence Thomas, she was berated by Senators as though she were the one accused of wrongdoing. How you vet this Supreme Court nominee on behalf of the people you represent and serve is being closely watched. It will signal whether you have learned the lessons of our nation's shameful history of silencing and demonizing survivors of sexual trauma, who are bringing their stories to light through the #MeToo movement and Time's Up. It would be unacceptable for Senators to make it unsafe or difficult for survivors across the country to come forward and share their experiences in this setting or any other.

The Senate has a responsibility to do better than 1991. As a nation, we must be clear about the character required for those nominated to our nation's highest court. It is incumbent upon you to do what is right for Dr. Blasey Ford, for the public, and for the integrity of the Senate and the Supreme Court.

Sincerely,

Vanita Gupta
President and CEO
The Leadership Conference on Civil and Human Rights

Fatima Goss Graves
President and CEO
National Women's Law Center

Solidarity House
8000 EAST JEFFERSON AVE.
DETROIT, MICHIGAN 48214
PHONE (313) 926-5000

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA – UAW

GARY R. JONES, *PRESIDENT* RAY CURRY, *SECRETARY-TREASURER*
VICE-PRESIDENTS: TERRY DITTES • CINDY ESTRADA • RORY L. GAMBLE

July 26, 2018

Dear Senator:

On behalf of the more than one million active and retired members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, I am writing in strong opposition to the nomination of Judge Brett Kavanaugh to the United States Supreme Court. Judge Kavanaugh's rulings consistently favor the wealthy and corporations over working families. His viewpoints on presidential power are a threat to our Constitution's democratic checks and balances system. If confirmed to the Supreme Court, he could vote to undermine voting rights and allow the wealthy and corporations to have even a bigger say in our elections. He has given every indication he would vote to erode workers' rights and undermine access to health care for millions of Americans.

Judge Kavanaugh has a clear record of routinely ruling against workers. He dissented from a majority opinion upholding a safety citation against SeaWorld following the death of a trainer who was working with a killer whale that had previously killed people. Mr. Kavanaugh also wrote an opinion that would allow the Department of Defense to eliminate collective bargaining rights; in another case, he overruled the NLRB's decision and allowed a corporation to prevent workers from displaying pro-union signs in their cars. Considering the Supreme Court's recent decisions to restrict worker's rights in the public sector (*Janus v. AFSCME*) and to force workers to settle cases through mandatory arbitration instead of through public courts, confirmation of Judge Kavanaugh could result in cementing a Supreme Court tilted against working people in favor of corporate interests.

Importantly, Judge Kavanaugh's disturbing judicial philosophy demonstrates a desire for overturning long-established Supreme Court precedent which currently provides deference to the legal interpretation of federal agencies, such as the National Labor Relations Board and the Department of Labor. Consequently long-standing, hard fought gains for working people could be put in jeopardy. Furthermore, alarming statements from Judge Kavanaugh that sitting presidents should not be subject to criminal prosecution and investigation also call into question his ability to fulfill the judicial obligation to uphold checks and balances.

President Trump has promised to appoint judges to overturn and eliminate health care protections under the Affordable Care Act (ACA). Judge Kavanaugh's rulings and written opinions suggest that he will fulfill the president's promises to eviscerate the ACA. He has argued against the constitutionality of the individual mandate and further asserted that the president may refuse to enforce any law that he deems unconstitutional. Before the ACA was enacted into law,

insurance companies could charge higher rates simply based on gender or rescind health care coverage due to pre-existing conditions such as diabetes, cancer, or pregnancy. A current Texas lawsuit threatens to find the ACA unconstitutional and therefore upend this lifesaving provision. This case could eventually make its way to the Supreme Court. If he is confirmed, the future of basic health benefits and protections would be in extreme jeopardy.

Retiring Justice Kennedy served on the Supreme Court for 30 years. His tenure overlapped with six presidents and spanned several generations. Undoubtedly, the selection of the next justice who serves a lifetime appointment should be treated with the utmost scrutiny and concern. Critical civil and human rights issues hang in the balance, including access to health care for millions of Americans, labor rights, economic security, and the rights of immigrants. Judge Kavanaugh's record and radical philosophy give every indication he will act against the interests of working people and undermine democratic protections.

I urge you to oppose Judge Kavanaugh's nomination to the Supreme Court and instead work to confirm a justice that will act to strengthen our democracy and improve lives for working families.

Sincerely,

Gary Jones

Gary Jones
President
International Union, UAW

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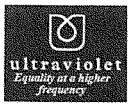

A letter to the U.S. Senate from 1600 Sexual Assault Survivors: Oppose Brett Kavanaugh

September 21, 2018

To the United States Senate:

We write as survivors of sexual assault and their loved ones urging you to publicly commit to rejecting Brett Kavanaugh's confirmation to the Supreme Court.

We believe Christine Blasey Ford.

According to Ford, she was sexually assaulted by Kavanaugh, which disqualifies him from holding any office in government, let alone the Supreme Court. It proves that Kavanaugh neither has the character nor the integrity to be a Supreme Court justice. It also confirms his harmful disregard for the rights of people, particularly women. Violence against women is an epidemic in this country: one in six women will be sexually assaulted in their life time, and nearly a third of women in the U.S. have experienced domestic and dating violence. We ask that you publicly oppose Kavanaugh and call to cancel the vote on his confirmation.

Kavanaugh already poses a threat to millions of people, especially women, Indigenous people, LGBTQ people, and poor people--the very communities that consistently endure sexual violence at unspeakably high rates. Kavanaugh's record shows the repeated dismissal of the rights of people from health care access, to reproductive care, to workplace justice--all crucial to the prevention of sexual violence and to adequately supporting survivors of such violence.

We urge you to side with survivors and women, and prevent Kavanaugh's confirmation to the Supreme Court.

Sincerely,

Sexual assault survivors, domestic violence survivors, and their loved ones

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VOTOLATINO

It's your country. Represent!

August 31, 2018

The Honorable Chuck Grassley, Chairman
The Honorable Dianne Feinstein, Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senators:

For the reasons detailed in the Leadership Conference coalition letter enclosed here, Voto Latino opposes the nomination of Brett Kavanaugh.

Senators can't fulfill their constitutional obligation to advice and consent until the National Archives completes its review of the materials requested by Chairman Grassley at the end of October, so no vote should even happen until senators have had ample time to review the records from the National Archives. This is even more concerning given that what little we do have of Kavanaugh's record suggests he would be another accomplice in Trump's inhumane immigration agenda. In *Garza v. Hargan* his dissent rejected the notion that the Due Process clause protects "any person," including undocumented immigrants in the United States. He broke with his colleagues and tried to prevent a 17-year-old immigrant from exercising her right to an abortion.

The well-being of the Latino community is at stake with this nomination, and we will be watching the hearings closely.

Sincerely,

Jessica Reeves
COO
Voto Latino

The Leadership Conference
on Civil and Human Rights

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Policy and Enforcement
Committee Chair
Michael Lieberman
Anti-Defamation League
President & CEO
Vanita Gupta

The Leadership Conference

July 17, 2018

OPPOSE THE CONFIRMATION OF BRETT KAVANAUGH TO THE SUPREME COURT OF THE UNITED STATES

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, and the more than 100 undersigned organizations, we write to express our strong opposition to the confirmation of Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

The Supreme Court is the final arbiter of our laws and Constitution, and its rulings dramatically impact our rights and freedoms. Every Supreme Court vacancy is significant, but the stakes could not be higher in deciding who will replace Justice Kennedy – who served as the deciding vote in nearly all the momentous cases of the past dozen years. Critical civil and human rights issues hang in the balance, including access to health care for millions of Americans, the ability of women to control their own bodies, voting rights, labor rights, economic security, rights of immigrants and persons with disabilities, LGBTQ equality, equal opportunity and affirmative action, environmental protections, and whether the judiciary will serve as a constitutional check on a reckless president.

Judge Kavanaugh's 12-year record on the U.S. Court of Appeals for the D.C. Circuit, as well as his known writings, speeches, and legal career, demonstrate that if he were confirmed to the Supreme Court, he would be the fifth and decisive vote to undermine many of our core rights and legal protections. In case after case, he has ruled against individuals and the environment in favor of corporations, the wealthy, and the powerful. He has advanced extreme legal theories to overturn longstanding precedent to diminish the power of federal agencies to help people. And he has demonstrated an expansive view of presidential power that includes his belief that presidents should not be subject to civil suits or criminal investigations while in office despite what misconduct may have occurred. Many of our organizations opposed Judge Kavanaugh's nomination to the D.C. Circuit,[1] and our fears and concerns have been realized. Judge Kavanaugh has not served as a neutral and fair-minded jurist. He has served as a conservative ideologue who lacks the impartiality and independence necessary to sit on the highest court in the land.

Moreover, Judge Kavanaugh's nomination to the Supreme Court was the product of a deeply flawed and biased process in which President Trump outsourced his constitutional duties to

[1] *See, e.g.*, https://civilrights.org/opposition-to-kavanaughs-confirmation-to-the-dc-circuit/.

two right-wing special interest groups: the Federalist Society and Heritage Foundation. These extremist organizations pre-approved candidates, including Judge Kavanaugh, based on the dangerous and unprecedented litmus tests that President Trump put forward as a presidential candidate. In a 2016 presidential debate, he said that his Supreme Court appointees would vote to overturn *Roe v. Wade*. He said: "If we put another two or perhaps three justices on, that is really what will happen. That will happen automatically in my opinion. Because I am putting pro-life justices on the Court."[2] He also indicated he had a litmus test on the Affordable Care Act, stating in a February 2016 interview: "We're going to have a very strong test.... I'm disappointed in Roberts because he gave us Obamacare, he had two chances to end Obamacare, he should have ended it by every single measurement and he didn't do it, so that was a very disappointing one."[3] Judge Kavanaugh has passed these litmus tests, or he wouldn't have been nominated. If confirmed, he would vote to undermine women's control over their own bodies and sabotage accessible health coverage for millions of people, disproportionately impacting women, people of color, people with disabilities, and low-income families.

The confirmation process for Judge Kavanaugh should not be rushed to fulfill a campaign promise or to reward elite Washington, D.C. interest groups or donors. Each individual Senator has an obligation to independently review his entire record, a significant portion of which has not yet been disclosed. It could take weeks before the National Archives and the George W. Bush Presidential Library begin to make public the hundreds of thousands of documents relevant to the nominee's record. It is a dereliction of Senators' constitutional duty to simply allow one's political party to determine approval of such an impactful appointment before that record is public and reviewed. The American people are represented in this crucial process in the Senate. The independent vetting that Supreme Court candidates receive has long been rigorous and this should be no exception. Justice Kennedy himself was not the first nominee to the seat he is vacating. Two nominees before him failed because of the Senate's role, and the nation was better for it.

Sought to Undermine Access to Health Care: Access to health care is a civil and human rights issue of profound importance. Based on his known record and the process by which he was selected, if confirmed to the Supreme Court, there's every reason to believe Judge Kavanaugh would be a vote to overturn and gut critical health care protections. As a D.C. Circuit judge, he has written dissenting opinions in three cases that could have undermined the Affordable Care Act ("ACA") and jeopardized access to health care. In *Seven-Sky v. Holder*,[4] which upheld the ACA's requirement that individuals purchase health insurance as within Congress's authority under the Commerce Clause, Judge Kavanaugh maintained, in dissent, that the court did not yet have jurisdiction to hear the case. In his view, the Anti-Injunction Act limited the court's ability to hear the case until the taxpayer first paid the disputed tax and then brought suit for a refund. Using hyperbolic language, he labeled the individual mandate as "unprecedented on the federal level in American history" and a "significant expansion" of congressional authority.[5] Of

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[2] https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063.
[3] https://www.wgbh.org/news/2016/02/08/news/donald-trump-litmus-tests-supreme-court-justices-less-taxes-big-business-0.
[4] 661 F.3d 1 (D.C. Cir. 2011), *abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).
[5] *Id.* at 51-52 (Kavanaugh, J., dissenting).

particular alarm was his suggestion that "the President might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional."[6]

In *Priests for Life v. U.S. Department of Health and Human Services*,[7] the D.C. Circuit rejected a challenge to the ACA's accommodation to the birth control benefit, which allows certain religiously-affiliated non-profit employers to opt out of providing birth control coverage directly to their workers by submitting a one-page form notifying their insurer or the federal government of their objections. When a qualifying employer opts out, the accommodation guarantees employees receive contraceptive coverage separately from their insurer. These objecting employers argued that the mere submission of the opt-out form rendered the organizations "complicit" in providing contraceptive coverage and thus impermissibly burdened their religious rights under the Religious Freedom Restoration Act ("RFRA"). The challengers sought rehearing en banc, and the D.C. Circuit denied it. Dissenting to the denial, Judge Kavanaugh maintained that objecting employers should have prevailed on their RFRA claim. He asserted that the filing of the form substantially burdened the organizations' exercise of religion because they were required, in order to avoid financial penalties, to take an action contrary to their sincere religious beliefs and courts "may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiff's religious beliefs – including about complicity in wrongdoing."[8] Judge Kavanaugh's view that courts ought to accept, without question, any claim by a religious organization that a government requirement substantially burdens a sincerely held religious belief and their free exercise of religion, raises serious concerns about his willingness to allow religious beliefs to be used as a license to discriminate and deny essential health care.

In *Sissel v. U.S. Department of Health and Human Services*,[9] Judge Kavanaugh authored another dissent from the D.C. Circuit's denial to rehear a case challenging the constitutionality of the ACA en banc. The *Sissel* court had rejected the claim that the ACA was unconstitutional because it was a revenue-raising bill, but failed to originate in the House of Representatives as required under the Origination Clause. Although Judge Kavanaugh acknowledged that the law's passage did not violate the Origination Clause, he nonetheless argued for the full D.C. Circuit to rehear the case because of the allegedly faulty reasoning in the panel decision. As a rehearing of the case would have prolonged the uncertainty surrounding the ACA's constitutional status, thereby hindering its implementation, Judge Kavanaugh's position in *Sissel* – one that the Supreme Court did not adopt, as it declined to hear the case – provides further evidence of his skepticism of the ACA.

Hostile to Women's Reproductive Freedom: Judge Kavanaugh's hostility towards women's reproductive rights was demonstrated by his rulings in the recent high-profile case, *Garza v. Hargan*.[10] In this case, Judge Kavanaugh was a member of a three-judge panel that sided with the Trump administration and blocked Jane Doe, a 17-year-old immigrant woman, from getting an abortion. Judge Kavanaugh issued an order delaying Jane Doe's abortion under the guise of finding her a sponsor, and

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[6] *Id.* at 50 (Kavanaugh, J., dissenting).
[7] 808 F.3d 1 (D.C. Cir. 2015).
[8] *Id.* at 18 (Kavanaugh, J., dissenting).
[9] 799 F.3d 1035 (D.C. Cir. 2015).
[10] 874 F.3d 735 (D.C. Cir. 2017) (en banc).

held that this did not unduly burden her right to an abortion.[11] Four days later, the D.C. Circuit reheard the case en banc and reversed the panel decision, ruling that Jane Doe was entitled to seek an abortion without delay. Judge Kavanaugh dissented, arguing that the en banc majority had "badly erred," and adopting the language of anti-abortion extremists, stated that the majority decision had effectively given Jane Doe and others like her a new right "to obtain immediate abortion on demand." As one of the judges in the majority pointed out in criticizing Judge Kavanaugh's dissent: "Abortion on demand? Hardly.... Unless Judge Kavanaugh's dissenting opinion means the demands of the Constitution and Texas law."[12]

Judge Kavanaugh has also revealed his anti-abortion views off the bench. In a speech last year to the conservative American Enterprise Institute, he praised Chief Justice Rehnquist's opinion in *Washington v. Glucksberg*[13] for "stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition," stating that Chief Justice Rehnquist accomplished in *Glucksberg* what he was unable to in *Roe v. Wade*.[14] Such unenumerated rights include not only the right to an abortion but also the right to use contraception and the right to marriage equality. Judge Kavanaugh's apparent skepticism of those rights is disturbing.

A recent op-ed from one of Judge Kavanaugh's former law clerks, Sarah Pitlyk, who now works at an extreme anti-abortion organization, also sheds light on his anti-abortion ideology. She wrote: "As social conservatives know from bitter experience, a judicial record is the best – really, the only – accurate predictor of a prospective justice's philosophy on the issues that matter most to us. On the vital issues of protecting religious liberty and enforcing restrictions on abortion, no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh. On these issues, as on so many others, he has fought for his principles and stood firm against pressure. He would do the same on the Supreme Court."[15] This is additional confirmation that Judge Kavanaugh passed President Trump's *Roe v. Wade* litmus test. Ms. Pitlyk also made clear that Judge Kavanaugh passed the anti-ACA litmus test too. She wrote: "Although he ultimately determined that a challenge to Obamacare had to be brought later, he left no doubt about where he stood. No other contender on President Trump's list is on record so vigorously criticizing the law."[16]

Restricted Voting Rights: In two voting rights cases, Judge Kavanaugh has demonstrated his lack of commitment to racial justice. In 2012, in *South Carolina v. United States*,[17] Judge Kavanaugh wrote an opinion for a three-judge panel upholding a South Carolina voter ID law that was objected to by the U.S. Department of Justice because of the significant racial disparities in the law's photo ID requirement. Journalist Ari Berman wrote an article entitled "63,756 Reasons Racism Is Still Alive in South Carolina," explaining: "That's the number of minority registered voters who could be blocked from the polls by the

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[11] No. 17-5236, 2017 WL 4707112 (D.C. Cir. Oct. 19, 2017).
[12] *Id.* at 738 (Millett, J., concurring).
[13] 521 U.S. 702 (1997).
[14] http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.
[15] https://www.nationalreview.com/2018/07/judge-brett-kavanaughs-impeccable-record-of-constitutional-conservatism/.
[16] *Id.*
[17] 898 F. Supp. 2d 30 (D.D.C. 2012).

state's new voter ID law."[18] Perhaps even more troubling than Judge Kavanaugh's opinion in this case was his refusal to acknowledge the importance of Section 5 of the Voting Rights Act. In a notable concurrence, Judge Bates – a fellow Republican appointee – wrote that "one cannot doubt the vital function that Section 5 of the Voting Rights Act played here. Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive… [T]he history of [the South Carolina law] demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws."[19] The fact that Judge Bates felt compelled to write a separate concurrence to make this basic point about the Voting Rights Act highlights the significance of Judge Kavanaugh's refusal to include it in his opinion for the court. This is a clear and dangerous signal about Judge Kavanaugh's views on voting rights and racial justice in America, and it strongly suggests he would be a reliable fifth vote to continue the Supreme Court's diminishment of the landmark Voting Rights Act.

Judge Kavanaugh worked against the interests of minority voters as an attorney as well. In the case *Rice v. Cayetano*,[20] he co-authored, along with conservative firebrands Robert Bork and Roger Clegg, a Supreme Court brief arguing that Hawaii violated the Constitution by permitting only Native Hawaiians to vote in elections for the Office of Hawaiian Affairs, a state agency charged with working for the betterment of Native Hawaiians. Although the Supreme Court sided with Judge Kavanaugh in this case, Justice Stevens wrote an eloquent dissent and said the voting provision at issue should be permissible because "there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs, and to preserve a distinct and vibrant culture that is as much a part of this Nation's heritage as any."[21]

In addition to filing a brief in *Rice v. Cayetano*, Judge Kavanaugh also wrote a *Wall Street Journal* op-ed in 1999 about this case in which he revealed a lack of understanding about the rights of indigenous peoples. Rather than recognizing, as does the Annex to the U.N. Declaration on the Rights of Indigenous Peoples, that "indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources,"[22] Judge Kavanaugh made partisan allegations about the Clinton Administration Justice Department's motives for filing a brief in support of Hawaii. He wrote: "As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency."[23] He also wrote: "The Supreme Court ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe."[24] When viewed against the history of U.S. injustice against Native Hawaiians, Judge Kavanaugh's cynical and partisan comments are alarming.

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[18] https://www.thenation.com/article/63756-reasons-why-racism-is-still-alive-in-south-carolina/.
[19] 898 F. Supp. 2d 30, 53-54 (D.D.C. 2012) (Bates, J., concurring).
[20] 528 U.S. 495 (2000).
[21] *Id.* at 529 (Stevens, J., dissenting).
[22] http://www.un-documents.net/a61r295.htm.
[23] Brett Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL ST. J., Sept. 27, 1999.
[24] *Id.*

Dismissive of Discrimination Claims: Judge Kavanaugh's ideological bias can also be seen in his rulings in employment discrimination cases, where he has dissented and voted to dismiss claims that a majority of his D.C. Circuit colleagues found to be meritorious. In *Howard v. Office of the Chief Administrative Officer of the U.S. House of Representatives*,[25] Judge Kavanaugh dissented from a majority decision which held that under the Congressional Accountability Act ("CAA"), an African-American woman fired from her position as House of Representatives deputy budget director could pursue claims of racial discrimination and retaliation in federal court. Judge Kavanaugh dissented, arguing that the Speech or Debate Clause of the Constitution prohibited the employee from moving forward with her claims, and he would have dismissed her case. Judge Kavanaugh's interpretation of this constitutional provision would bar workers in Congressional offices and throughout the legislative branch from pursuing most CAA claims in federal court, including many sexual harassment, discrimination, and retaliation claims, leaving the inadequate and secret CAA administrative process as their only recourse. Especially in light of recent scandals in Congress about the treatment of staff, the potential consequences of Judge Kavanaugh's dissent warrants serious inquiry.

In *Miller v. Clinton,*[26] the majority held that the State Department violated the Age Discrimination in Employment Act ("ADEA") when it imposed a mandatory retirement age and fired an employee when he turned 65. The State Department argued that it was exempt from the ADEA in light of a separate federal law (the Basic Authorities Act) that permits U.S. citizens employed abroad to be excepted from U.S. anti-discrimination laws. The majority disagreed and held that there was "nothing in the Basic Authorities Act that abrogates the ADEA's broad proscription against personnel actions that discriminate on the basis of age" and that "the necessary consequence of the Department's position is that it is also free from any statutory bar against terminating an employee like Miller solely on account of his disability or race or religion or sex."[27] Judge Kavanaugh dissented, arguing that the Basic Authorities Act trumps existing anti-discrimination laws. His willingness to embrace such a broad exemption from anti-discrimination laws is troubling. So too was his accusation that the majority was "stacking the deck with inapposite interpretive presumptions, and raising the specter of rampant race, sex, and religious discrimination."[28]

And in *Rattigan v. Holder*,[29] the majority ruled that an African-American FBI agent could pursue a case of improper retaliation for filing a discrimination claim where the agency began a security investigation against him, as long as he did so without questioning unreviewable decisions by the FBI security division. Judge Kavanaugh dissented and said the entire claim must be dismissed, despite the majority's warning that this was not required by precedent and that the courts should preserve "to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation."[30] Judge Kavanaugh's dissents in these three cases embrace positions that carve out federal employees from the protections of federal employment discrimination laws or limit their ability to enforce such rights.

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[25] 720 F.3d 939 (D.C. Cir. 2013).
[26] 687 F.3d 1332 (D.C. Cir. 2012).
[27] *Id.* at 1335.
[28] *Id.* at 1357 (Kavanaugh, J., dissenting).
[29] 689 F.3d 764 (D.C. Cir. 2012).
[30] *Id.* at 770 (internal quotations and citation omitted).

Hostile to Workers' Rights: Judge Kavanaugh has a pattern of ruling against workers and employees in other types of workplace cases as well, such as workplace safety, worker privacy, and union disputes. For example, in *SeaWorld of Fla., LLC v. Perez*,[31] Judge Kavanaugh dissented from a majority opinion upholding a safety citation against SeaWorld following the death of a trainer who was working with a killer whale, which had killed three trainers previously. While the majority deferred to the Occupational Safety and Health Review Commission's finding that SeaWorld had insufficiently limited the trainers' physical contact with the whales, Judge Kavanaugh strongly disagreed and questioned the role of the government in determining appropriate levels of risk for workers. He wrote: "When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves – that the risk of significant physical injury is simply too great even for eager and willing participants?"[32] According to David Michaels, a former Occupational Safety and Health Act Assistant Secretary: "In his dissent in the SeaWorld decision, Judge Kavanaugh made the perverse and erroneous assertion that the law allows SeaWorld trainers to willingly accept the risk of violent death as part of their job. He clearly has little regard for workers who face deadly hazards at the workplace."[33]

In *National Labor Relations Board v. CNN America, Inc.*,[34] Judge Kavanaugh dissented in part from Chief Judge Garland's majority opinion upholding a National Labor Relations Board ("NLRB") order that CNN recognize and bargain with a worker's union and finding that CNN violated the National Labor Relations Act ("NLRA") by discriminating against union members in hiring. Judge Kavanaugh dissented from the finding that CNN was a successor employer, and his position would have completely absolved CNN of any liability for failing to abide by the collective bargaining agreement.

Judge Kavanaugh also dissented in *National Federation of Federal Employees v. Vilsack*,[35] where the D.C. Circuit majority invalidated a random drug testing program for U.S. Forest Service employees at Job Corps Civilian Conservation centers. The majority, which included another Republican-appointed judge, observed that there was no evidence of any difficulty maintaining a zero-tolerance drug policy during the 14 years before the random drug testing policy was adopted, and that the primary administrator of the Job Corps, the Department of Labor, had no such policy. Judge Kavanaugh dissented and tried to deal a major blow to employee privacy rights. The majority criticized Judge Kavanaugh, noting: "Our dissenting colleague paints with a broad brush without regard to precedent from the Supreme Court, and this court, on the particularity of the Fourth Amendment inquiry" with respect to such drug testing programs.[36]

In *American Federation of Government Employees, AFL-CIO v. Gates*,[37] Judge Kavanaugh authored the majority opinion that reversed the lower court's partial blocking of Department of Defense regulations, which had found that many of the Pentagon's regulations would "entirely eviscerate collective bargaining." Judge Kavanaugh disagreed. Judge Tatel dissented in part, noting that Judge Kavanaugh's

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[31] 748 F.3d 1202 (D.C. Cir. 2014).
[32] *Id.* at 1217 (Kavanaugh, J., dissenting).
[33] http://jordanbarab.com/confinedspace/2018/07/10/kavanaugh-threat-to-osha-workers/.
[34] 865 F.3d 740 (D.C. Cir. 2017).
[35] 681 F.3d 483 (D.C. Cir. 2012).
[36] *Id.* at 489 n.5.
[37] 486 F.3d 1316 (D.C. Cir. 2007).

majority opinion would allow the Secretary of Defense to "abolish collective bargaining altogether – a position with which even the Secretary disagrees."[38]

Anti-Immigrant Views: In his ruling discussed above in *Garza v. Hargan* (involving Jane Doe's right to an abortion) and in cases discussed below, Judge Kavanaugh has demonstrated hostility to the rights of immigrants. He has been described by a Breitbart writer as someone with an "America First" approach who would "share President Trump's views on immigration."[39]

In *Agri Processor v. National Labor Relations Board,*[40] a company refused to engage in collective bargaining with workers who had voted to unionize, on the basis that many of the workers were undocumented immigrants. The D.C. Circuit rejected this claim, based on the plain language of the NLRA and applicable Supreme Court precedent. But Judge Kavanaugh dissented, asserting that a federal immigration law had implicitly amended at least part of the NLRA. The majority rejected that argument and stated that "not only is there no clear indication that Congress intended IRCA implicitly to amend the NLRA, but all available evidence actually points in the opposite direction."[41] The majority stated that Judge Kavanaugh's dissent would lead to an "absurd result."[42] Former U.S. Department of Labor official Sharon Block has noted that his *Agri Processor* dissent is significant because "it reflects a broader trend in Kavanaugh's record of being unsympathetic to the plight of immigrants."[43]

In another immigration case, *Fogo de Chao Inc. v. Department of Homeland Security,*[44] a company challenged DHS's refusal to grant temporary visas to foreign workers with specialized cultural knowledge relating to Brazilian-style cooking, even though such visas had been granted in the past. The majority sided with the restaurant and its workers, and remanded the case for further consideration. Judge Kavanaugh dissented, leaving the majority to express "puzzlement" and to question whether Judge Kavanaugh embraced "woodenly excluding any and all knowledge or skills acquired by an employee solely because those skills and knowledge were learned from family or community rather than in-company trainers."[45]

Troubling Views on Presidential Power: Judge Kavanaugh has expressed extreme and disturbing views about presidential power. Despite being a lead author and prosecutor on Kenneth Starr's independent counsel team when it was a Democratic president under investigation, he now believes that presidents should not be subject to civil lawsuits or criminal investigations while in office. In a 2009 law review article, Judge Kavanaugh wrote that "we should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions" and "the country loses when the President's focus is distracted by

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[38] *Id.* at 1331 (Tatel, J., dissenting in part).
[39] https://www.breitbart.com/big-government/2018/07/04/america-first-scotus-choice-judge-brett-kavanaugh-applies-trumps-economic-patriotism-to-the-law/.
[40] 514 F.3d 1 (D.C. Cir. 2008).
[41] *Id.* at 4.
[42] *Id.* at 7.
[43] https://onlabor.org/the-kavanaugh-nomination-and-labor/.
[44] 769 F.3d 1127 (D.C. Cir. 2014).
[45] *Id.* at 1150.

the burdens of civil litigation or criminal investigation and possible prosecution."[46] Had this been the law in the 1970s, the Supreme Court would not have had the opportunity to rule on the Watergate tapes case in *United States v. Nixon*, and President Nixon would never have resigned from office. In a 1998 law review article, Judge Kavanaugh said that a sitting president should have "absolute discretion" to determine whether and when to appoint a special counsel.[47] And he has said that special counsels should be "appointed (and removable) in the same manner as other high-level executive branch officials"[48] — in other words, whenever it would be convenient to the president. In a 1998 panel discussion, Judge Kavanaugh raised his hand after the moderator asked: "How many of you believe as a matter of law that a sitting president cannot be indicted during the term of office?"[49]

Judge Kavanaugh's record demonstrates that he lacks the requisite independence from President Trump to serve as a much-needed check on his abuses of power. As commentator Simon Lazarus has observed: "If President Donald Trump wished to replace retired Supreme Court justice Anthony Kennedy with a successor likely to back the White House in any Russia investigation showdown with Special Counsel Robert Mueller, or, more broadly, to legitimate Trump's penchant for sabotaging laws he disfavors, he could not have done better than nominate Brett Kavanaugh."[50]

Judge Kavanaugh's judicial record reflects his executive authority absolutism. For example, in *PHH Corp. v. Consumer Financial Protection Bureau*,[51] he ruled it was unconstitutional for the Consumer Financial Protection Bureau ("CFPB") to be headed by a single director who could not be removed by the president without cause.[52] He wrote the majority opinion for a conservative panel, which held that the structure of the CFPB violated Article II of the Constitution and ruled that the CFPB director should be subject to supervision and removal by the president without cause. Judge Kavanaugh asserted that independent agencies constitute "a headless fourth branch of the U.S. government" and wrote: "Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances."[53] An en banc panel of the D.C. Circuit vacated and remanded Judge Kavanaugh's decision, upholding the constitutionality of the Dodd-Frank Wall Street Reform and Consumer Protection Act provision specifying that the CFPB director serves a five-year term, subject to removal by the president only for "inefficiency, neglect of duty, or malfeasance in office."[54] The CFPB's independence has been critical to its ability to remain a steadfast enforcer of the consumer protection laws despite massive political opposition from the financial industry. A seat on the Supreme Court would allow Judge

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[46] http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf.
[47] http://online.wsj.com/public/resources/documents/2018_0628_kavanaugh_1998_president_independent_counsel.pdf.
[48] *Id.*
[49] https://www.c-span.org/video/?101056-1/independent-counsel-statute-future.
[50] http://prospect.org/article/here%E2%80%99s-how-democrats-can-expose-what-kavanaugh-threatens.
[51] 839 F.3d 1 (D.C. Cir. 2016), *vacated and remanded, PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).
[52] *Id.* at 5.
[53] *Id.* at 6.
[54] 881 F.3d at 77.

Kavanaugh and his allies to expand attacks on the ability of government to regulate and enforce the rules on behalf of ordinary people.

It is also important to note Judge Kavanaugh's role in the Bush administration's deeply flawed detention and interrogation policies, and possible misrepresentations he made to the Senate Judiciary Committee at his 2006 D.C. Circuit nomination hearing. In response to a question from Senator Durbin, Judge Kavanaugh testified, under oath: "I was not involved and am not involved in the questions about the rules governing detention of combatants."[55] However, a 2007 *Washington Post* article reported that Judge Kavanaugh participated in a "heated meeting" in the White House in 2002 about whether U.S. citizen enemy combatants should have access to counsel.[56] That report appears to contradict Judge Kavanaugh's sworn testimony before the Senate Judiciary Committee. Senator Durbin sent a letter to Judge Kavanaugh in 2007 asking him to explain the discrepancy, but Senator Durbin, in recent comments he made about the Kavanaugh nomination,[57] said that he never received a response from Judge Kavanaugh. We urge Senators to demand documents relevant to his involvement in this area to determine the truth about his role in the Bush administration's troubling detention policies. Lying to Senators under oath is a serious offense that cannot be disregarded in the confirmation process if that process is to have any legitimacy.

Undermined Environmental Protections: During his 12 years on the bench, Judge Kavanaugh has consistently ruled to protect polluters rather than the environment. He has opposed critical environmental protections for clean air and clean water, repeatedly ruling that the Environmental Protection Agency ("EPA") exceeded its statutory authority in issuing rules to limit pollutants. For example, in *EME Homer City Generation, L.P. v. EPA,*[58] Judge Kavanaugh struck down the EPA's Cross-State Air Pollution Rule, which regulates air pollution that crosses state boundaries, as a violation of the Clean Air Act. He concluded that the EPA exceeded its statutory authority in two ways – first, by requiring upwind states to reduce emissions more than the statute requires, and second, by not deferring to the states to be the initial ones to implement the required reductions. Judge Kavanaugh went further in limiting the EPA's authority than the conservative Supreme Court, which upheld the pollution rule on a 6-2 vote.[59]

In *Howmet Corp. v. EPA,*[60] Judge Kavanaugh dissented from a decision to approve an EPA fine of over $300,000 against a company that had improperly shipped a corrosive chemical to be added to fertilizer without properly labelling it and taking other precautions to treat it as a hazardous waste. Judge Kavanaugh claimed that the EPA had misinterpreted the language of its own regulation on the subject. But this view was rejected by the two judges in the majority, Janice Rogers Brown and David Sentelle, who are among the most conservative judges on the D.C. Circuit. As they pointed out, the EPA's interpretation was appropriate and helped prevent "significant risks to public health and the environment"

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[55] https://www.rollcall.com/news/politics/democratic-senators-accused-potential-trump-scotus-pick-offering-misleading-testimony.
[56] http://voices.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/.
[57] https://www.judiciary.senate.gov/meetings/07/12/2018/executive-business-meeting.
[58] 696 F.3d 7 (D.C. Cir. 2012).
[59] 134 S. Ct. 1584 (2014).
[60] 614 F.3d 544 (D.C. Cir. 2010).

from hazardous wastes.[61] Judge Kavanaugh would have allowed the corporation's shipment of the corrosive chemical to proceed without the precautions prescribed under federal law.

In *Mexichem Fluor Inc. v. EPA*,[62] Judge Kavanaugh wrote the opinion striking down a rule that banned certain uses of hydrofluorocarbons, gases used in air conditioning and refrigeration that when released into the atmosphere are extremely potent greenhouse gases. His ruling said that the EPA exceeded its authority because the statute was meant to stop ozone-depleting substances, not to allow the EPA to order the replacement of substances that are not ozone-depleting but contribute to climate change.

In addition to his anti-environmental rulings, Judge Kavanaugh has advanced an anti-environmental view of the *Chevron* doctrine. For more than three decades, since 1984, the Supreme Court has required judges to defer to administrative agencies' interpretations of federal law in most cases where the law is "ambiguous" and the agency's position is "reasonable." Conservative Justice Antonin Scalia defended the *Chevron* doctrine as an important rule-of-law principle.[63] Federal agencies issue regulations addressing a wide array of civil and human rights issues, including environmental protections, immigration policy, health care protections, education laws, workplace safety, and consumer protections. Overturning the *Chevron* precedent would return that ultimate decision-making authority to judges, which appears to be what Judge Kavanaugh wants to do. He has said that "the *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes."[64] And he has called *Chevron* "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."[65] Judge Kavanaugh's clear intent to overturn this precedent and its progeny would impede the ability of federal agencies to carry out their vital missions.

Opposed to Common-Sense Gun Safety Laws: After the Supreme Court decided 5-4 in the 2008 case *District of Columbia v. Heller* that the Second Amendment protects an individual right to bear arms, Washington, D.C. passed laws that prohibited assault weapons and high-capacity magazines, and that required certain firearms to be registered. The same plaintiff, Richard Heller, argued again that the new gun laws violated the Second Amendment. In the 2011 case *Heller v. District of Columbia*,[66] a panel of three Republican-appointed judges ruled 2-1 that D.C.'s ban on assault weapons and high-capacity magazines was constitutional. Judge Kavanaugh dissented and would have held that the ban on assault weapons was unconstitutional. He wrote: "In *Heller*, the Supreme Court held that handguns – the vast majority of which today are semi-automatic – are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles."[67] It is troubling that Judge Kavanaugh sees no difference between assault weapons and handguns, and it is a strong indication that he, like President Trump, will cater to the gun lobby. During the 2016 campaign,

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[61] *Id.* at 553.
[62] 866 F.3d 451 (D.C. Cir. 2017).
[63] https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3075&context=dlj.
[64] https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4733&context=ndlr.
[65] http://harvardlawreview.org/wp-content/uploads/2016/06/2118-2163-Online.pdf.
[66] 670 F.3d 1244 (D.C. Cir. 2011).
[67] *Id.* at 1269 (Kavanaugh, J., dissenting).

President Trump stated: "I'm very proud to have the endorsement of the NRA and it was the earliest endorsement they've ever given to anybody who ran for president.... We are going to appoint justices that will feel very strongly about the Second Amendment."[68] Judge Kavanaugh clearly passes this litmus test.

Pro-Government Bias in Criminal Cases: Judge Kavanaugh reflexively rules for the government in criminal cases. A report by People For the American Way indicates that Judge Kavanaugh has written 12 dissents in criminal and law enforcement cases, and he has ruled for the government in 10 of the 12 cases.[69] For example, in *United States v. Askew*,[70] a majority of the en banc court, including three Republican-appointed judges, reversed a lower court and decided that the police violated the Fourth Amendment rights of a suspect by unzipping his jacket to search him without a warrant after a stop and frisk produced no results. Judge Kavanaugh wrote a dissent and claimed that the action was justified because it was a reasonable continuation of the stop and frisk and it helped police in showing the subject to a witness at an alleged robbery. The majority rejected Judge Kavanaugh's analysis.

And in *Roth v. U.S. Department of Justice,*[71] Judge Kavanaugh dissented from a majority ruling that the Department of Justice ("DOJ") improperly refused to say whether it had records in response to a Freedom of Information Act request by a death row prisoner who believed that DOJ records could corroborate his claim of innocence. The majority held that the public has an interest in knowing whether the federal government is withholding information that could corroborate a death-row inmate's claim of innocence, and also that this interest outweighed the privacy interests of three other men in having the FBI not disclose whether it possessed any information linking them to the murders. Judge Kavanaugh dissented and would have upheld the FBI's non-disclosure, arguing: "The privacy interests of third parties who are named in law enforcement documents are invariably strong" and in this case outweigh "the public interest in accurately assessing criminal liability or exposing prosecutorial or investigative misconduct."[72]

Troubling Views on Money in Politics: Judge Kavanaugh's judicial record indicates he would vote with the conservative bloc on the Supreme Court to continue opening the floodgates of money into our political system. An analysis by Demos and Campaign Legal Center of Judge Kavanaugh's cases involving money in politics shows that, if confirmed, he would be more aggressive than Justice Kennedy in lifting restrictions on big money.[73] For example, in *EMILY's List v. Federal Election Commission*,[74] Judge Kavanaugh wrote the opinion for a conservative three-judge panel that struck down FEC rules developed to address the influx of spending by outside organizations and paved the way for the creation of super PACs. In another case, *Independence Institute v. Federal Election Commission*,[75] he wrote the

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[68] https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063.
[69] http://www.pfaw.org/report/the-dissents-of-judge-brett-kavanaugh-a-narrow-minded-elitist-who-is-out-of-the-mainstream/.
[70] 529 F.3d 1119 (D.C. Cir. 2008) (en banc).
[71] 642 F.3d 1161 (D.C. Cir. 2011).
[72] *Id.* at 1189 (Kavanaugh, J., dissenting).
[73] https://campaignlegal.org/sites/default/files/2018-07/CLC%20Demos%20Kavanaugh%20Brief%207-12-18%209pm.pdf.
[74] 581 F.3d 1 (D.C. Cir. 2009).
[75] 816 F.3d 113 (D.C. Cir. 2016).

opinion for two conservative panel members (over a strong dissent) utilizing what Demos and Campaign Legal Center deemed "a novel theory that would limit disclosure based on a spender's tax-status, a theory subsequently rejected by a three-judge court and the Supreme Court."[76]

Sought to Undermine Church-State Separation in Education: As an attorney in private practice, Judge Kavanaugh was part of the legal team representing former Florida Governor Jeb Bush's effort to create the Opportunity Scholarships Program, a school voucher program in Florida that would direct public money to private schools by providing students who decide to leave some of the state's lowest-rated public schools with about $4,350 in tuition aid they could use in private or religious schools.[77] Notably, students attending these private schools receiving public funds would not have the same civil rights, including their right to services as a child with a disability, as if they were in a public school. In 2006, the Florida Supreme Court struck down the program as a violation of the state constitution's provision that requires a "uniform" system of public schools for all students.[78]

In *Santa Fe Independent School District v. Doe*,[79] Judge Kavanaugh wrote an amicus brief on behalf of Republican members of Congress in which he argued that the use of loudspeakers for student-led prayers at high school football games did not constitute a violation of the Establishment Clause of the First Amendment. In his brief, he accused the other side of advocating that Christian students receive fewer rights than Nazis and KKK members. Judge Kavanaugh wrote: "But offense at one's fellow citizens is not and cannot be the Establishment Clause test, at least not without relegating religious organizations and religious speakers to bottom-of-the-barrel status in our society – below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes, all of whom may use the neutrally available public square and receive neutrally available government aid."[80] The Supreme Court rejected his hyperbolic argument 6-3, ruling that the prayer involved both perceived and actual endorsement of religion.

Ideological Jobs and Affiliations: Judge Kavanaugh's right-wing ideology is reflected not only in his judicial record but also in his earlier career as a partisan lawyer. After clerking for Third Circuit Judge Walter Stapleton, Ninth Circuit Judge Alex Kozinski, and Supreme Court Justice Anthony Kennedy, he went to work for Kenneth Starr to conduct investigations into President Clinton. Judge Kavanaugh was one of the primary authors of the infamous Starr Report, in which he laid out in graphic detail the case for impeachment. He then went to work at the Washington, D.C. law firm Kirkland & Ellis, LLP, where he represented corporate clients and Republican causes and politicians. In 2000, he worked as the Mid-Atlantic regional coordinator for the Bush-Cheney campaign, and he traveled to Florida to observe the recount as part of the *Bush v. Gore* litigation. He was rewarded with plum White House positions and ultimately a judgeship. From 2001 to 2003, Judge Kavanaugh served as Associate Counsel to President Bush, and from 2003 to 2006 he served as the Assistant to the President and Staff Secretary. In these

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[76] https://campaignlegal.org/sites/default/files/2018-07/CLC%20Demos%20Kavanaugh%20Brief%207-12-18%209pm.pdf.
[77] 767 So.2d 668 (Fla. 2000).
[78] 919 So.2d 392 (Fla. 2006).
[79] 530 U.S. 290 (2000).
[80] https://www.au.org/sites/default/files/2018-07/Santa%20Fe%20Independent%20School%20Dist%20v%20Doe%20amicus%20brief.pdf.

positions, he worked on the nominations of several contentious judicial nominees – including Miguel Estrada, Priscilla Owen, Carolyn Kuhl, and many others – before he himself was nominated to the D.C. Circuit in 2003. He also worked on many policy issues, including Executive Order 13233, which revised the Presidential Records Act to make it easier for presidents to withhold documents from the public. Due to his controversial background and the intense opposition to his confirmation, it took three years for Judge Kavanaugh to be confirmed, and he was confirmed on a largely party-line vote.

Judge Kavanaugh is a longtime member of the Federalist Society and served as the co-chair of its Religious Liberties Practice Group School Choice Subcommittee from 1999 to 2001. This out-of-the mainstream legal organization represents a sliver of America's legal profession – just four percent – yet all 25 of the candidates President Trump considered for the Supreme Court nomination were on a list vetted and approved by the Federalist Society. As the *New York Times* put it in a recent editorial: "The Federalist Society claims to value the so-called strict construction of the Constitution, but this supposedly neutral mode of constitutional interpretation lines up suspiciously well with Republican policy preferences – say, gutting laws that protect voting rights, or opening the floodgates to unlimited political spending, or undermining women's reproductive freedom, or destroying public-sector labor unions' ability to stand up for the interests of workers."[81]

Ties to Judge Kozinski: As workplace and sexual harassment gain national attention in the midst of the #MeToo movement, Senators must ask Judge Kavanaugh what he knew about Judge Kozinski's sexual harassment and assaults of his law clerks, when he learned of it, and what actions he took in response. Judge Kavanaugh has reportedly remained close friends with Judge Kozinski since his 1991-1992 clerkship.[82] Judge Kozinski resigned from the bench in December 2017 following numerous allegations by at least 15 former law clerks of severe sexual harassment and abuse. Long before the *New York Times* exposed the allegations against him in 2017, Judge Kozinski's sexualized and abusive behavior was an open secret in the legal profession. Judge Kavanaugh and Judge Kozinski reportedly worked together for years as clerkship screeners for Justice Kennedy. This process led to many applicants who had previously clerked for Judge Kozinski obtaining clerkships with Justice Kennedy. As a result, Judge Kavanaugh helped maintain the prestige of a Kozinski clerkship, which no doubt had the effect of encouraging many young attorneys to continue to seek Kozinski clerkships despite the widespread rumors of abusive behavior. One former Kozinski law clerk has stated: "It is unfathomable to me that his [Judge Kozinski's] closest associates did not know, and Kavanaugh was a very close associate. To not know would require a degree of willful blindness which is, in my mind, as disqualifying as actual knowledge. The last thing this country needs is a Supreme Court Justice who squeezes his eyes shut so tightly that he can't see what's in front of his face."[83] Professor Joanna Grossman, who clerked for a different judge on the Ninth Circuit, has said: "When I clerked on the Ninth Circuit, Kozinski sent a memo to all the judges suggesting that a rule prohibiting female attorneys from wearing push-up bras would be more effective than the newly convened Gender Bias Task Force. His disrespect for women is legendary."[84] Judge

[81] https://www.nytimes.com/2018/07/09/opinion/editorials/trump-kavanaugh-supreme-court-senate.html.
[82] https://abovethelaw.com/2018/07/did-brett-kavanaugh-know-about-alex-kozinski/?rf=1.
[83] https://twitter.com/courtneymilan/status/1016530256411283456.
[84] https://twitter.com/JoannaGrossman/status/939542418638147584.

Kavanaugh must be truthful and forthcoming about any knowledge or awareness of Judge Kozinski's predatory and abusive behavior.

We urge you to exercise your full "advice and consent" responsibility by engaging in a searching and thorough review of Judge Kavanaugh's extensive record. It has been publicly reported that there could be in excess of a million pages of documents from Judge Kavanaugh's work in the Bush White House.[85] The significant number of documents that exists is likely the reason that Deputy Attorney General Rod Rosenstein recently made an unprecedented and inappropriate request for more than 100 federal prosecutors and attorneys to assist in document review.[86] The Senate Judiciary Committee must ensure that all requested documents about Judge Kavanaugh's extensive record are produced and examined, that the committee and the public have sufficient time to study the record prior to a hearing, and that committee members are permitted to adequately question Judge Kavanaugh and receive full and complete answers. Our letter of opposition is based on what is currently known about Judge Kavanaugh's public record, and we may submit follow-up letters or analysis once additional materials are made available by Judge Kavanaugh, the National Archives, the George W. Bush Presidential Library, and other sources. Before the Senate Judiciary Committee considers acting on the nomination of Judge Kavanaugh, the American people have a right to know specific information about his entire record in order to gauge how his appointment to the Supreme Court would impact our rights, freedoms, and liberties.

Thank you for your consideration of our views.

Sincerely,

The Leadership Conference on Civil and Human Rights
Advocates for Youth
Alliance for Justice
American Atheists
American Federation of Labor – Congress of Industrial Organizations (AFL-CIO)
American Federation of State, County, and Municipal Employees
American Federation of Teachers
American Humanist Association
American-Arab Anti-Discrimination Committee
Americans United for Separation of Church & State
Asian American Legal Defense and Education Fund (AALDEF)
Asian Pacific American Labor Alliance
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Bend the Arc Jewish Action
Black Women's Roundtable
Business & Professional Women of Colorado
Business and Professional Women of Denver (BPW Denver)

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[85] https://www.politico.com/story/2018/07/09/brett-kavanaugh-vince-foster-files-703344.
[86] https://www.nytimes.com/2018/07/11/us/politics/rosenstein-kavanaugh-document-review-prosecutors.html.

Center for American Progress
Center for Biological Diversity
Center for Constitutional Rights
Center for Health and Gender Equity (CHANGE)
Center for Popular Democracy
Center for Responsible Lending
CLASP
Clearinghouse on Women's Issues
Coalition of Labor Union Women
Defending Rights & Dissent
Demand Justice
Disability Rights Education & Defense Fund
Earthjustice
Economic Policy Institute Policy Center
Equal Justice Society
Equal Rights Advocates
Equality California
Every Voice
Faith in Action
Faith in Public Life
Family Equality Council
Family Values @ Work
Farmworker Justice
Feminist Majority
GLSEN
GreenLatinos
Herd on the Hill
Human Rights Campaign
Immigrant Legal Resource Center
In Our Own Voice: National Black Women's Reproductive Justice Agenda
International Association of Women in Radio and Television-USA
Jobs With Justice
Lambda Legal
LatinoJustice PRLDEF
Muslim Advocates
Muslim Public Affairs Council
NAACP
NARAL Pro-Choice America
National Abortion Federation
National Association of Human Rights Workers
National Association of Social Workers (NASW)
National Bar Association
National Black Justice Coalition

National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition for Asian Pacific American Community Development
National Coalition on Black Civic Participation
National Council of Jewish Women
National Education Association
National Employment Law Project
National Employment Lawyers Association
National Equality Action Team (NEAT)
National Federation of Business and Professional Women
National Federation of Business and Professional Women's Clubs-NYC (NFBPWC-NYC)
National Health Law Program
National Immigration Law Center
National Institute for Reproductive Health (NIRH)
National Latina Institute for Reproductive Health
National Law Center on Homelessness & Poverty
National Organization for Women
National Partnership for Women & Families
National Urban League
National Women's Law Center
National Workrights Institute
NFBPC EL PASO WEST
NFBPWC
People For the American Way
PFLAG National
Planned Parenthood Federation of America
PolicyLink
Population Connection Action Fund
Progress Florida
Progressive Turnout Project
Public Knowledge
Secular Coalition for America
Service Employees International Union (SEIU)
Sierra Club
Southern Poverty Law Center
State Innovation Exchange (SIX)
The Immigration Hub
The National Council of Asian Pacific Americans (NCAPA)
The New Jersey Institute for Social Justice
The Washington Bar Association Young Lawyers Division
The Workmen's Circle
United State of Women
United Steelworkers

Violence Policy Center
Voices for Progress
West Pinellas National Organization for Women (NOW) Florida
Women Employed
Woodhull Freedom Foundation

Prof. William Wagner
Distinguished Professor Emeritus

The Honorable Chuck Grassley, Chairman
The Honorable Lindsey Graham
The Honorable Michael S. Lee
The Honorable Ben Sasse
The Honorable Mike Crapo
The Honorable John Kennedy
The Honorable Orrin G. Hatch
The Honorable John Cornyn
The Honorable Ted Cruz
The Honorable Jeff Flake
The Honorable Thom Tillis

The Honorable Dianne Feinstein
The Honorable Patrick Leahy
The Honorable Sheldon Whitehouse
The Honorable Kamala Harris
The Honorable Richard Blumenthal
The Honorable Dick Durbin
The Honorable Amy Klobuchar
The Honorable Christopher A. Coons
The Honorable Mazie Hirono

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Dear Senators:

My name is William Wagner and I serve as the President of the Great Lakes Justice Center, an organization dedicated to preserving the good governance under the Rule of Law. I hold the academic rank of Distinguished Professor Emeritus (Constitutional Law). Before joining academia, I served as a federal judge in the United States Courts, a Senior Assistant United States Attorney in the Department of Justice, and as a Legal Counsel in the United States Senate. As to the nomination of Brett Kavanaugh to serve on the Supreme Court, I focus my remarks on his qualifications and his record concerning the Rule of Law.

Kavanaugh's Qualifications

Judge Kavanaugh is eminently qualified to serve as a Supreme Court Justice. After earning his undergraduate degree from Yale College, he attended Yale Law School.

After completing his education, Judge Kavanaugh worked as an attorney for Independent Counsel Kenneth Starr. Thereafter, he served under President George W. Bush at the White House. There he served as counsel and staff secretary. In 2006, the President nominated Kavanaugh to serve on the U.S. Court of Appeals for the District of Columbia Circuit. The Senate confirmed.

Kavanaugh's Record and the Rule of Law

My review of Judge Kavanaugh's judicial record shows that he understands the proper role of the judiciary in our constitutional republic. It also reflects that he understands of the proper jurisprudential approach to interpreting the Constitution (i.e., the Constitution is not a living document empowering judges to change it by adding rights with the ink in their pens).

In a recent speech, Kavanaugh affirmed that "a judge must be independent and must interpret the law, not make the law." His record further suggests he prioritizes the rule of law and precedent over his own personal views about policy.

In [redacted], Judge Kavanaugh dissented when the D.C. Circuit incorrectly upheld an ordinance banning most semi-automatic rifles. He argued that the Second Amendment included the right to own semi-automatic rifles. Kavanaugh wrote that "our task is to apply the Constitution and the precedents of the Supreme Court, regardless of whether the result is one we agree with as a matter of first principles or policy." This highlights Kavanaugh's qualifications to serve as a Supreme Court Justice; a good judge follows the rule of law, regardless of his personal views. Various other decisions written by Judge Kavanaugh further support a proper jurisprudential approach to constitutional interpretation. *See* [redacted] (on issues of abortion and immigration), [redacted] (on Obamacare's contraceptive coverage mandate and religious-liberty), [redacted] (on EPA regulations), Seven-Sky v. Holder (on Obamacare).

Upon his nomination, Kavanaugh stated that "a judge must interpret the constitution as written, informed by history and tradition and precedent." This raises the question of whether he considers the Court's precedents inventing a "right" of personal autonomy/ identity legitimate. Based on his jurisprudential position that judges interpret law, not create law, the answer is likely no. The answer to the question is important because the judicially-invented right serves as the Court's justification for things like abortion, homosexual conduct, and same sex marriage. If he finds the plain meaning of the Constitution requires states to determine policy matters like these, rather than an unelected imperial judiciary, he could help return the Rule of Law to a nation urgently in need of it.

Respectfully submitted,

William Wagner

//s William Wagner
Distinguished Professor Emeritus (Constitutional Law)

August 29, 2018

The Honorable Charles E. Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

I am the President of the Washington Jesuit Academy, an independent middle school here in Washington, DC, that provides a high-quality education to boys from low-income communities.

Distinguished Members of the Committee, I am not writing about politics, religion, or one's jurisprudence. I am writing to provide ***personal*** insight on Brett Kavanaugh's moral character, based simply on what I have observed while he served as a volunteer tutor at WJA and more recently as a member of our Board of Directors. And while most know him as Judge Kavanaugh, I've only ever known him as ***Brett*** Kavanaugh.

At WJA, we provide our students a safe haven with a rigorous academic setting, where for 11 hours a day, 11 months a year they learn and grow — spiritually, emotionally and intellectually. WJA really is a second home to our students. Working together, we build a foundation that will help these young men thrive in high school, in college and in life.

WJA is a school unlike most others. We are tuition free and rely on a team of dedicated teachers and a community of caring volunteers to help make a positive and lasting impact on the lives of Washington, DC's most deserving young men.

As mentioned, one of those volunteers is Brett Kavanaugh.

In that our school is in the shadow of the US Capitol, over the years we have been fortunate to have many Washington professionals and Hill staff - from both sides of the political aisle - volunteer at WJA. These men and women come through the doors of our school with different talents to share, but all with the same goal of making a profound difference in our students' lives.

I have been inspired and energized by the work of so many of our volunteers. Brett - and hundreds of others - volunteer their time and talent to empower these young men to take on the challenges that lie ahead.

For more than two years, Brett was a regular presence at our school, serving as a tutor to many of our middle schoolers. He would come to WJA week after week in the late afternoon and meet with a small group of students. Brett would help with homework, work on improving study skills, and help students become stronger readers.

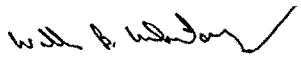
As you may know, Brett taught at Harvard, Yale and Georgetown. As a tutor, Brett worked to foster and inspire a love for learning, so that the students could grow in confidence and ability. He helped unlock the intellectual curiosity in these young men, allowing them to build a spirit of self-worth.

Our boys come from under-served communities and often are left behind. They have life stories that have forced them to grow up fast. Often if Brett's study group finished their homework early, conversations about simple life lessons would evolve. Brett offered guidance, and encouragement to bolster the student's sense of self-worth and self-confidence. Brett was a positive role model and mentor.

Before I became President of WJA I was a basketball coach at Gonzaga High School. As a coach, I always looked up to John Wooden, the legendary basketball coach at UCLA. Coach Wooden once said: "The true test of **a man's character** is what he does when no one is watching."

Without fanfare, without attention, without anyone watching, Brett Kavanaugh has volunteered at WJA to make a lasting difference in our students' lives. His actions have helped build confidence in our students, putting them on the path to success. His good works have helped shape the character of our students, and serve as a testament to his own strength of character.

Sincerely,



William B. Whitaker
Founding President
Washington Jesuit Academy

September 1, 2018

The Honorable Charles Grassley,
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Judge Brett Kavanaugh
Associate Justice of the Supreme Court Hearing

Dear Chairman Grassley, Ranking Member Feinstein, and Members of the Senate Committee on the Judiciary,

We write today with grave concerns about the nomination of Judge Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States. We are sixty-three of the individual women lawyers who exercised our constitutional right to abortion and who jointly submitted an amicus brief about our abortions in support of the petitioners in *Whole Woman's Health v. Hellerstedt*, the most recent case in which the Supreme Court affirmed that the Constitution strongly protects the right to abortion. As we explained in our amicus brief, our right to terminate a pregnancy—to exercise personal autonomy in decision-making and bodily integrity—was critical to our ability to participate equally in "the economic and social life of the Nation"[1] as liberty guarantees.

Decisions about whether and when to have children are deeply personal expressions of individual agency, implicating core liberty, privacy, and dignity interests. The Supreme Court has long held that the decision to end a pregnancy is "central to the liberty protected by the Fourteenth Amendment"[2] and that "implicit in the meaning of liberty"[3] is a woman's right to "retain the ultimate control over her destiny and her body."[4] Just two years ago, in *Whole Woman's Health v. Hellerstedt*, the Supreme Court reaffirmed the constitutional protection for the right to abortion and made clear that the standard under which courts must evaluate restrictions on the right is a robust one.[5]

Judge Kavanaugh's analysis in *Garza v. Hargan*, the "Justice for Jane" case, raises deep questions about his understanding of and respect for precedent and individual liberty interests. In *Garza*, Trump administration officials repeatedly blocked an unaccompanied young immigrant woman from accessing abortion despite her compliance with numerous hurdles.

Judge Kavanaugh twice ignored Jane Doe's evidence, presented in her briefs and at oral argument, that she had already been blocked from obtaining an abortion for almost four weeks; that finding

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[1] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).
[2] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).
[3] *Id.* at 869.
[4] *Id.*
[5] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *as revised* (June 27, 2016).

a sponsor was often a lengthy process and two possibilities for Jane Doe had fallen through; that Jane Doe had already gone through the Texas state bypass process and been deemed able to consent to the abortion for herself; and that the government was not being asked to facilitate the abortion, but simply to permit Jane Doe to obtain an abortion with private funds and logistical support.

Instead, sitting on a three-judge panel, Judge Kavanaugh would have permitted the federal government to force Jane Doe to continue the pregnancy for at least another 11 days while detention officials investigated the availability of finding a sponsor for her – contrary to settled Supreme Court precedent, which holds that "every minor must have the opportunity—if she so desires—to go directly to court without first consulting or notifying her parents" of her abortion decision, with "sufficient expedition to provide an effective opportunity for an abortion to be obtained."[6] In his dissent to the en banc opinion that reversed his panel decision, Kavanaugh invoked, but did not in fact conduct, an undue burden analysis, writing only that "the Supreme Court has repeatedly upheld a wide variety of abortion regulations that entail some delay in the abortion but that serve permissible Government purposes. These include parental consent laws, parental notice laws, informed consent laws, and waiting periods, among other regulations. Those laws, of course, may have the effect of delaying an abortion…[even for several weeks]."[7]

Judge Kavanaugh's disregard for the constitutional liberty right at stake in *Garza*, and of controlling precedent, stands in stark contrast to the legacy of Justice Kennedy—whose seat he would take. While Justice Kennedy embraced expansive, evolving liberty rights in cases including *Planned Parenthood v. Casey* and *Obergefell v. Hodges*, Judge Kavanaugh publicly praised Justice Rehnquist for dissenting in *Roe v. Wade*, stating that "it is fair to say that Justice Rehnquist was not successful in convincing a majority of the justices in the context of abortion either in *Roe* itself or in the later cases such as *Casey* [that unenumerated rights should rarely be recognized], in the latter case perhaps because of stare decisis. But he was successful in stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition."[8]

Any nominee for the Supreme Court must be able to express his or her support and respect for constitutional liberty rights, including reproductive rights, and for *Roe*'s precedent. After reviewing Judge Kavanaugh's record, we are concerned that he has consistently failed to express or apply those judicial values and made statements that disparage liberty as set out in *Roe*.

We thus urge you to thoroughly question Judge Kavanaugh about his understanding and interpretation of the constitutional underpinnings of abortion jurisprudence; his commitment to precedent; and his analysis of substantive due process rights to liberty and bodily autonomy. It is particularly necessary for the Judiciary Committee to probe Judge Kavanaugh on this issue, given that the President Trump has repeatedly committed to nominate justices who would overturn *Roe v. Wade* and "automatically" undo the crucial constitutional protections on which two generations of women have relied for over four decades.

There is simply no justification for Judge Kavanaugh to refuse to answer questions on this topic. Evasive answers on this subject are not acceptable and we believe would indicate Judge

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[6] *Bellotti v. Baird*, 443 U.S. 622, 640–644 (1972) (striking statute requiring minor to obtain the consent of both parents prior to an abortion as unduly burdensome).
[7] *Garza v. Hargan*, 874 F.3d 735, 755 (D.C. Cir. 2017), cert. granted, judgment vacated sub nom. *Azar v. Garza*, 138 S. Ct. 1790 (2018)
[8] "From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist" at the American Enterprise Institute (Sept. 18, 2017).

Kavanaugh's intent to undermine and overturn these fundamental liberty interests that have been so pivotal in our own lives.

We are united in our strongly held belief that we would not have been able to achieve our personal or professional aspirations, as diverse as they are, were it not for the ability to obtain safe and legal abortions. Meaningful access to reproductive choice has allowed us to become, remain, and thrive as women, as lawyers and as equal members of society. As lawyers who have participated in all aspects of the legal profession, including at private law firms, corporations, multinational governmental organizations, nonprofit organizations, and law schools, we have taken personal and professional risks to publicly disclose our abortion stories to the justices of the Supreme Court, the members of the U.S. Senate, and the American people. We did so because the right to make decisions for ourselves, our health, and our families is *so* critical for millions of women that it was worth the risk.

We had the courage to speak publicly about what this right has meant to us personally, despite the stigma associated with abortion, including for us as women lawyers. Judge Kavanaugh owes the same openness to the Senate and the American people that we offered willingly.

Judge Kavanaugh cannot be confirmed to a lifetime appointment on our nation's highest court unless he clearly and compellingly states that the right to abortion is among the Constitution's guaranteed personal liberty rights.

Sincerely,

Janice Mac Avoy, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP
Emma C. Alpert, Family Defense Attorney, Brooklyn, NY
Elizabeth Arndorfer
Natasha Lycia Ora Bannan, President, National Lawyers Guild
Nina Brodsky, Sr. Assoc. General Counsel, Mount Sinai Health System
Rhonda Brownstein, Legal Director, Southern Poverty Law Center
Emily C. Camin, Attorney
Cynthia Carr, Deputy General Counsel, Yale University
Monica A. Ciolfi, Sr. Director of Policy, Fedcap Rehabilitation Services, Inc.
Lorraine A. Clasquin, Co-founder and President, The KLE Foundation, Austin, Texas
Brenda H. Collier, CollierLaw
Sarah Deer, Professor, University of Kansas
Andrea M. Diaz, Los Angeles County Deputy Public Defender
Victoria L. Eastus, Visiting Professor of Law, New York Law School
Jamie Fellner, retired, former senior counsel and director, US Program, Human Rights Watch
Tiffany M. Femiano, Supervising Attorney, Mobilization for Justice
Elise C. Funke, Esq.
Emily Jane Goodman, NYS Supreme Court Justice (ret)
Hayley Gorenberg, Legal Director, New York Lawyers for the Public Interest
Sharlyn Grace, Co-Executive Director, Chicago Community Bond Fund

Lori Jo Hansel, Lawyer, Austin, Texas
Susan Katz Hoffman, retired attorney, Fellow of College of Labor and Employment Lawyers, Charter Fellow, American College of Employee Benefits Counsel
Andrea L. Irwin, Executive Director, Mabel Wadsworth Center
Sarah Honig Khouri, Assistant Public Defender, Cuyahoga County Public Defender's Office
Margaret Klaw, Partner, Berner Klaw & Watson LLP
Karen Kramer, Legal Consultant, ChangeLab Solutions
Sylvia A. Law, Elizabeth K. Dollard Professor of Law Medicine and Psychiatry, NYU Law
Amy Lieberman, Attorney
Dorchen A. Leidholdt, Director, Center for Battered Women's Legal Services, Sanctuary for Families
Judith Liben, Attorney
Star Lightner, Senior Counsel, Miller Starr Regalia, Walnut Creek, CA
Gail Lopez-Henriquez, Retired from Private Practice, Philadelphia, PA
Virginia S. Longmuir
Julie Lowenberg, retired attorney, volunteer advocate for women's reproductive health and rights
Amelia Meier, public interest lawyer, Los Angeles
Chris Ann Maxwell, Principal, Law Offices of Chris Ann Maxwell
Michele Coleman Mayes
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Three Merians, Esq.
Carlin Meyer, Professor Emeritus, New York Law School
Jill Morrison, Visiting Professor of Law, Georgetown University Law Center
Tracy L. Norton, Associate Professor, Touro College Jacob D. Fuchsberg Law Center
Jennifer L. Nye, Lecturer in Law and Social Justice, History Dept., University of Massachusetts Amherst
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Kelsey Ryland, Senior Policy and Legislative Affairs Manager
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Bianca Victoria Scott, New York Human Rights Lawyer
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Anna Zaret, Attorney, PhD Student in Jurisprudence and Social Policy, University of California, Berkeley

** Signers sign as individuals, not as representatives of their affiliated organizations.*

[redacted]

August 28, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Office Building
Washington, D.C. 20510

Re: Judge Brett M. Kavanaugh

Dear Chairman Grassley and Ranking Member Feinstein:

Your responsibility to oversee the appointment of federal judges is weighty and of crucial importance to the rule of law in our democracy. Thank you for your dedication to this vital task.

I practiced law for 35 years with the Washington, D.C. law firm Williams & Connolly LLP. My area of specialization was litigation, in both state and federal trial courts and courts of appeal. I also served on the American Bar Association's Standing Committee on the Federal Judiciary in which capacity I vetted a number of nominees to the federal courts, including Supreme Court nominees. I respectfully submit this letter in enthusiastic support of the nomination of Judge Brett Kavanaugh to the United States Supreme Court.

Judge Kavanaugh has all the qualities litigants and lawyers hope to find in a Supreme Court Justice - superb intellect and legal acumen, fundamental fairness and decency, abiding respect for precedent and the rule of law.

I have been following Brett Kavanaugh's career since 1990, when he was a student at Yale Law School and I was chair of Williams &

Connolly's hiring committee. He worked for our firm, as a summer associate, and quickly showed that he had the potential to become a superb lawyer. Williams & Connolly wished to have him return to our firm as a permanent associate but he went on to a stellar -- and multifaceted -- legal career in private practice, government service and the federal judiciary. Not only have I followed his trajectory in the legal profession but I have also remained in touch with him and his family since I met him 28 years ago.

Throughout his career, Brett Kavanaugh has performed at the highest level of professional excellence. His personal integrity and respect for judicial precedent are beyond question. Your Committee has his superlative resume before you. His tenure on the D.C. Circuit Court of Appeals is further evidence that he is eminently well qualified to serve on our country's highest court.

Despite his extraordinary credentials, Judge Kavanaugh is a humble man who does not aspire to make new law. He is not motivated by political ideology. Rather, he is dedicated to applying the law without bias or predilection.

Please contact me if you need any further information. I can be reached at [redacted] and [redacted]

Sincerely,

Carolyn H. Williams

Carolyn H. Williams

Senator Chuck Grassley
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Senator Dianne Feinstein
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

August 21, 2018

Dear Chairman Grassley and Ranking Member Feinstein,

We, the undersigned, write in steadfast opposition to the confirmation of Judge Kavanaugh. We believe his nomination to the Supreme Court poses a dire threat to women's health and wellbeing. Specifically, we are concerned about what his confirmation to the Supreme Court could mean for the 67 million women and girls with pre-existing conditions.[1]

The threat Judge Kavanaugh poses to women's reproductive health has been well documented. His appointment would be a disaster for women's reproductive health, including access to abortion and contraception. President Trump has been clear that he will only appoint justices who will overturn *Roe v. Wade* "automatically"[2] and undo the legal right to abortion care. Judge Kavanaugh was selected for that very reason. [3] When Judge Kavanaugh had the opportunity to block access to abortion care, he jumped at it: he recently voted to prevent a young immigrant woman from accessing the abortion care she wanted, arguing for a delay in her release that could have made it too late for her to legally access abortion. [4] He has also ruled against disabled women's right to make their own choices regarding their own reproductive health care - issuing a ruling upholding a DC government policy that had led to two involuntary abortions.[5]

Additionally, there are threats to women's health moving through the courts. Cases involving the Affordable Care Act's (ACA) prohibition on discrimination based on pre-existing conditions are working their way through the court system and may, ultimately, end up at the Supreme Court. Judge Kavanaugh already expressed his opposition to the ACA. Judge Kavanaugh openly criticized Chief Justice Roberts for his decision to uphold the health care law[6] and, from the bench, repeatedly voiced his opposition to the ACA, [7] including by suggesting that a president could "decline to enforce" this lifesaving legislation if he personally deems it unconstitutional.[8]

Women simply cannot return to the discriminatory practices that were pervasive before the ACA. For example, in the individual insurance market, a woman could be denied coverage or charged a higher premium if she had experienced HIV or AIDS, , diabetes, lupus, an eating disorder, pregnancy or a previous Cesarean birth, just to name a few.[9] Recent estimates find that more than half of women and girls nationally (over 67 million) have

preexisting conditions.[10] There also are nearly six million pregnancies each year, a common reason for denying women coverage on the individual market before the ACA.[11] The data make clear that allowing insurers to return to pre-ACA practices could mean millions of women being denied coverage or charged more based on their health status if they ever sought coverage in the individual market.

Women's health, wellbeing, and economic security – indeed, their very lives – are all at risk with Judge Kavanuagh's nomination. We urge the Senate to stand with the millions of women and girls who would be left without affordable, comprehensive, quality care and to reject Judge Kavanaugh's nomination to the Supreme Court of the United States.

Sincerely,

Advocates for Youth
AIDS United
American Academy of Nursing
American Association of University Women
American Muslim Health Professionals
Athlete Ally
Black Women's Health Imperative
Black Women's Roundtable
Center for American Progress
Center for Popular Democracy Action
CLASP
Community Catalyst
Equal Rights Advocates
Feminist Majority Foundation
GLMA: Health Professionals Advancing LGBT Equality
GLSEN
Health Care for America Now
Jacob's Institute of Women's Health
Jobs With Justice
Justice in Aging
NAACP
NARAL Pro-Choice America
National Asian Pacific American Women's Forum (NAPAWF)
National Black Justice Coalition
National Center for Transgender Equality
National Consumers League
National Equality Action Team (NEAT)
National Health Law Program
National Institute for Reproductive Health (NIRH)
National Partnership for Women & Families
National Women's Law Center
Outserve – SLDN

Physicians for Reproductive Health
Raising Women's Voices for the Health Care We Need
The Sargent Shriver National Center on Poverty Law
URGE: Unite for Reproductive & Gender Equity
Voices for Progress
Women's Law Project
YWCA Asheville
YWCA Berkeley/Oakland
YWCA Bethlehem
YWCA Binghamton & Broome County
YWCA Boston
YWCA Central Alabama
YWCA Central Massachusetts
YWCA Clark County
YWCA Evanston/North Shore
YWCA Greater Pittsburgh
YWCA Madison
YWCA Mahoning Valley
YWCA Mount Desert Island
YWCA New Britain
YWCA NorthEastern New York
YWCA of Greater Atlanta
YWCA of Rochester & Monroe County
YWCA of Spokane
YWCA of Syracuse and Onondaga County Inc.
YWCA of University of Illinois
YWCA of Van Wert County
YWCA Olympia
YWCA Pierce County
YWCA Quad Cities
YWCA Rhode Island
YWCA San Francisco & Marin
YWCA Southeastern Massachusetts
YWCA Titusville
YWCA USA
YWCA Western New York
YWCA-GCR

CC:
Senator Richard Blumenthal
Senator Cory Booker
Senator Shelly Moore Capito
Susan M. Collins
Senator Christopher A. Coons
Senator John Cornyn

Senator Mike Crapo
Senator Ted Cruz
Senator Joe Donnelly
Senator Dick Durbin
Senator Jeff Flake
Senator Lindsey Graham
Senator Kamala Harris
Senator Orrin G. Hatch
Senator Heidi Heitkamp
Senator Mazie Hirono
Senator John Hoeven
Senator Doug Jones
Senator Angus S. King, Jr.
Senator John Kennedy
Senator Amy Klobuchar
Senator Patrick Leahy
Senator Michael S. Lee
Senator Joe Manchin, III
Senator Claire McCaskill
Senator Lisa Murkowski
Senator Ben Sasse
Senator Richard C. Shelby
Senator Dan Sullivan
Senator Thom Tillis
Senator Sheldon Whitehouse
Senator Todd Young

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[1] National Partnership for Women & Families and the Center for American Progress. (2018). *Moving Backward: Efforts to Undo Pre-Existing Condition Protections Put Millions of Women and Girls at Risk*. Retrieved 14 August 2018, from http://www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf

[2] In the final October 2016 presidential debate, Trump replied to a question about whether he would appoint judges to overturn Roe v. Wade by saying, "Well, if we put another two or perhaps three justices on, that's really what's going to be — that will happen, . . . And that'll happen automatically, in my opinion, because I am putting pro-life justices on the court. I will say this: It will go back to the states, and the states will then make a determination." Berman, M. (2017, March 21). Trump Promised Judges Who Would Overturn *Roe v. Wade*. *Washington Post*. Retrieved 14 July 2018, from https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmationhearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/

[3] Compare the Supreme Court nominee shortlist that President-elect Trump released on January 12, 2017, with the shortlist released on November 17, 2017, just weeks after Judge Kavanaugh's dissent in *Garza v. Hargan*. *See* de Vogue, A. (2017, January 12). CNN's Donald Trump Supreme Court Nominee Shortlist. *CNN*. Retrieved 14 July 2018, from https://www.cnn.com/2016/12/06/politics/donald-trump-supreme-court-nominee-shortlist/index.html; White House. (2017, November 17). *President Donald J. Trump's Supreme Court List*. Retrieved 14 July 2018, from https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/

[4] Garza v. Hargan, No. 17–5236, 2017 WL 4707112 (Oct. 19, 2017).

[5] Doe ex Rel. Tarlow v. District of Columbia, 489 F.3d 376, 379 (D.C. Cir. 2007), reversing Jane Does I through III v. District of Columbia, 232 F.R.D. 18 (D.D.C. 2005).

[6] The Heritage Foundation. (2017, October 25). *The Joseph Story Distinguished Lecture*. Retrieved 14 July 2018, from https://www.heritage.org/josephstory2017

[7] Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *cert. denied*, 567 U.S. 951 (2012); Sissel v. U.S. Dep't of Health & Human Servs., 799 F.3d 1035 (D.C. Cir. 2015) (Kavanaugh, J., dissenting), *cert. denied*, 136 S. Ct. 925 (2016).

[8] *Seven-Sky*, 661 F.3d at 50 n.43 (Kavanaugh, J., dissenting) ("Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.").

[9] National Women's Law Center. (2008). *Nowhere to Turn: How the Individual Health Insurance Market Fails Women*. Retrieved 19 June 2018, from https://nwlcciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/NWLCReport-NowhereToTurn-81309w.pdf; Kaiser Family Foundation. (2016). *Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA*. Retrieved 19 June 2018 from https://www.kff.org/health-reform/issue-brief/pre-existing-condition-sand-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca/

[10] National Partnership for Women & Families and the Center for American Progress. (2018). *Moving Backward: Efforts to Undo Pre-Existing Condition Protections Put Millions of Women and Girls at Risk*. Retrieved 14 August 2018, from http://www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf

[11] National Partnership for Women & Families and the Center for American Progress. (2018). *Moving Backward: Efforts to Undo Pre-Existing Condition Protections Put Millions of Women and Girls at Risk*. Retrieved 14 August 2018, from http://www.nationalpartnership.org/research-library/health-care/aca-pre-ex-protections-women-girls.pdf

October 4, 2018

Dear Senators,

We are a non-partisan group of women law faculty from across the nation charged with training our students to become ethical lawyers and leaders of the bar. We believe in and embrace the Supreme Court and all that it represents – judicial independence, fair-mindedness, and justice and equality under the law. On a daily basis, we teach our students about the importance of the rule of law, impartiality on the part of judges in the United States' legal system, and professionalism as a mandate for attorneys and judges.

Judicial professionalism is not an abstract ideal. At a minimum, judicial professionalism includes respecting and listening to parties who come before the bench, exercising honesty and integrity, and the ability to control one's temper. The *ABA Model Code of Judicial Conduct* and the *Code of Conduct for United States Judges* give guidance to judges on how to perform their duties with impartiality and integrity. These characteristics are the building blocks of a fair and just legal system. They were, however, absent from Judge Brett Kavanaugh's opening statement and testimony before the Senate Judiciary Committee on September 28, 2018. We are deeply concerned that if Judge Kavanaugh is confirmed, he will fail to perform his duties in a manner befitting our highest Court. For these reasons, we urge you to vote against Judge Kavanaugh's nomination to the Supreme Court of the United States of America.

Canon 2 of the *Code of Conduct for United States Judges* requires that "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Manifestations of bias or prejudice with respect to gender and political affiliation are inconsistent with Canon 2.

Judge Kavanaugh demonstrated disrespect towards Democratic senators vested with the constitutional authority to assess his ability to serve on the Supreme Court of the United States. He continually interrupted, speaking in a tone that was inappropriate given the seriousness of the proceedings. His condescension was especially evident in his responses to the questions of women senators. One of the worst instances of such behavior was exhibited when Senator Amy Klobuchar asked the Judge whether his drinking meant that he could not remember events. He responded, "You're asking about blackout. I don't know, have you?"

Judge Kavanaugh's lack of respect for our democratic institutions, and for women in positions of power in particular, revealed that he does not have the requisite judicial temperament. We would never allow our students to engage in such conduct even in mock proceedings or the classroom. If the venue for Judge Kavanaugh's conduct had been a courtroom, a judge might have found him in contempt.

Many of us have participated on search committees for faculty members, deans, provosts, university presidents, and other positions. If job candidates refused to answer probative questions and side-stepped with stock answers about their pedigrees and accomplishments, their behavior would leave us with serious questions about their honesty and credibility.

We are not alone in our assessment of Judge Kavanaugh. Although the Judge has cited the ABA's endorsement of his nomination in 2006, the ABA actually downgraded the Judge from well-qualified to simply qualified, in part, because of his temperament and concerns about his "ability to be balanced and fair."

We doubt that Judge Kavanaugh can be impartial. In his lengthy opening remarks during the Senate hearing, he stated:

> This whole two-week effort has been a calculated and orchestrated political hit fueled with apparent pent-up anger about President Trump and the 2016 election, fear that has been unfairly stoked about my judicial record. Revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups.

For over two centuries, Supreme Court justices have set aside their political views to evaluate claims and render rulings that advance the rule of law and reflect changes in our society. Judge Kavanaugh's pointed remarks suggest he does not have the capacity to give fair consideration to all cases.

We urge you to reject Judge Kavanaugh's nomination to the Supreme Court of the United States of America. Judge Kavanaugh has shown that he is unable to respect women in positions of power, manifests bias with respect to gender and political affiliation, does not meet basic standards of professionalism, and lacks independence, impartiality, and judicial temperament.

Sincerely,

** all signatories to this letter have signed in their individual capacities; title and institutions are listed solely for the purpose of identification.

Felice Batlan
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Director of the Institute for Compliance
Co-Director of the Institute for Law and the Humanities
Chicago-Kent College of Law

Kathleen Engel
Research Professor
Suffolk University Law School

Karla McKanders
Clinical Professor of Law
Vanderbilt University Law School

Teri McMurtry-Chubb
Professor of Law
Mercer University School of Law

Jennifer D. Oliva
Associate Professor of Law and Public Health
West Virginia University

Mae C. Quinn
Visiting Professor of Law
University of Florida Levin College of Law

(Signatures continued on next page)

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Lecturer
Boston Univ. School of Law

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New York Law School

Cynthia Adams
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Indiana Univ.

Leah Adams
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Univ. of the Pacific

Susan Adams
Professor of Law
Chicago Kent college of Law

Nadia Ahmad
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Susan Bandes
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Linda Barris
Professor
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Laurie Barron
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Roger Williams Univ.

Laura Bartell
Professor of Law
Wayne State Univ. Law School

Christine Bartholomew
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Marsha Baum
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Jasbir Bawa
Asst. Prof. of Lawyering Skills
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Heather Baxter
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Dorothea Beane
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Susan Becker
Professor Emerita
Cleveland State Univ.

Sheila Bedi
Clinical Associate Professor of Law
Northwestern

Valena Beety
Professor of Law
West Virginia Univ. College of Law

Roxana Bell
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September 4, 2018

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The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

RE: Nomination of Judge Brett Kavanaugh to the Supreme Court

Dear Senators Grassley and Feinstein,

Every Supreme Court nomination is critically important for women's rights. But as lawyers (and their colleagues) working to uphold the democratic values of equality and justice, we think the stakes could not be higher than at this moment.

A large amount of Judge Brett Kavanaugh's documents are still not available (and won't be, before his scheduled Senate Judiciary Committee hearing). But what we know about his record does not bode well for women's equality and legal rights - including their constitutional rights to birth control and choices in reproductive health, their right to have affordable heath care coverage, and for laws protecting against workplace harassment and discrimination. It's not hyperbole to say that Kavanaugh's confirmation to the Supreme Court would shift the balance of the Court for an entire generation. Here's how.

- **Birth control**. Taken for granted in the modern age, birth control is a constitutional right under siege. In *Priests for Life v. H.H.S.*, Kavanaugh would have allowed an employer's religious beliefs to supersede an individual's right to insurance coverage of birth control. His dissent went against not only the majority on the U.S. Court of Appeals for the D.C. Circuit, but also the decisions of seven other appeals courts.

  The Trump Administration's rules (now being litigated) allow virtually any employer to deny birth control coverage.

- **Healthcare/ACA**. Kavanaugh has expressed contempt for the Affordable Care Act (ACA) in cases that came before him on the D.C. Circuit. In speeches that he gave right before being named to President Trump's "short list," he criticized Chief Justice John Roberts's reasoning in NFIB v. Sebelius, a landmark

decision that upheld the ACA against constitutional challenge. And, in a dissent in Seven-Sky v. Holder that was criticized by legal scholars as "bizarre," Kavanaugh embraced the extreme position that the President can ignore a law if he thought it was unconstitutional.

Opponents of the ACA (including the Trump administration) continue to bring challenges to this law– including putting in jeopardy protections for individuals with pre-existing conditions. That could send us back to the day when simply being a woman could once again be considered a pre-existing condition and a reason to deny women health insurance – a lifeline for many women and their families. Kavanaugh could hear these, and many other critical cases, and the consequences for women and their families could be devastating.

- **Abortion.** Kavanaugh has consistently shown hostility towards the constitutional right to abortion. In a speech last year, he praised Justice Rehnquist's dissent in *Roe v Wade*. More recently, Kavanaugh tried to block a young immigrant woman from getting an abortion, despite her having satisfied the legal and logistical barriers to obtain an abortion in Texas. Fortunately, his colleagues on the D.C. Circuit overruled Kavanaugh's order. But if confirmed to the Supreme Court, four other Justices are ready to join him in restricting abortion access, creating a majority.

  Cases threatening *Roe v. Wade* are already making their way through the lower courts—including a challenge to Mississippi's blatantly unconstitutional ban on abortion 15 weeks after a woman's last menstrual period. At least 20 states are poised to immediately ban abortion if *Roe* is overturned. Make no mistake, if Kavanaugh is the next Supreme Court justice, women could be sent to jail if they have an abortion or, as in pre-*Roe* days, will die undergoing illegal abortions.

- **Sexual harassment.** Last, but not least, at a moment when women have inspired a national reckoning about the destructive impact of sexual harassment in workplaces across the country, Kavanaugh's narrow interpretation of anti-discrimination protections and his willingness to defer to employers are especially alarming. In one judicial opinion, Kavanaugh accepted the argument that laws protecting against workplace harassment and other forms of discrimination are anti-competitive and a liability for employers.

For women across the country, regardless of political affiliation, these issues cut to the heart of their daily lives. But the threat to valued rights does not end there. Kavanaugh's record fails to inspire confidence that he would serve as a **check on other branches of government**. After working with Kenneth Starr to investigate President Clinton, he wrote that he had changed his views to conclude that sitting Presidents should "be excused from some of the burdens of ordinary citizenship," such as civil lawsuits, criminal investigations and prosecutions. He also opined that Presidents should have more authority over independent agencies. This troubling view suggests Kavanaugh would fail to provide a check against the executive branch stripping us of our constitutional rights.

While some have expressed support for Brett Kavanaugh based on the fact that he is personable, intelligent or attended elite educational institutions, we respectfully submit that these qualities alone are insufficient - especially at this time and with the effect that his jurisprudence would have on our country.

When Senators consider the full record, they should weigh one key question: How would Kavanaugh impact the law- and our lives- if he is confirmed? Based on Kavanaugh's public record, his nomination is a threat especially

to women's lives, civil liberties and civil rights. For all these reasons, we strongly urge the Senate to vote against confirmation of Brett Kavanaugh for the United States Supreme Court.

Sincerely,

Cory M. Amron
Deborah Barron
Paulette Chapman
Lorelie Masters
Corrine Propas Parver

Women Lawyers On Guard Action Network, Inc.

174 Signatures follow from Past Presidents of the American Bar Association and other bar associations, attorneys general, state senators, law professors, non-profit CEO's and other leaders of the legal profession. They hail from 32 states and the District of Columbia.

Institutional, organizational or firm affiliation for all signatories is included for identification purposes only; individuals represent only themselves, not the entities listed.

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Senator Christopher A. Coons
Senator John Cornyn
Senator Mike Crapo
Senator Ted Cruz
Senator Richard Durbin
Senator Jeff Flake
Senator Lindsey Graham
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Senator Mike Lee
Senator Ben Sasse
Senator Thom Tillis
Senator Sheldon Whitehouse
Senator Susan Collins
Senator Lisa Murkowski

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Randi		Sterrett		Orlando	FL
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Tina	M.	Tchen	Buckley Sandler LLP	Chicago	IL
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Lucy	L.	Thomson		Alexandria	VA
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Marna	S.	Tucker	Past President, District of Columbia Bar	Chevy Chase	MD
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Alan		Van Etten	Past President, Hawaii State Bar Association	Honolulu	HI
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Deborah	P.	Wais		Chicago	IL
Marshall	I.	Wais		Chicago	IL
Elizabeth		Wang		New York	NY
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April		Wilson		Honolulu	HI
Carole		Worthington		Knoxville	TN

September 20th, 2018

The Honorable Chuck Grassley
Chairman
Committee on Judiciary
United States Senate
Washington, DC 20510

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

Dear Chairman Grassley and Ranking Member Feinstein:

We are writing to offer our support for Dr. Christine Blasey Ford. We believe her story, as we believe that the vast majority of women are telling the truth when they share their experience of sexual assault. We believe she is a true patriot, risking embarrassment, intimidation, and harassment in sharing a painful and private traumatic memory in order to protect the integrity of the Supreme Court. We hope that the Senate shows Dr. Blasey Ford the respect and consideration that she deserves, and that they thoroughly investigate her claims before considering elevating Brett Kavanaugh to the Supreme Court.

As women, our hearts ache for young girls who walk away from violent sexual experiences struggling to grasp what happened, to cope, to move on. We don't wonder for a single second why a traumatized, stunned child might not report. Christine would have faced the usual mountain of disincentives to reporting: the scorn, the shame, the natural instinct to turn away from the horror, the powerlessness, the near certainty that she would report at tremendous personal cost with no gain or resolution. Nor in a world of polarized politics, misogyny, and vitriolic victim-shaming, do we wonder why a strong, educated, professional woman might hesitate to publicize her story of sexual victimization by a powerful, high-profile man. That Dr. Blasey Ford has been forced into hiding due to death threats since coming forward highlights the wisdom in her caution.

As physicians, we hear the familiarity and truth of Dr. Blasey Ford's narrative of sexual trauma just as we recognize the classic appearance of heart failure, liver disease, or stroke. We care for the spectrum of sexual violence in our patients, from the immediate aftermath to the lifelong health sequelae. We clean the wounds, suture injured tissue, and assess strangulation injuries after violent sexual assaults. We offer emergency contraception after rapes to prevent unwanted pregnancies. We administer antibiotics to treat the infections that result from undesired penetrations. We collect evidence and complete rape kits that we know too often will not result in justice. We prescribe antidepressants to treat the resulting depression and post-traumatic stress disorder. We treat the severe anxiety in our elderly patients with dementia who relive their sexual assaults through hallucinations. We know all too well that the wounds of sexual trauma can impact a person's health for a lifetime.

We find Dr. Blasey Ford's struggle to heal heartbreakingly familiar, and not just because we see it so often among our patients. We share her pain, because many of us have the same wounds. We too have been abused, harassed, and assaulted. We ourselves have not always reported our assaults, either those

which occurred to us as children or as adult women. Our reasons were heartbreaking, sometimes pragmatic, and always intensely personal.

We stand with Dr. Christine Blasey Ford and all survivors who speak out, as well as those who cannot.

We believe Dr. Blasey Ford. We admire her strength to come forward and share her story.

She did not deserve this - no one does.

Assaults like this one are so common - yet never normal or okay. We reject the casual acceptance of this kind of behavior.

Sexual violence exacts an enormous public health toll. We cannot afford to tolerate it any longer. All women and men must stand together against sexual violence and end our societal tolerance and endorsement of it. We will no longer tolerate the elevation of men or women that commit acts of sexual violence to positions of power.

We call on the Senate to thoroughly investigate the accusations made by Dr. Blasey Ford. If Dr. Blasey Ford is to testify, we request that both men and women are part of the questioning process during her testimony, and that she be treated with the utmost respect and compassion.

Unless the Senate and/or the FBI produce evidence that clearly exonerates Brett Kavanaugh of the sexual assault reported by Dr. Blasey Ford, we oppose the elevation of Brett Kavanaugh to the Supreme Court. This accusation calls into question his fitness to pass objective judgement on the cases that may come to the court in coming years related to matters of sexual assault or the autonomy of women over their bodies.

Although we may never know for certain exactly what happened that night, Dr. Blasey Ford's story seems plausible, and is supported by a significant amount of collateral evidence. She has very little to gain, and much to lose, by coming forward and sharing her experience. Brett Kavanaugh has strong motivation to deny that an assault occurred, regardless of what the truth is. We believe Dr. Blasey Ford. We remind the Senate that the standard to convict someone of a crime and remove rights is not the same standard that should be applied to giving the great honor and privilege of a lifetime appointment to the highest court in the land. To appoint Brett Kavanaugh with this lingering uncertainty about a history of violent sexual crime would bring shame to the court and anger survivors of sexual assault everywhere.

In solidarity with Dr. Blasey Ford, and inspired by her courage, we would like to share some of our personal stories of sexual assault and difficulties with reporting for the Senate to consider.

"I was raped in med school by a 'friend' at a party. He held me down, held my neck until I passed out since I was fighting him. I had bruises on my neck for a week. My friend walked in and thought it was consensual so didn't stop him. He raped me with a tampon in my vagina as I was on my period. I didn't report it because I was mortified this could happen to responsible me, a medical student, and didn't want to relive that horrible night. Come to find out, 20 years later, I still relive that horrible night."

"When I was in medical school, I watched the egregious actions of a serial sexual harasser get swept under the rug. The medical school silenced victims and promoted the abuser even after his actions were reported through official channels."

"A male medical student asked to sleep on my couch after a party I had. As I was getting the couch ready for him he held me down, pulled off my shorts and anally raped me."

"When I was 7, a 17 year old boy lured me off of the playground to see his hamster and molested me. He told me he would kill the hamster if I told anyone."

"As he left he told me 'You're fat. You're lucky I even came near you!' I feared people would agree with him. I didn't want to be humiliated."

"I didn't report because I was only 9 years old and it was my aunt's husband/my cousin's dad and I knew it would destroy my family. I was smart and savvy enough to make sure I was never alone with him again. I learned that men cannot be trusted. It's been 41 years and he is dead and I've still never told anyone. His daughter is one of my closest friends and I could never do that to her."

"When I was 10 my 15 year old cousin molested me 3 times in 1 weekend while we visited. He told me no one would believe me if I told and that I would never get to come back to visit my family if I told."

"When I was in residency, a senior resident grabbed my breasts at a party, but I didn't report it because I was worried it would damage my reputation and career."

"When I was 13, I was at a sleepover with my friend and her brother who was 17 or 18 came into the room we were sleeping in and started touching my breasts. When I started to object, he squeezed hard so I just lay still. He masturbated while he touched me."

"I didn't want to lose my letter of recommendation."

"So many instances, never occurred to me to report most of them."

"When I was 17, I was raped by my boyfriend. I didn't tell my family or report the event because I felt ashamed, and I judged myself for getting drunk."

"I didn't report because he was my orthodontist and I felt so stupid because I didn't realize a 35 year old man would be interested in a 17 year old girl. And I knew my parents would make a scene."

"He was my best friend's cousin and I didn't want to make trouble."

"He was my research advisor. I was afraid no other advisor would have taken me as a student."

"I was raped several times by an ex-boyfriend in college. I didn't report it because he threatened to kill me, the boy I was then dating, and himself. I was terrified and ashamed. I moved 6 hours away and had nightmares for years. It affects my marriage now, 20 years later."

"When I was 14, two drunk brothers cornered me in a doorway, pulled up my shirt and molested me. When I told a friend about it, I was told to keep to myself or else everyone would think I was 'crazy.' I still haven't told anyone about it."

"I was 10 when I was molested. He was a friend of the family in his 50s. We stayed at his house on the way through town on a road trip. I told my mom right when it happened and we left right away. I was supported by my family, but it was never reported. Come to find out he had molested and taken advantage of other women in my family decades before. The culture of silence and shame is so powerful. He had stepdaughters. His wife was a teacher. How it was never reported I will never understand. I was a kid, but it still haunts me to this day."

"He is a Pulitzer Prize winning photojournalist. He was my father's colleague and friend. He is 25 + years my senior. I was 21. I was in his city, far from my home, interviewing for medical school there. Since he was friends of my parents, they asked him to meet up with me for dinner. He tried to get me to drink alcohol the entire night. My gut told me not to. When he brought me back to the hotel, he entered my room, jumped on me on a bed, straddled me, pinned my arms down and repeated many times 'I'm gonna get you'. I finally called home and when I heard my mother's voice I cried so uncontrollably I could not get any words out for a very long time. Years later, while at the Newseum in DC with my two best friends, I began to shiver and shake when he came up on the video exhibition we were watching. We went to a private room and I poured it out to my best friends, whom I had never told. To this day, I have not 'come forward' against him."

"He was drunk. Out of the blue, he pulled me towards him, forcefully, in a tight, asphyxiating embrace. While I tried to recover from the shock, he stuck his tongue in my mouth. I felt violated. It made me feel dirty. I had never been kissed before. Still, to this day, I cannot forgive the man who forced himself on me and took without permission the memory of my first kiss."

"I was 14 and raped by an American on a business trip with my parents. I did not tell anyone until I was 19 when my mother said I was a savvy kid how did I get myself in the position. And I am student #13 in the Hotchkiss report that was released in August. These incidents shape us and stay with us."

"Nobody wants to be viewed differently or shamed."

"I am still haunted 15 years later by a patient who came to our hospital's ER reporting a violent and prolonged rape. She did not receive empathy or kindness. She was put in a closed room at the end of the hall because she was 'hysterical'. She was ignored, and she hung herself from the TV power cord. I cared for her in the ICU, where she was pronounced braindead on her 30th birthday. There was no investigation of her reported rape. No reporting of this tragedy within the halls of the hospital. Just another woman's life who meant so little to this system."

"I was in college, and we were both drunk. I blamed myself."

"I was 15 and I'd just met a 17 year old boy who'd moved to our neighborhood. We'd only talked a couple of times but he asked me if I wanted to come watch a movie after school at his house. I got off the bus and headed over. During the movie, he started kissing me and tried removing my shirt and pants. I started crying, told him "no" so many times, tried to fight a little but ended up just giving in because he was too strong and I was too scared. I cried the whole time, it hurt so bad and felt stupid and naive that I'd gone there alone...I blamed myself. Afterwards, he told me (as I lay crying and bleeding) he "had a girlfriend back home"and he "planned on staying with her". That was my very first sexual experience...I had been a virgin...he destroyed me for many, many years because I had no idea what intimacy was supposed to be and I had zero self-esteem after that. I didn't tell people because I was embarrassed."

Signed,

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Erin Karl, MD, Nebraska
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Miryam Miller, MD, New Mexico
Molly Carroll, MD, New Mexico
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Karen E. Jerardi Beck, Ohio

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Sarah Nayeem MD, Ohio
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Tamar Gur, MD PhD, Ohio
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Anne-Marie McCoy, MD, Oregon
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Elizabeth Kichula, MD PhD, Pennsylvania
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Lydia McNeary, MD, Virginia
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Lisa Erlanger MD, Washington
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Thangam Venkatesan, Wisconsin
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August 27, 2018

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

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Brett M. Kavanaugh for United States Supreme Court

Dear Chairman Grassley and Senator Feinstein:

We are a bipartisan group of Brett Kavanaugh's classmates from the Yale Law School Class of 1990. Many of us have kept in touch with him ever since and value his friendship greatly.

Although we doubt we will agree with every decision Judge Kavanaugh may make as a justice (just as many of us have not agreed with every opinion of his as a United States Circuit Judge), we firmly believe that Judge Kavanaugh would make decisions thoughtfully, honestly and impartially, and after careful, thorough and respectful consideration of precedent, the case records and the arguments of the litigants.

From the time we first met Judge Kavanaugh as a classmate, he has impressed us with his considerable intellect, friendly manner, good sense of humor and humility. His contributions to class discussions as a law student were perceptive, fair-minded, rational and calm. His service as a Notes Editor of the *Yale Law Journal* demonstrated his capacity for hard work, thoroughness, thoughtfulness and collegiality. Judge Kavanaugh was, and remains, well-liked and respected by those who know him, regardless of their political party affiliations or stands on political issues. In the passionate intellectual atmosphere of Yale Law School, none of us can say that Judge Kavanaugh stood out as ideological at all. He was not a person with an agenda. Rather, he was a thoughtful classmate and loyal friend who obviously loved the intellectual challenges of the law and the good company of his peers.

We remember Judge Kavanaugh from our law school days not just for his hard work on the *Journal* or his wisdom in the classroom, but also for his competitiveness in intramural basketball and his good-natured friendship. Judge Kavanaugh is a person anyone would be proud to have as a friend. He is extraordinarily bright, yet modest and humble about his intellect. He has demonstrated his exemplary judicial temperament as a United States Circuit Judge and we have high hopes that he would have a positive influence on the collegiality of the Supreme Court. We were favorably impressed that he publicly expressed admiration of the qualifications of his colleague Merrick Garland for the Supreme Court when Chief Judge Garland was nominated.

Disagreements we may have had over the years about policy views have not diminished our conviction that Judge Kavanaugh is a fair-minded and reasonable judge who seeks to interpret and apply the law fairly. Based on our years of knowing Judge Kavanaugh, we are firmly convinced that his allegiance as a Supreme Court justice would be only to the Constitution and laws of the United States and not to any partisan interests. Many of us served as law clerks to judges across America, in chambers for United States District Court, United States Court of Appeals and state Supreme Court judges. In that experience and in our subsequent legal careers, we have seen many models of outstanding judges, who treat every litigant before them with respect and who work hard to apply the law to reach a just result in every case before them. We believe Judge Kavanaugh has lived up to those models.

We appreciate the opportunity to submit this letter in support of Brett Kavanaugh.

Respectfully,

Rob Bergdolt
Randy Berholtz
James Brochin
Michelle H. Browdy
Trevor A. Brown
Edmund C. Burns
Paul W. Cobb, Jr.
Sheldon Fisher
David Flattum
Jonathan Franklin
Steven Hartmann
John P. Irwin
Paul E. Kalb
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Stephanie Marcus
Mark W. Osler
Michael J. Proctor
Jacob S. Pultman
Mary Humes Quillen
Robert Rivera, Jr.
Doug Rutzen
Floyd G. Short
Kent Sinclair

Letter from Yale Students, Alumni, and Faculty in Support of Judge Brett M. Kavanaugh

July 12, 2018

We write as students, alumni, and faculty proud of our alma mater. We join Yale Law School in its praise of distinguished Yale alumnus Judge Brett Kavanaugh.

Judge Kavanaugh is eminently qualified to serve as a Supreme Court Justice. Judge Kavanaugh, a graduate of Yale College and Yale Law School, is one of our nation's most distinguished jurists. In his twelve years of service on the United States Court of Appeals for the D.C. Circuit, he has demonstrated a principled approach to interpreting the law. He has reached legal conclusions free of political partisanship. Judge Kavanaugh has devoted his professional life to upholding the rule of law and our Constitution.

Throughout his time on the federal bench, Judge Kavanaugh has been a valuable friend to the Yale community, visiting frequently to speak on important topics and to encourage admitted students to begin their legal careers in New Haven. More importantly, Judge Kavanaugh has been a faithful servant to his community in the Washington D.C. area. He is a basketball coach for his daughters' teams, and a regular volunteer with Catholic Charities. As the many students he has mentored will attest, he is a person of deep conviction and integrity.

We are proud of Judge Kavanaugh's nomination, and believe that his accomplishments and qualifications speak for themselves.

We admire the Yale Law faculty who have spoken in support of Judge Kavanaugh's qualifications and commitment to the Constitution. Some selections of our faculty's comments are below:

"I can personally attest that, in addition to his government and judicial service, Judge Kavanaugh has been a longtime friend to many of us in the Yale Law School community. Ever since I joined the faculty, I have admired him for serving as a teacher and mentor to our students and for hiring a diverse set of clerks, in all respects, during his time on the court."

— Heather K. Gerken, Dean and Sol & Lillian Goldman Professor of Law

"He is a terrific judge. In my federal criminal law class, I love teaching his opinions because they are smart, thoughtful, and clear. He's also been a wonderful mentor and teacher to our students—not just to those who clerk for him, but those who meet with him during one of his many visits to Yale Law School."

— Kate Stith, Lafayette S. Foster Professor of Law

"Judge Kavanaugh commands wide and deep respect among scholars, lawyers, judges, and justices." "Good appellate judges faithfully follow the Supreme Court; great ones influence and help steer the Court. Several of Kavanaugh's biggest ideas have found their way into

Supreme Court opinions. Thanks to decades of high-level experience and close observation, Kavanaugh also understands the intricacies of the executive and legislative branches."

— Akhil Reed Amar, YLS '84, Sterling Professor of Law

"Brett Kavanaugh has been one of the most learned judges in America on a variety of issues, ranging from theories of statutory interpretation to separation of powers." "We are proud that he is our graduate and eager to continue to learn from his judicial opinions and scholarly publications."

— William N. Eskridge, Jr., YLS '78, John A. Garver Professor of Jurisprudence

"Politics have deeply harmed our Supreme Court nomination process." "But in terms of the man now before us, Brett Kavanaugh is a true intellectual—a leading thinker and writer on the subjects of statutory interpretation and federal courts; an incomparable mentor—someone who picks law clerks of all backgrounds and viewpoints; and a fair-minded jurist who believes in the rule of law. He is humble, collegial and cares deeply about the federal courts."

— Abbe R. Gluck, YLS '00, Professor of Law

In our deeply polarized climate, these respectful, civil, and entirely accurate comments are a breath of fresh air.

Judge Kavanaugh is a distinguished jurist qualified for the highest public service. He should be given the fair, principled, and swift consideration he deserves.

Sincerely,

Athanasia Livas, YLS '19
Will Kamin, YLS '20
Thomas Hopson, YLS '20
Callum A.F. Sproule, YLS '20
Alexis Zhang, YLS '20
Peter Keisler, YLS '85
Brian McCarty, YLS '19
Aaron Haviland, YLS '19
Aaron Hauptman, YLS '20
DJ Sandoval, YLS '20
Josh Woods, YLS '19
Sam Adkisson, YLS '18
Chandler Harris, YLS '18
Katrin Marquez, YLS '20
Hunter Swanzy, YLS '19
Aaron Gordon, YLS '20
D.H. Dilbeck, YLS '20
Khalil Tawil, YLS '18

Ryan Thier, YLS '20
Nicholas Flatley, YLS '20
Jasmine Stein YLS '19
Kurt Lash YLS '92
Jack Park YLS '80
Evan Young, YLS '04
Jeffrey A. Jannuzzo YLS '76
Robert J. Giuffra, Jr., YLS '87
Thomas A. Smith, YLS '84
Chad Pekron, YLS '00
Minor Myers, YLS '03
Andrew C. Hruska, YLS '93
Joshua Kleinfeld, YLS '06
Elbert Lin, YLS '03
Kathleen Beecher Moore, YLS '93
Daniel Feith, YLS '12
Laurie Barber Lin, YLS '03
Richard W. Garnett, YLS '95
John S. Hahn, YLS '77
Christopher Angevine, YLS '08
JD Vance, YLS '13
Hilary Albrecht '16
Jeff Ballabon, YLS '88
Sadie Blanchard, '10
Charles Korsmo, YLS '06
Adam Gustafson, YLS '09
Matt Mellema, YLS '14
William Levi, YLS '10
Dan Himmelfarb, YLS '91
Nicolas Thompson, YLS '09
Martin Newhouse, YLS '84
Rishabh Bhandari, YLS '21
Lawrence J. Fossi, YLS '83
Gene Schaerr, YLS '85
Peter Tucci, YLS '16
Brian C. Kalt, YLS '97
Michael E. Rosman, YLS '84
John H. Carley, YLS '68
Michael B. Mukasey, YLS '67
Rebecca Taibleson, YLS '10
Benjamin Taibleson, YLS '10
Jonathan Macey, YLS '82 and Sam Harris Professor of Corporate Law, Corporate Finance & Securities Law
Christian R. Burset, YLS '14
Charles Correl YLS '95
Jed Brinton, YLS '10

William H. Slattery, YLS '68
Brandt Leibe, YLS '05
Roger Clegg, YLS '81
Steve A. Matthews, YLS '80
Natalie Hausknecht, YLS '15
Glenn Harlan Reynolds, YLS '85
Alexa Zahl, YLS '20
Thomas H. Bell, YLS '83
Albert Horsting, YLS '18
Frances Mackay, YLS '18
Paulina Perlin, YLS '19
Robert Pushaw YLS '88
Donald C. Brey, YLS '81
Aaron Sibarium, YC '18
Ruel Jerry, YLS '20
Shlomo Klapper, YLS '20
Ben Johnson, YLS '10
George Conway YLS '87
Michael Taunton, YLS '14
Roberto M. Braceras, YLS '94
Robert J. Giuffra, Jr., YLS '87
Robert M. Overing, YLS '20
Brian Mund, YLS '18
Nicole Stelle Garnett, YLS '95
Josh Divine, YLS '16
Sean Strasburg, YLS '08
Nicole L. Kuenzi, YLS '07
Jeremy Liss, YLS '16
Kasdin Miller Mitchell, YLS '12
Abigail Shrier, YLS '05
Jeffrey R. Holmstead, YLS '87
Conor Clarke, YLS '15
William F. Rogel, YC '03
Andrea Siso, YLS '20
Jared Morris, YLS '09
Thomas McIver, YLS '17
Michael Fransclla, YLS '01
Joel Hornstein, YLS '00
Thomas C. Mazza, YLS '64
Joseph Chatham YLS '19
Philip Axt, YLS '18
Alan Charles Raul, YLS '80
Sara Turk, YLS '20
Ryan Proctor, YC '16
Suranjan M. Sen, YLS '19
John C. Meyer, YC '67

Logan Beirne, YLS '08
Arthur D. Hellman YLS '66
David C. Tam YC '15
Ken Leonczyk, YLS '09
Lochlan Shelfer, YLS '13
Amanda Schwoerke, YLS '08
Clark L. Hildabrand, YLS '16
John Brinkerhoff, YLS '18
Michael Rappaport, YLS '85
Janet S. McCloud, YLS '75
David Dominic Legge, YLS '96
Stephen E. Sachs, YLS '07
Victor Hsu, YLS '87
Heath Mayo, YLS '18
Michael Kopcha, YC '96
Rob Crisell, YC '93
Paul Taylor, YC '91
Michael Krauss, YLS '78
Deborah Marcus, YC '93
Tomo Takaki, YLS '20
Daniel P. Kearney, Jr., YLS '04
William J. Carney, YLS '62
Robert F. Nagel, YLS '72
Frank R. Jimenez, YLS '91
Holden Tanner, YLS '21
Brian W. Barnes, YLS '10
Bobbie G. Kilberg, YLS '69
Michael Medved, YC '69
Alexander Marcus, YC 92
Whit Cobb, YLS '90
Grant Dorfman, YLS '92
John Cassidy YC '80
Tim Schnabel, YLS '05
Seth Corey, YC '78
Ben Mallet, YC '19
Finnegan Schick, YC '18
James C. Vardell III, YLS '80
Michael DeBow, YLS '80
Shay Dvoretzky, YLS '00
Jeffrey I. Zuckerman, YLS '72
Michael Maloney, YLS '86
Owen Hughes, YLS '77
Saikrishna Prakash, YLS '93
David Bernstein, YLS '91
Leonard Nelson, YLS '84
Habib Olapade, YLS '20

Thomas G. Hungar, YLS '87
Joshua Wilson, YLS '19
Hyun-Soo Lim, YLS '18
Kris Kobach, YLS '95
Ben Daus-Haberle, YLS '21
Jorge E. Souss, YLS '97
Harry Graver, YC '14
Keerthika M. Subramanian, YLS '11
Andy Hessick, YLS '02
Donald B. Susswein, YLS '78
Alexander Hoeschel, YC '17
John W. Carr, YC'62, YLS'65
Charles Maurras, YLS '88
Renee Lettow Lerner, YLS '95
Stephen Holzer, YLS '74
Eric B. Amstutz, YLS '78
Francis Menton YC 72
Jonathan Lubin, YLS '08
Jarrett Stern, YC '93
Vladyslav Vykhodets, YC '19
Diane (Richards) Brey, YLS '88
Michael L. Yaeger, YLS '03
Charles G. Mills, LIM, YC '62
Edmund LaCour, YLS '11
George P. Burdell, YLS '13
Benjamin Zuraw, YLS '83
Kevin Leitao, YLS '91
Mary Louise Serafine, YLS '91
Ray R. Ciste, YLS '13
John Borgo, YLS '77
Michael Abramowicz, YLS '98
Julia D. Mahoney, YLS '87
Rebecca Karabus, YC '18
Brian Chen, YLS '21
Kevin Dayton, YC '92
Joseph C. Asch, YLS '83
Charles Faint, GSAS '13
Benjamin Zollinger, YC '19
Jordan A. Blashek, YLS '18
Jaye Letson Hungar, YLS '87
Bert Kwan, YLS '03
Peter J. Kalis, YLS '78
Matthew Capoccia, YLS '17
Eric M. Palmer, YLS '17
Emily Hall, YLS '21
Bo Hines, YC '18

Christine Buzzard, YLS '13
Weaver Lilley, YC '21
Tyler Whiting, YC '20
Chris Muha, YLS '06
Christopher Moeckel, YC '20
Christopher D'Urso, YLS '24
Ugonna Eze, YC '16
Motti Slomovics, YLS '21
Frederick Liu, YLS '08
Joshua Hano, YC '20
James Berry, YLS '77
Hamilton Osborne, Jr., YLS '68
Christian F. Wolpert Gaztambide, YC '20
Esteban Elizondo, YC '19
Jennifer Sarah Bolton, YC '08
Elizabeth Henry, YC '14
Casey Verkamp, YC '10
Patrick Moriarty, YLS '86
Brendan Harrington, YC '13
Charles Su, YC '14
James Hwang, YLS '10
Burton Ahrens, YLS '62
Paul Han, YC '20
John N. Reed, YLS '21
Kevin Liu, YC '14
Henry Weissmann, YLS '87
Christina Brasco, YC '14
Raleigh Cavero, YC '15, YLS '22
Mark A. Schuman, YLS '91
Gabriel Anderson, YLS '21
Sundar J.M Brown, YLS '21
Kristofer Kirk, YLS '21
Alex Cooke, YLS '04
William Rinner, YLS '09
Kenneth McKenna, YC '75, GSAS '78
Patrick Price, YLS '04
Josh Ginsborg, YC '16
Shelby Baird Smith, YC '14
John Pugsley, YLS '86
Erika Schermer, YC '14
Victoria Pierre YC '15
Pratik Chougule, YLS '14
Paul Mahoney, YLS '84
John Yoo, YLS '92
Elaine Augustine Alexander, YLS '68
Lawrence Alexander, YLS '68

Enrique Schaerer, YLS '08
Chris Sorrow, YLS '95
Nicholas Quinn Rosenkranz, YC '92, YLS '99
C. Michael Watson, YLS '74
John Meyer, YC '67
Erin Morrow Hawley, YLS '05
Paul Dykstra, YLS '68
Matt Vega, YLS '93
Margaret A. Little, YC '77, YLS '84
Larry Obhof, YLS '03
Peter O. Clauss, YLS '58
Eric Dixon, YLS '94
Zac Hudson, YLS '09
Michael R. Dunleavy, Jr. YC '06
West Cuthbert, YC '14
Alexander Crutchfield, YC '15
Jordan A. Grode, YC '21
Jon W. Deuber, YC '21
Renee Breer, YC'16
Kevin Ig-Izevbekhai, YC '16
Emmett Gilles, YLS '20
Christopher Lunding, YLS '71
Tyler McGaughey, YLS '09
Marah Stith McLeod, YLS '06
Kellen S. Dwyer, YLS '09
Keith Urbahn, YC '06
Alan Schwartz, YLS '64
Steve Blum, YLS '87
David Fierson YLS '99
Eni Kassim, YLS '20
Steven G. Calabresi, YLS '83
Elizah Stein, YC '18
Elizabeth Levin, YLS '20
David S. Blatt, YLS '88
Richard Nash Gould YC '68 MArch '72
Steven Y. Tian YC '20
Jefferson B. Riley YMArch'72
James B. Cowperthwait YC '59
Joe H Staley Jr. YC '59
D. Livingston Miller, YC '68
Robert McCallum YC '68 YLS '73
Arthur Rogers, Y'63
Jonathan M. Clark YC '59
Hannah Templin, YLS '21
Rob Bergdolt, YLS '90

August 30, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We are women who attended Yale College with Brett Kavanaugh. We came to Yale from different walks of life and have taken different paths since college. Our political viewpoints are as varied as our backgrounds and careers. We are united in expressing our admiration and respect for our friend, Brett.

Before he was a lawyer and a judge, Brett was an excellent student, a dedicated basketball player, and a great friend. He earned top grades, but was always humble; he never showed off his obvious brilliance or acted arrogantly. He was kind, accessible, and had a quick sense of humor. Brett was and remains a loyal friend to us and to many of our classmates.

Brett treated us as friends and equals in all respects. Many of us played varsity sports at Yale. His appreciation of the importance of women's athletics was impressive at that time. It clearly is something he has carried forward to the present day, with his years of coaching girls' basketball teams and his raising two daughters who are enthusiastic athletes and sports fans.

In the years since we graduated from Yale, we have gathered at reunions to reconnect with our classmates. Brett has attended those events enthusiastically and spoken on panels about his government service. Audience members of diverse viewpoints have been impressed with Brett's graciousness, thoughtfulness, and insights. That is simply the Brett we have known since college. Yes, he has held many important positions, but Brett has stayed true to himself. He is immensely generous, intelligent, and warm.

We will leave it to others to speak to Brett's record as a public servant. We speak to his record as a truly exceptional person. We are proud to call him our friend.

Sincerely,

Gayle Connors Dargan '87

Lisa Gollob Finke '87

Leslie Farenkopf Foley '90

Louisa Gerritz Garry '87

Iffie Okoronkwo M.D. '87

Yumi Ozawa '87

Helen Healey Rice '87

Carolyn Ballan Wasserman '87

Suzanne Woods '88

Karen Yarasavage '87

YWCA
IS ON A
MISSION

August 6, 2018

United States Senate
Washington, D.C.
20510

Dear Members of the United States Senate,

On behalf of YWCA USA, I write to express our concerns about the nomination of Judge Brett Kavanaugh to the United States Supreme Court, and to urge you to vote against his confirmation.

In all matters of national leadership, YWCA USA is concerned first and foremost with the needs of those who are at greatest risk of marginalization, including women, people of color, immigrants and refugees, survivors of violence and abuse, the LGBTQ+ community, and others whose rights and safety are all too often threatened. At the time of his nomination, YWCA USA expressed opposition to Judge Kavanaugh's nomination based on his judicial record on reproductive rights, women's access to contraception, health care, and worker and consumer rights, particularly as they relate to workplace discrimination, and we urged the Senate to oppose his nomination.

Rather than assuaging these concerns, further review has made clear that Judge Kavanaugh's judicial philosophy and record raise serious concerns about his ability to render decisions that will advance health, safety, and racial and gender equity for the people and communities who are at the heart of YWCA's mission.

I write today to share concerns about Judge Kavanaugh's record, and to urge you to explore these issues with Judge Kavanaugh in any meetings or interviews you hold with him, to insist on full disclosure of Judge Kavanaugh's record prior to any confirmation hearings, and to vote against his confirmation should it come to the Senate floor for a vote.

Access to Health Care and the Affordable Care Act

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ywca

YWCA USA
1020 19th Street NW, Suite 750 Washington, DC 20036
P 202.467.0801 F 202.467.0802

The Affordable Care Act (ACA) has provided a healthcare lifeline to 9.5 million women who could not otherwise afford health insurance. The ACA not only expanded health insurance coverage to millions of individuals who were previously uninsured, it changed the landscape for women's health insurance coverage and access. The ACA has been particularly beneficial for women of color, whose uninsured rates have dropped dramatically. Protections for survivors of domestic violence, coverage for the full array of essential health benefits, and full and affordable coverage for people with pre-existing are among the ACA's coverage, affordability, and accessibility provisions that are critical to women's health—and that would be jeopardized by the appointment of a Supreme Court justice whose judicial philosophy is hostile to preservation of the ACA.

Judge Kavanaugh's record raises significant concerns that he would overrule the constitutionality of the ACA in matters that may come before the Supreme Court. While on the DC Circuit Court, Judge Kavanaugh dissented from the opinion upholding the constitutionality of the Affordable Care Act (ACA). And, just weeks before being added to President Trump's short list of potential candidates, Kavanaugh criticized Chief Justice Roberts for the reasoning he used in *NFIB v. Sebelius* to uphold the ACA's individual mandate. Judge Kavanaugh's actions and reasoning suggest that if he were confirmed, millions of Americans — including many women, women of color, and survivors of domestic violence — stand to lose their health care coverage.

Women's Access to Reproductive Health Services

The right to access the full range of reproductive health care services safely and legally in this country—including birth control and abortion care—will be seriously threatened if Judge Kavanaugh is confirmed. President Trump has been explicit that he would only nominate someone who would "automatically overturn" *Roe v. Wade*. Judge Kavanaugh was on the list of candidates who met that criteria, and his judicial record and off-the-bench comments confirm the anti-abortion views he will carry to the Supreme Court. Most recently, in the well-known "Jane Doe" case (*Garza v. Hargan*), Kavanaugh tried to block a young immigrant woman's access to abortion care. Over Kavanaugh's dissent, the DC Circuit rightly allowed the young woman to seek the medical care she needed.

Moreover, Judge Kavanaugh's dissent in *Priests for Life vs. US Department of Health and Human Services* makes clear that he would prioritize other's religious beliefs over women's constitutional rights and access to contraception and other needed health care. Allowing an employer's religious beliefs to override an individual's right to insurance coverage for birth control and access to reproductive health services gives license to discriminate and deny essential health care.

Judge Kavanaugh's record of arguing against access to abortion, birth control, and

health care is of significant concern. Protecting access to the full range of reproductive health care is an especially important issue for women, and YWCA opposes efforts to limit the ability of reproductive health service providers to provide accessible, safe, and comprehensive services to patients. Confirmation of Judge Kavanaugh would turn the balance of the Supreme Court against women's constitutional rights, including abortion, and undermine our health and safety.

Fairness and Equity in the Workplace

The Supreme Court plays a critical role in ensuring fairness and safety in the workplace that are critical for women's economic empowerment and security. Yet here, too, Judge Kavanaugh's record is troubling. Judge Kavanaugh has consistently dissented and voted to dismiss employment discrimination claims that a majority of his DC Circuit colleagues found to be meritorious and has demonstrated deference to employers to the detriment of workers. Judge Kavanaugh's record in this arena demonstrates a particularly narrow understanding of anti-discrimination protections, which is reinforced by public comments that he has made. In a 1999 interview with the Christian Science Monitor, Judge Kavanaugh commented that, "I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of government." This, coupled with his reasoning in employment discrimination cases, reflects a profound misapprehension of the myriad ways in which racism, sexism, and other inequities are deeply embedded in our nation's history and in the lived experiences and current reality of women, people of color, LGBT individuals, and other marginalized groups. Such a perspective on the Supreme Court threatens the critical role the Court plays in safeguarding our nation's constitutional freedoms and values, with profound implications for the many groups and individuals who experience historical and continuing marginalization.

Knowledge of Ongoing Sexual Assault by a Federal Judge

Particularly within this context, YWCA strongly urges you to ascertain and hold Judge Kavanaugh accountable for his knowledge of ongoing sexual assault by Judge Alex Kozinski.

Judge Kavanaugh clerked for Judge Alex Kozinski of the Ninth Circuit and has reportedly remained close to his former boss, who left the Ninth Circuit in late 2017 after over a dozen allegations of sexual harassment by his former clerks. Long before the Washington Post exposed the allegations against him in 2017, Kozinski's sexualized and abusive behavior was an open secret in the legal profession. Kavanaugh and Kozinski reportedly worked together for years as "screeners" for Justice Kennedy, essentially hiring the Justice's clerks for him. This process led to many applicants who had previously clerked for Kozinski obtaining clerkships with Justice Kennedy. As a result, Kavanaugh helped maintain the prestige of a Kozinski

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clerkship, which no doubt had the effect of encouraging many young attorneys to continue to seek Kozinski clerkships despite the widespread rumors of abusive behavior. The White House has asserted that Judge Kavanaugh "had never heard any allegations of sexual misconduct or sexual harassment" by Kozinski prior to the story becoming public last year, but some in the legal community have asserted that this strains credulity.

Judge Kavanaugh must speak fully to the question of what he knew about Kozinski's abusive behavior, when he learned of it, and what actions he took in response. Too much is at stake for women for the Senate to move forward on his nomination without a thorough vetting of these questions.

Gun Violence

Judge Kavanaugh's record of ruling against gun violence protection measures is of particular concern to YWCA, given our extensive work with survivors of domestic violence and the prevalence of gun violence in the US. As detailed more fully in YWCA's position statement on gun violence, women's experiences of gun violence are inextricably linked to domestic violence. Some 4.5 million women in the U.S. have been threatened with a gun by an intimate partner, and nearly 1 million women alive today have been shot, or shot at, by an intimate partner. In an average month, 50 women in the U.S. are shot to death by intimate partners, and many more are injured. The presence of a gun in a domestic violence situation makes it five times more likely that a woman will be killed. Gun violence is particularly dangerous for women of color, who are nearly three times as likely to be murdered with a gun than white women.

Moreover, most mass shootings in the US—those in which four or more individuals are killed—are related to domestic violence: shooters killed intimate partners or other family members in at least 54 percent of mass shootings. While women make up only 15 percent of all gun violence, they make up 50 percent of victims in mass shootings, largely due to the correlation between intimate partner violence and mass shootings. Even when strangers are targeted instead of family members, there are connections between mass shootings and domestic violence: while most mass shootings occur in the home, the shooters in one third of the 46 mass shootings that took place entirely in public between 2009 and 2016 had a history of violence against women.

In this context, YWCA has included eliminating access to automatic weapons and high capacity ammunition among our policy recommendations to decrease gun violence for women and girls. Unfortunately, Judge Kavanaugh's record indicates he is opposed to this kind of common-sense step and would vote to strike down such a law.

Notably, after the Supreme Court decided 5-4 in the 2008 case *District of Columbia v. Heller* that the Second Amendment protects an individual's right to bear arms, the District of Columbia passed laws that prohibited assault weapons and high-capacity

magazines, and that required certain firearms to be registered. The same plaintiff, Richard Heller, argued again that the new gun laws violated the Second Amendment. In the 2011 case *Heller v. District of Columbia*, a panel of three Republican-appointed judges ruled 2-1 that DC's ban on assault weapons and high-capacity magazines was constitutional. Judge Kavanaugh dissented and would have held that the ban on assault weapons was unconstitutional. He wrote: "In *Heller*, the Supreme Court held that handguns — the vast majority of which today are semi-automatic — are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles."

It is deeply troubling that Judge Kavanaugh sees no difference between assault weapons and handguns, and particularly alarming given the intersection of domestic violence and firearms.

Conclusion

The Supreme Court is the ultimate arbiter of our most cherished and constitutionally-protected rights, and it is no place for an outside-the-mainstream jurist who will roll back the clock on hard-won freedoms. Unfortunately, on core issues likely to come before the Supreme Court, Judge Kavanaugh's record and judicial philosophy are at odds with the principled pragmatism required to make decisions that protect the people and communities we serve. We urge you to vote against his confirmation to the Supreme Court. I would welcome the opportunity to meet with you or your staff and further discuss our concerns regarding Judge Kavanaugh's nomination.

Best regards,

Alejandra Y. Castillo
CEO, YWCA USA

YWCA USA is on a mission to eliminate racism, empower women, stand up for social justice, help families, and strengthen communities. Our more than 50,000 employees and volunteers in 46 states and the District of Columbia help over 2 million women, girls and their families each year. To learn more about YWCA USA, visit www.ywca.org.

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empowering women
ywca

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October 2, 2018

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

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Brett M. Kavanaugh for United States Supreme Court
Prior letter of August 27, 2018, from some members of Yale Law School Class of 1990

Dear Chairman Grassley and Senator Feinstein:

On August 27, 2018, a letter was transmitted to you in support of the confirmation of Judge Brett M. Kavanaugh's appointment to the United States Supreme Court. The letter was signed by twenty-three classmates of Judge Kavanaugh's at Yale Law School, including us. We identified ourselves as a bipartisan group of supporters who have had our ideological difference over the years with Judge Kavanaugh, but who nevertheless supported his confirmation. The letter relied on, among other things, Judge Kavanaugh's "exemplary judicial temperament." It emphasized Judge Kavanaugh's lack of partisanship, his fair-mindedness and reasonableness, and his collegiality. And it emphasized that the signatories also knew Judge Kavanaugh as a friend.

Since that letter was submitted, the Committee held a hearing on Thursday, September 27, 2018, in which both Judge Kavanaugh and Professor Christine Blasey Ford testified. The allegations are currently being investigated by the Federal Bureau of Investigation, and we will not comment on them here. However, having watched those hearings, it gives us no pleasure to advise you that we must withdraw our support for that letter and Judge Kavanaugh's confirmation.

The reason for our withdrawal is not the truth or falsity of Dr. Ford's allegations, which are still being investigated, but rather was the nature of Judge Kavanaugh's testimony. In our view that testimony was partisan, and not judicious, and inconsistent with what we expect from a Justice of the Supreme Court, particularly when dealing with a co-equal branch of government.

This is not a judgment on Brett Kavanaugh as a human being. It is, rather, a conclusion rooted in what is institutionally required from a Supreme Court Justice. In our democracy, the legitimacy of our Supreme Court arises from the confidence Americans have that it deliberates and decides cases based not on partisanship, but based on principles. Judge Kavanaugh, earlier in the confirmation process, observed that "the Supreme Court must never be viewed as a partisan institution." He was right.

Under the current circumstances, we fear that partisanship has injected itself into Judge Kavanaugh's candidacy. That, and the lack of judicial temperament displayed on September 27 hearing, cause us to withdraw our support.

Thank you for allowing us to express our views.

Very truly yours,

MICHAEL J. PROCTOR

MARK OSLER

October 1, 2018

The Honorable Chuck Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We are former clerks to Judge Kavanaugh. In early July, we joined letters sent to this committee describing our positive experiences with the Judge as a boss and mentor on the D.C. Circuit. Over the weekend, the committee publicized quotations from those letters, creating the impression that they were responsive to the serious allegations raised in the last several weeks. We write to clarify that, like many Americans, we have been deeply troubled by those allegations and the events surrounding them and were encouraged by the initiation of a formal FBI investigation, which we believe is warranted. We hope, for the good of everyone involved, that this investigation will be independent and thorough.

Sincerely,

Will Dreher, Bridget Fahey, and Rakim Brooks

Friday, September 21, 2018

Open Letter to Senate Judiciary Committee from Yale Law Faculty

As the Senate Judiciary Committee debates Judge Brett Kavanaugh's nomination, we write as faculty members of Yale Law School, from which Judge Kavanaugh graduated, to urge that the Senate conduct a fair and deliberate confirmation process. With so much at stake for the Supreme Court and the nation, we are concerned about a rush to judgment that threatens both the integrity of the process and the public's confidence in the Court.

Where, as here, a sexual assault has been alleged against an individual nominated for a lifetime appointment in a position of public trust, a partisan hearing alone cannot be the forum to determine the truth of the matter. Allegations of sexual assault require a neutral factfinder and an investigation that can ascertain facts fairly. Those at the FBI or others tasked with such an investigation must have adequate time to investigate facts. Fair process requires evidence from all parties with direct knowledge and consultation of experts when evaluating such evidence. In subsequent hearings, all of those who testify, and particularly women testifying about sexual assault, must be treated with respect.

The confirmation process must always be conducted, and appointments made, in a manner that gives Americans reason to trust the Supreme Court. Some questions are so fundamental to judicial integrity that the Senate cannot rush past them without undermining the public's confidence in the Court. This is particularly so for an appointment that will yield a deciding vote on women's rights and myriad other questions of immense consequence in American lives.

Amy Kapczynski
Reva Siegel
Doug NeJaime
Muneer Ahmad
Owen Fiss
Harold Hongju Koh
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Judicial temperament is one of the most important qualities of a judge. As the Congressional Research Service explains, a judge requires "a personality that is even-handed, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result." The concern for judicial temperament dates back to our founding; in Federalist 78, titled "Judges as Guardians of the Constitution," Alexander Hamilton expressed the need for "the integrity and moderation of the judiciary."

We are law professors who teach, research and write about the judicial institutions of this country. Many of us appear in state and federal court, and our work means that we will continue to do so, including before the United States Supreme Court. We regret that we feel compelled to write to you, our Senators, to provide our views that at the Senate hearings on Sept. 27, Judge Brett Kavanaugh displayed a lack of judicial temperament that would be disqualifying for any court, and certainly for elevation to the highest court of this land.

The question at issue was of course painful for anyone. But Judge Kavanaugh exhibited a lack of commitment to judicious inquiry. Instead of being open to the necessary search for accuracy, Judge Kavanaugh was repeatedly aggressive with questioners. Even in his prepared remarks, Judge Kavanaugh described the hearing as partisan, referring to it as "a calculated and orchestrated political hit," rather than acknowledging the need for the Senate, faced with new information, to try to understand what had transpired. Instead of trying to sort out with reason and care the allegations that were raised, Judge Kavanaugh responded in an intemperate, inflammatory and partial manner, as he interrupted and, at times, was discourteous to senators.

As you know, under two statutes governing bias and recusal, judges must step aside if they are at risk of being perceived as or of being unfair. As Congress has previously put it, a judge or justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." These statutes are part of a myriad of legal commitments to the impartiality of the judiciary, which is the cornerstone of the courts.
We have differing views about the other qualifications of Judge Kavanaugh. But we are united, as professors of law and scholars of judicial institutions, in believing that he did not display the impartiality and judicial temperament requisite to sit on the highest court of our land.
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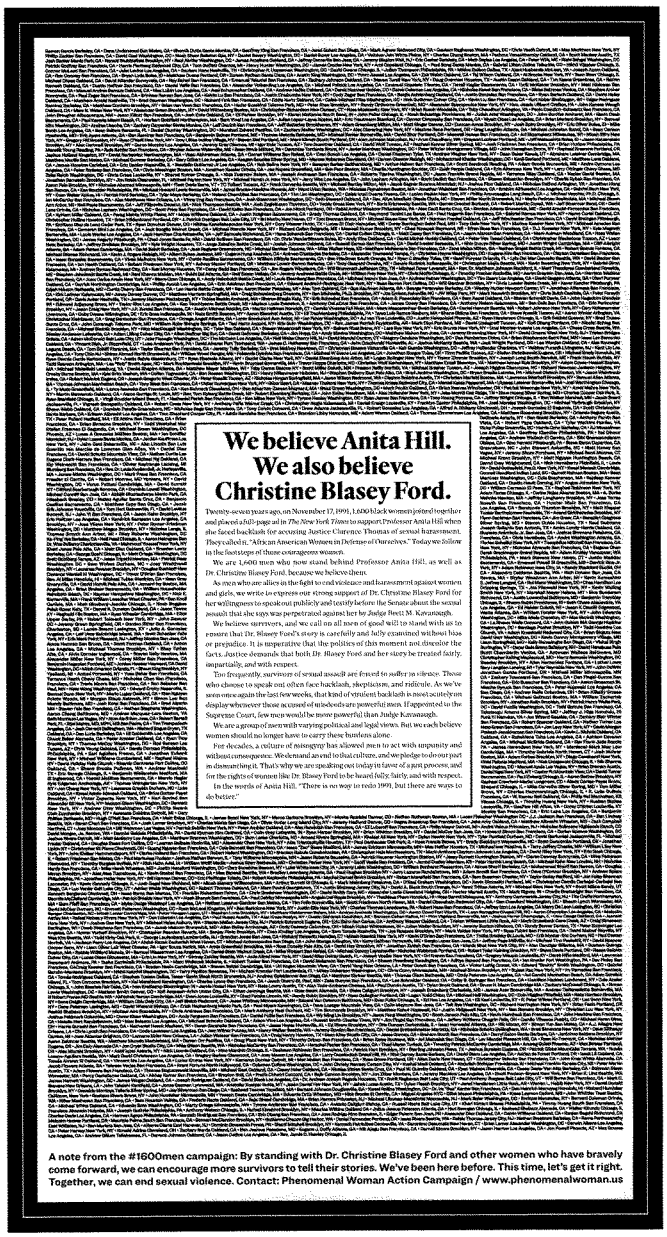

We believe Anita Hill. We also believe Christine Blasey Ford.

Twenty-seven years ago, on November 17, 1991, 1,600 black women joined together and placed a full-page ad in *The New York Times* to support Professor Anita Hill when she faced backlash for accusing Justice Clarence Thomas of sexual harassment. They called it, "African American Women in Defense of Ourselves." Today we follow in the footsteps of these courageous women.

We are 1,600 men who now stand behind Professor Anita Hill, as well as Dr. Christine Blasey Ford, because we believe them.

As men who are allies in the fight to end violence and harassment against women and girls, we write to express our strong support of Dr. Christine Blasey Ford for her willingness to speak out publicly and testify before the Senate about the sexual assault that she says was perpetrated against her by Judge Brett M. Kavanaugh.

We believe survivors, and we call on all men of good will to stand with us to ensure that Dr. Blasey Ford's story is carefully and fully examined without bias or prejudice. It is imperative that the politics of this moment not dissolve the facts. Justice demands that both Dr. Blasey Ford and her story be treated fairly, impartially, and with respect.

Too frequently, survivors of sexual assault are forced to suffer in silence. Those who choose to speak out often face backlash, skepticism, and ridicule. As we've seen once again the last few weeks, that kind of strident backlash is most acutely on display whenever those accused of misdeeds are powerful men. If appointed to the Supreme Court, few men would be more powerful than Judge Kavanaugh.

We are a group of men with varying political and legal views. But we each believe women should no longer have to carry these burdens alone.

For decades, a culture of misogyny has allowed men to act with impunity and without consequence. We demand an end to that culture, and we pledge to do our part in dismantling it. That's why we are speaking out today in favor of a just process, and for the rights of women like Dr. Blasey Ford to be heard fully, fairly, and with respect.

In the words of Anita Hill, "There is no way to redo 1991, but there are ways to do better."

A note from the #1600men campaign: By standing with Dr. Christine Blasey Ford and other women who have bravely come forward, we can encourage more survivors to tell their stories. We've been here before. This time, let's get it right. Together, we can end sexual violence. Contact: Phenomenal Woman Action Campaign / www.phenomenalwoman.us

Godfrey Dadich

Please examine these publication materials carefully. Any questions regarding the materials, please contact Erik Welch at (415) 266-7154

Brett Kavanaugh in Partisan 2-1 cases: Advancing Right-Wing and Corporate Interests 91% of the Time

A review of Brett Kavanaugh's jurisprudence on the D.C. Circuit reveals that in the most controversial and salient civil cases – those decided by bare 2-1 majorities – when Kavanaugh is in the majority with another Republican-appointed judge, he votes to advance right-wing and corporate interests a striking **91% of the time**.

Methodology:

- We identified 22 D.C. Circuit cases in which Kavanaugh and another Republican appointee formed a 2-1 majority over the dissent of a Democratic appointee.
- 20 of the 22 2-1 partisan civil cases **(91%)** advance Republican and/or corporate interests.

Helping Republicans Win Elections: Dark Money, Voter Suppression & Union-Busting

1. Independence Institute v. FEC (2016)
   - Enabled dark money groups to evade donor disclosure requirements. Kavanaugh's opinion was later reversed by a three judge panel and the reversal was summarily upheld by the Supreme Court.

2. Citizens for Responsibility and Ethics in Washington v. Federal Election Commission (2018)
   - Shielded FEC commissioners' considerations not to investigate dark money groups, making it easier for a partisan FEC to decline to investigate campaign violations.

Protecting Corporations from Liability: Letting Polluters Pollute & Making It Harder for Americans to Have Their Day in Court.

3. American Federation of Government Employees, AFL-CIO v. Gates (2007)
   - Granted temporary authority to abolish collective bargaining, effectively eliminating collective bargaining for hundreds of thousands of employees.

4. Association of Irritated Residents v. E.P.A. (2007)
   - Gave polluters a free pass by refusing to review agreements between the EPA and animal feeding operations.

5. Friends of Blackwater v. Salazar (2012)
   - Upheld the Fish and Wildlife Service's delisting of the West Virginia Northern Flying Squirrel as an endangered species.

6. EME Homer City Generation, L.P. v. E.P.A. (2012)
   - Struck down an EPA rule aimed at reducing air pollution, expanding judicial review over final rules promulgated by the EPA and undercutting the ability of the EPA to rely on the Clean Air Act to craft new rules.

7. In re Aiken County (2013)
   - Granted permission to process a license application for a permanent nuclear waste station, limiting agency discretion.

8. Ivy Sports Medicine, LLC v. Burwell (2014)
   - Limited the FDA's authority to correct its own errors or make revised determinations based on new information.

9. Verizon New England Inc. v. National Labor Relations Board (2016)
   - Held that yearly across-the-board wage increases were not a term or condition of employment, undercutting the National Labor Relations Act and diminishing workers' protected speech rights.

10. Bais Yaakov of Spring Valley v. Federal Communications Commission (2017)
    - Struck down a law that would have required businesses to include opt-out notices with solicited fax advertisements.

11. National Railroad Passenger Corporation (Amtrak) v. Fraternal Order of Police, Lodge 189 Labor Committee (2017)
    - Aggressively used judicial review to vacate an arbitration award that would have reinstated a terminated union member, undercutting workers' rights.

12. Mexichem Fluor, Inc. v. Environmental Protection Agency (2017)
    - Undermined agency deference, stripped the EPA of its authority to properly implement the CAA, and opened the door to unregulated corporate pollution.

13. Arc Bridges, Inc. v. National Labor Relations Board (2017)
    - Undermined the NLRB and made it easier for corporations to discriminate against union members.

Taking Away Civil Rights and Condoning Discrimination

14. Jackson v. Gonzales (2007)
    - Found that the non-selection for promotion of an African-American employee of the Bureau of Prisons was not a result of racial discrimination in violation of Title VII.

15. Saleh v. Titan Corp. (2009)
    - Extended sovereign immunity to tort claims brought by international plaintiffs.

16. Odhiambo v. Republic of Kenya (2014)
    - Made it more difficult for foreign plaintiffs to access our courts even if they are experiencing harm in the United States.

17. Meshal v. Higgenbotham (2015)
- Limited access to civil remedies for victims of torture and abuse.

18. Ortiz-Diaz v. United States Department of Housing & Urban Development (2016)
- Made it harder for federal employees to bring discrimination claims.

19. Multicultural Media, Telecom and Internet Council v. Federal Communications Commission (2017)
- Prevented the translation of life-saving information to non-English speakers.

Advancing the Far-Right Social Agenda: Religion, Guns & Abortion

20. In re Navy Chaplaincy (2008)
- Affirmed the Navy's choice of the Catholic faith over non-liturgical Protestant faiths in the Chaplain Corps, creating a denomination preference for Catholics and marginalizing those of other faiths.

Ideologically Neutral or Liberal Rulings

21. American Trucking Associations, Inc. v. E.P.A. (2010)
- Upheld the EPA's authorization of a California air-quality rule that limits emissions from in-use non-road engines, noting that the rule did not impose a de facto national rule that precluded other states from declining to follow it and the EPA adequately considered cost of compliance. This decision is favorable to the EPA and to environmental regulation more generally as it affirms its authority to approve state guidelines.

22. National Sec. Archive v. C.I.A. (2014)
- Held that material related to the CIA's internal investigation of the Bay of Pigs Operation in Cuba was protected by deliberative process privilege, and exempt from disclosure under the Freedom of Information Act (FOIA).

FOR IMMEDIATE RELEASE
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660 WOMEN LAW FACULTY FROM AROUND THE COUNTRY JOIN TOGETHER TO OPPOSE JUDGE KAVANAUGH'S APPOINTMENT TO THE UNITED STATES SUPREME COURT

Today hundreds of women law professors from law schools around the United States have written to the United States Senate, asking all members to reject Judge Brett Kavanaugh's appointment to the Supreme Court. Representing a range of disciplines, from corporate law and legal history to criminal justice and tax, women faculty have joined together to urge senators to reject Kavanaugh's bid for the nation's high Court.

"All of us believe that Judge Kavanaugh's partisan performance and unprofessional behavior during his testimony on September 27 disqualify him for the most important judicial position in our country," explained Professor Kathleen Engel of the Suffolk University Law School. Indeed, the statement of opposition, signed*, in less than 24 hours by 660 women law faculty from coast to coast declared: "Judge Kavanaugh has shown that he is unable to respect women in positions of power, manifests bias with respect to gender and political affiliation, does not meet basic standards of professionalism, and lacks independence, impartiality, and judicial temperament."

Professor Teri McMurtry-Chubb of Mercer University Law School, consistent with the joint statement's call to reject the nominee, further expressed concern about Kavanaugh's lack of candor and what appeared to be efforts to obfuscate the truth. "He dodged question after question, failing to answer even the most straight-forward inquires, which reflected a lack of commitment to transparency and impeded the Judiciary Committee's ability to get to the truth." The professors' signed statement of opposition, submitted to all senators today, further noted that Judge Kavanaugh "refused to answer probative questions and side-stepped with stock answers" throughout his presentation.

In addition the women law professors noted Kavanaugh's explosive temper, hostile temperament, and repeated displays of disrespect toward the women senators who questioned him on September 27. "Turning the questions back on Senator Klobuchar was an outrageous act," noted Professor Jennifer Oliva of West Virginia University College of Law. "Such disrespectful antics cannot be erased with an after-the-fact apology. Instead it reflected a real problem with dealing appropriately with women in positions of power."

Professor Felice Batlan of Chicago-Kent College of Law further lamented that "Judge Kavanaugh's anger and self-righteousness throughout the proceedings absolutely failed to convey empathy or understanding for the difficulty and delicacy of the situation at hand, one involving allegations of sexual assault. His tone alone exacerbated harms experienced by survivors all over the country."

As legal educators preparing the next generation of lawyers to enter the profession, the women faculty signatories noted they could not in good conscience stand back and allow this nomination to take place. "We tell our students that the judiciary is the branch of government that serves as a check on partisan politics, provides litigants with a fair venue to resolve disputes, and is committed to equal justice for all," Professor Karla McKanders of Vanderbilt Law School stated. "Judge Kavanaugh's September 27 performance undermines our ability to teach our students the highest standards of professionalism and decorum to which they should [strive to] adhere as future lawyers."

Mae Quinn, Visiting Professor at the University of Florida Levin College of Law noted that having Judge Kavanaugh elevated to the Supreme Court is "a very troubling proposition." Rather, as the professors' joint statement declares: "We are deeply concerned that if Judge Kavanaugh is confirmed, he will fail to perform his duties in a manner befitting our highest Court."

# # #

* a list of the signatories is available by request to kengel@suffolk.edu

ALASKA FEDERATION OF NATIVES

AFN OPPOSES KAVANAUGH APPOINTMENT

The Alaska Federation of Natives is the oldest and largest Native organization in Alaska. Our membership includes 186 federally recognized Indian tribes, 177 for-profit village corporations, 12 for-profit regional corporations, 12 not-for-profit regional organizations, and a number of tribal consortia that compact and contract to run federal and state programs. For over 50 years, AFN has been the principal forum and voice for Alaska Natives in addressing critical issues of law and policy, including the nomination of U.S. Supreme Court justices.

The federal judicial appointment and confirmation process is designed to thoroughly vet nominees. As such, we did not immediately weigh in on President Trump's choice to replace retiring Justice Anthony Kennedy. However, the questions and colloquies that came out of Judge Brett Kavanaugh's Senate Judiciary hearings last week has necessitated us taking a position. AFN joins our colleagues and friends across Indian country in strongly opposing Judge Kavanaugh for the Supreme Court because of, among other things, his views on the rights of Native peoples.

- Judge Kavanaugh's Position on the Indian Commerce Clause is Erroneous. Congress' plenary power over Indian affairs is grounded in the Commerce Clause of the U.S. Constitution. The clause gives the Congress the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Judge Kavanaugh concedes this point. However, like Justice Clarence Thomas—the most senior justice on the Supreme Court, he challenges the clause's application to affairs beyond trade. This impacts Alaska Native tribes, corporations, organizations and consortia because their dealings with Congress presently extends to a host of federal programs concerning their members, resources and governments.

  In the 2013 *Adoptive Couple v. Baby Girl* decision, Justice Thomas contested Congress' authority to enact the Indian Child Welfare Act, reasoning the Indian Commerce Clause only provides federal authority over Indian trade. Because most federal laws concerning Indians lack a nexus to Justice Thomas's narrow definition of trade, they would unlikely survive the scrutiny he urges. The result would be a wholesale reshaping of the body of law and policy that has governed Indian affairs for the past century and a half.

  Legal observers tracking Judge Kavanaugh believe he is further to the right than Chief Justice John Roberts. Thus, he may agree with Justice Thomas that Congress only has plenary power to regulate direct commerce with Indian tribes, nothing more. Confirming a nominee with this viewpoint would be disastrous for Alaska, and would roll back the gains of self-determination and usher back in the losses of termination.

- Judge Kavanaugh's View of the Special Trust Responsibility is Misguided. The federal government has a special trust relationship with federally recognized Indian tribes. The relationship commands the highest moral and legal obligations, and is rooted in early federal-tribal treaties, the U.S. Constitution, federal statutes, and opinions of the U.S. Supreme Court. Judge Kavanaugh's writings demonstrate a limited view of the federal government's power to deal with Native peoples under this relationship. Specifically, he would only extend the special trust relationship to Indian tribes that have with his preferred history of federal dealings, including territorial removal and isolation. This, too, impacts Alaska since Alaska Native have a unique federal experience and few reservations were established.

  During his Senate Judiciary Committee hearing, Judge Cavanaugh questioned the legitimacy of Native Hawaiian recognition, citing their different treatment by the federal government, and the fact that they do not live on reservations or enclaves. If he remains of the view that the special trust relationship only extends to Indian tribes with his brand of federal history, including territorial removal and isolation, he could very well rule that Congress lacks the authority to deal with Alaska Natives. This thinking could overturn much, if not all, of the Alaska Native Claims Settlement Act, as well as all other federal legislation and regulations addressing Alaska Natives, tribes, corporations and organizations. To confirm a nominee who does not understand or appreciate the position of Native Hawaiians, and who could weaken the special trust relationship Alaska Natives share with the federal government, would be imprudent.

- Judge Kavanaugh's Assessment of the Political Classification Doctrine is Troubling. The political classification doctrine announced in the 1974 *Morton v. Mancari* decision, that focusses on and Indian person's membership in a federally recognized tribe rather than his or her ancestry to avoid strict scrutiny review of federal legislation and regulation that benefits Indians, would be extremely vulnerable if Judge Kavanaugh were to ascend to the Court. For the reasons outlined above, he would likely align himself with Justice Thomas on the issue, and the two of them would likely work to persuade their fellow justices that the relationship between an Indian person's status politically and their race is open for interpretation. Judge Kavanaugh does not accept this well-established legal doctrine. Confirming a nominee who is unable to grasp the necessity of federal programs based on the political classification doctrine, and articulate why they must be protected, would be unwise.

AFN strongly urges the U.S. Senate to vote against Judge Kavanaugh. The documents that have been released so far in relation to his nomination demonstrate how troubling his confirmation would be for Native peoples, particularly Alaska Natives and Native Hawaiians.

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STATE OF HAWAI'I
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September 24, 2018

The Honorable Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

RE: Nomination of Judge Brett Kavanaugh to the U.S. Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein,

The Office of Hawaiian Affairs (OHA) greatly appreciates this opportunity to provide comments regarding the nomination of Judge Brett Kavanaugh to be an Associate Justice of the United States Supreme Court. In particular, given that Supreme Court precedent pertaining to OHA has become the subject of questions during Judge Kavanaugh's nomination hearing, our agency is compelled to clarify the record as it pertains to our organization, our work to better the conditions of Native Hawaiians, and the rights and status of our beneficiaries as Indigenous people.

By way of background, OHA is an independent state agency and public trust established by the Hawai'i State Constitution. OHA's purpose is to better the conditions of Native Hawaiians, the Indigenous people of Hawai'i. OHA holds substantial obligations to advocate for Native Hawaiians, and to assess policies and practices as they may impact Native Hawaiian rights and resources. Hawai'i State law designates OHA as the "principle public agency in [the] State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians."[1] Additionally, under federal law OHA is a recognized Native Hawaiian Organization with standing to enter into consultation with the federal government for the purposes of the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act.

As Judiciary Committee Member Mazie K. Hirono indicated during Judge Kavanaugh's nomination hearing, Native Hawaiians are the original, first people of the Hawaiian Archipelago, who exercised sovereignty for at least a thousand years prior to recorded contact with the Western world. Congress has acknowledged that ". . . prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion."[2] The Native Hawaiian people established and maintained the Kingdom of Hawai'i, first as a united monarchical government, and later as a constitutional monarchy, at all times under the leadership of a Native Hawaiian head of state.[3]

During the time of the Native Hawaiian-led and established Hawaiian Kingdom, Hawai'i developed a robust diplomatic relationship with the United States. This included full diplomatic recognition, as evidenced by treaties and conventions entered into in 1826, 1842, 1849, 1875, and 1887.[4] The United States later violated the friendship and peace it promised to the Native

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[1] Haw. Rev. Stat. §10-3 (2017).

[2] Apology Resolution, Pub. Law No. 103-150, 107 Stat. 1510 (1993).

[3] *See id.* (summarizing the history of the Kingdom of Hawai'i from 1778 through 1893).

[4] *See id.*

Hawaiian people when the federal government assisted in the overthrow of the Hawaiian Kingdom in 1893. One hundred years later, Congress acknowledged that despite the overthrow and subsequent transitions, "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum . . . ."[5]

While the United States failed to acknowledge the will of the Native Hawaiian people during the process in which Hawai'i fell under U.S. jurisdiction, Congress has, repeatedly, acknowledged Native Hawaiians as a distinct Indigenous people, and treated them in a manner similar to American Indians and Alaska Natives. The record is rich with examples of this, dating back to the early years of the U.S. Territory of Hawai'i, during which time Congress included Native Hawaiians among Indigenous subjects to be studied under the Smithsonian's U.S. Bureau of American Ethnology.[6] Recognition of Native Hawaiians continued during Hawai'i's admission as a State of the Union, with the Admission Act declaring the betterment of the conditions of Native Hawaiians as a trust purpose for the State's public land trust, and requiring the State to fulfill the purposes of the federal Hawaiian Homes Commission Act, established to provide lands for homesteading to certain Native Hawaiians, as a condition of statehood.[7]

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[5] *Id.*

[6] *See, e.g.*, Pub. L. No. 61-266, 26 Stat. 703, 718 (1910); Pub. L. No. 69-600, 44 Stat. 1069, 1079 (1927); Pub. L. No. 71-158, 46 Stat. 229, 241 (1930). In providing justification for extending the research of the Bureau of American Ethnology to include Hawai'i, William H. Holmes, Chief of the Bureau, compared the status of Native Hawaiians to that of Native Americans and acknowledged that the U.S. government had a trust responsibility for Native Hawaiians. As he wrote to Smithsonian Institute Secretary S.P. Langley on March 12, 1904: "The reasons for recommending the extension of the work to the natives of these islands are, first, that although these people are our wards in the same sense that the Indians are we know very little regarding them. It would seem the part of wisdom to acquire a working knowledge of their history, racial affinities, and physical and mental characteristics; and a record of their native arts and industries, their manners and customs, before it is finally too late. In a dozen years little will be left of either the people or their culture for study. Unless the government undertakes this work now, nothing can be done, and future generations can justly accuse us of neglecting opportunities presented now for the last time." Letter on file in Smithsonian Institution Archives.

[7] The public land trust is a portion of the Hawaiian Kingdom lands that were transferred to the State for management at the time of Hawaii's admission into the union. *See* An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959).

Starting in the 1960s and moving forward more comprehensively in the 1970s, U.S. policy towards Indigenous people shifted into what scholars and practitioners commonly refer to as the Era of Self-Determination. During this era, U.S. policy came to be characterized by a posture towards affirming the inherent sovereignty of Indigenous people by acknowledging their right to determine their own affairs. As U.S. policy towards American Indians and Alaska Natives became friendlier and more robust, Congress even more explicitly acknowledged Native Hawaiians as an Indigenous people with a unique legal and political relationship with the federal government. In 1974, Native Hawaiians were included in the Native American Programs Act, and in a litany of legislation thereafter Congress treated Native Hawaiians in a manner similar to other Indigenous people of the United States.

Later that same decade, in 1978, Hawai'i held a constitutional convention. Native Hawaiian community leaders had been organizing and discussing ideas for institutional change for years before the convention, but it proved to be a powerful platform for many State-level advancements in the area of Native Hawaiian rights. As University of Hawai'i Professors Melody MacKenzie and Davianna McGregor note, this included the establishment of OHA:

> One amendment established the Office of Hawaiian Affairs (OHA) with a nine-member board of trustees elected by all Native Hawaiian residents of the State of Hawai'i. As a result, Native Hawaiians were able to elect a governing body that truly represented their interest as a people distinct from the general population of Hawai'i.[8]

As OHA developed from a fledgling entity, Congress continued to treat Native Hawaiians as Indigenous people, even more deliberately and directly affirming its relationship with them. This included the passage of the Native Hawaiian Education Act[9] and the Native

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[8] Melody MacKenzie & Davianna McGregor, Mo'olelo Ea O Nā Hawai'i, Off. of Hawaiian Aff. 1, 56 (Aug. 19, 2014), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/McGregor-and-MacKenzie-History_of_Native_Hawaiian_Governance.pdf.

[9] Native Hawaiian Education Act, 20 U.S.C. § 7512 (2018) ("Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.... Congress has also

Hawaiian Health Care Act,[10] both of which included express affirmation of the United States-Native Hawaiian relationship. Congress also included Native Hawaiian organizations alongside federally-acknowledged American Indian and Alaska Native governments in laws like the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act. Both Acts established processes by which Native Hawaiians must be consulted in matters related to historic and cultural resources, and the disposition of ancestors and their belongings.[11]

While the establishment of OHA had been approved through a statewide vote open to all of the citizens of the State of Hawai'i, some objected to Native Hawaiians having exclusive control over electing the trustees who managed their trust resources. In 1996, rancher Harold "Freddy" Rice sued over OHA's elections, arguing that the voting system for trustees was unconstitutional. This suit gave rise to *Rice v. Cayetano*.[12] While the lower courts found the voting system constitutional, in 2000 the U.S. Supreme Court issued a 7-2 opinion invalidating OHA's elections on the grounds that they were not consistent with the Fifteenth Amendment of the U.S. Constitution. The majority's ruling was limited to OHA's Native Hawaiian-only elections, and expressly declined to comment on other matters such as OHA's mission to better the conditions of Native Hawaiians, or its use of its resources for Native Hawaiians pursuant to its state constitutional and statutory purpose.

OHA raises these facts because during the nomination hearing earlier this month, Judge Kavanaugh's description of the *Rice* decision may have left some Committee Members and observers with another impression. Senator Hirono asked the nominee about an amicus brief he submitted in *Rice*, as well as an op-ed he wrote for *The Wall Street Journal*, in which he argued

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delegated broad authority to administer a portion of the Federal trust responsibility to the State of Hawaii....").

[10] Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11701 (2018) ("The authority of the Congress under the United States Constitution to legislate in matters affecting aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native people of Alaska and Hawaii").

[11] National Historic Preservation Act, 54 U.S. C. § 300101 (2018); Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3010 (2018).

[12] 528 U.S. 495, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000).

that OHA's very purpose was inconsistent with the principles and language of the U.S. Constitution. When asked to explain these views, Judge Kavanaugh stated that by a vote of 7-2, the majority of the U.S. Supreme Court had agreed with him, and that the Court found violations of both the Fourteenth and Fifteenth Amendments.

This is erroneous.

As stated earlier, the majority's decision was limited to the manner in which OHA's trustees were elected under the Fifteenth Amendment. To quote U.S. Supreme Court Justice John Roberts, then an attorney representing the State of Hawai'i in the *Rice* case, ". . . the majority's opinion was very narrowly written and expressly did not call into question the Office of Hawaiian Affairs, the public trust for the benefit of Hawaiians and native Hawaiians, but only the particular voting mechanism by which the trustees are selected."[13] In limiting its holding to OHA's means of electing trustees, the majority chose not to adopt arguments and conclusions made by then-practicing attorney Brett Kavanaugh, with respect to OHA's purpose and mission.

The extreme nature of Judge Kavanaugh's arguments, both his examples and his conclusions, may have played a role in the majority's failure to incorporate them in *Rice*. For example, he compared OHA's mission of serving Hawaii's Indigenous people to an interracial marriage ban to maintain white supremacy.[14] He argued that allowing Native Hawaiians to elect their own trustees to manage their trust ". . . could usher in an extraordinary racial patronage and spoils system" of national consequence. Little explanation is given as to why treatment of the Indigenous people of Hawai'i in a manner similar to the treatment of other Indigenous people in the United States would have such dramatic consequences. At the time of his writing, Judge Kavanaugh may not have been familiar with Congress's clear legislative understanding that its

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[13] Helen Altonn & Christine Donnelly, *Top court backs Rice in OHA vote challenge*, Honolulu Star-Bulletin (Feb. 23, 2000), http://archives.starbulletin.com/2000/02/23/news/story1.html.

[14] Brief for Center for Equal Opportunity et al. as Amici Curiae Supporting Petitioner, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818) 1999 WL 345639, at *24.

relationship with Native Hawaiians is based on its recognition of Native Hawaiians as an Indigenous people and not based on race.[15]

Through the process of the Committee's review of a portion of Judge Kavanaugh's writings during his time with the Bush Administration, we learned that he continued to hold and advance extreme views against Native Hawaiian rights after *Rice*. Disregarding the Court's decision not to adopt his arguments against the constitutionality of Native Hawaiian programs, Judge Kavanaugh offered the same arguments as legal advice when reviewing administration testimony on legislation. Given his reported acknowledgement of his lack of exposure to Indigenous people's law,[16] it is concerning that he has held so tightly to arguments hostile to Native Hawaiians.

His past actions and the recent nomination hearing leave OHA with many doubts. We sincerely hope that if a case concerning Native Hawaiian rights comes before Judge Kavanaugh's court, be it the D.C. Circuit or the U.S. Supreme Court, he will look more closely at the facts before the court. Facts that include the actions that Congress, the Executive, and the State of Hawai'i have all taken, within the framework of the U.S. Constitution, in recognizing the unique status of Native Hawaiians. During his hearing, Judge Kavanaugh acknowledged Congress's "substantial" authority to deal with matters concerning Native people, though he offered few specifics beyond that statement. Judge Kavanaugh may find it interesting that in the years following *Rice*, Congress and the Executive have continued to pass legislation and establish programs to benefit Native Hawaiians, regularly with the acknowledgement of the legal and political relationship OHA has articulated throughout this letter.

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[15] *See, e.g.*, Native Hawaiian Education Act, 20 U.S.C. § 7512 (2018) ("Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship....).

[16] Geof Koss & Ellen M. Gilmer, *Murkowski to mull Kavanaugh's record on tribes*, E&E News (Sept. 13, 2018), https://www.eenews.net/stories/1060096949 (statement of Senator Lisa Murkowski) ("[Kavanaugh] was the first to admit that in terms of broader Indian law he hasn't had that much opportunity in the D.C. Circuit court to really engage on these issues, so this is not a body of law that he is often exposed to....").

In closing, OHA hopes that this letter has brought some clarity to questions raised as part of the process of considering Judge Kavanaugh's nomination. OHA hopes that the Committee understands the need we feel to clarify the record about *Rice*, and to address certain arguments espoused by Judge Kavanaugh prior to his taking the bench, which are not only inaccurate, but threaten the rights and resources of the beneficiaries that OHA exists to serve. Until and unless Judge Kavanaugh is able to correct the aforementioned misunderstandings and misconceptions, should a case involving the rights or political status of Native Hawaiians come before him, perhaps a recusal would be in order. Finally, OHA wishes to bring to the Committee's attention concerns voiced by American Indian and Alaska Native groups, who share our concerns with Judge Kavanaugh's record on Native law.

Sincerely,

Colette Y. Machado

Colette Y. Machado
OHA Board of Trustees Chair

Allegations Against Judge Kavanaugh

Alleged Victim (Date of Allegation)	Allegation; Current Status	Committee Response/Status
Dr. Christine Blasey Ford (anonymously reported on 9/14; named on 9/16)	At a high-school party, Kavanaugh pinned her to a bed and attempted to rape her while Mark Judge watched. Referred to FBI; SJC investigating	• SJC investigators immediately requested interviews with both Dr. Ford and Judge Kavanaugh. Judge Kavanaugh agreed to be interviewed and unequivocally denied all allegations. Dr. Ford declined to be interviewed. • SJC immediately offered Ford her choice of a public hearing, a private hearing, a public interview, or a private interview. The Committee also offered to interview her in California. • SJC investigators reached out to all other named partygoers. Leland Keyser, Mark Judge, and PJ Smyth denied the allegations. Keyser's attorney told SJC, "Simply put, Ms. Keyser does not know Mr. Kavanaugh and she has no recollection of ever being at a party or gathering where he was present, with, or without, Dr. Ford." Keyser is a lifelong friend of Dr. Ford. • SJC investigators interviewed and investigated [redacted] and [redacted], who each believe they had an encounter with Ford, although they describe the encounter as consensual. SJC also received an anonymous letter claiming responsibility for the incident. • SJC investigators contacted [redacted] (the [redacted]). [redacted] (Dr. Ford's ex-boyfriend), Donny Urgo (Kavanaugh's best friend), [redacted] (Dr. Ford's UNC classmate), and two people who identified what they believe to be the house described by Ford ([redacted] and [redacted]). • SJC investigators spoke with a second UNC classmate of Dr. Ford and received a statement. • SJC investigators received statements from multiple of Dr. Ford's high school classmates discussing her character and reputation at the time. • SJC investigators received a statement from Judge Kavanaugh's high school friend regarding his reputation and Dr. Ford's allegations. • SJC investigators reached out to [redacted] regarding statements they would like to offer. • SJC held a hearing to solicit the testimony of Dr. Ford and Kavanaugh. • Senate requested that the White House order the FBI to investigate all "current credible allegations." • SJC investigators received a statement from [redacted] (Dr. Ford's ex-boyfriend) with information directly contradicting Dr. Ford's

		testimony on issues of flying, claustrophobia, and whether she had previously coached someone on a polygraph. • SJC investigators talked to an attendee of the July 1st event from Judge Kavanaugh's calendar regarding that event, Devil's Triangle, FFFFFFF, and other topics. • SJC investigators talked to the General Manager of the Columbia Country Club regarding its records. • SJC received three statements from Judge Kavanaugh's Georgetown Prep classmates regarding the meaning of various yearbook entries. • SJC received a statement from individuals who knew of Devil's Triangle based on their experience in college with Judge Kavanaugh and his friends. • SJC investigators spoke to representative for multiple Georgetown Prep classmates of Judge Kavanaugh. • SJC investigators spoke to [redacted], the [redacted]. • SJC investigators spoke with an individual who has multiple social connections to Dr. Ford's family.
Deborah Ramirez (9/23)	Kavanaugh exposed himself to her and "thrust his penis in her face" at a college dorm-room party. Referred to FBI; SJC investigating	• SJC investigators immediately contacted Ramirez's attorneys, requested that they provide any evidence to SJC, and asked whether Ramirez would be willing to provide testimony to SJC. • SJC investigators immediately requested an interview with Judge Kavanaugh who agreed to be interviewed and who unequivocally denied all allegations. • Ramirez's attorneys refused seven requests for cooperation which included a request for evidence and an interview. • SJC investigated claims by James Roche (Kavanaugh's college roommate) and determined that he has no knowledge of the substantive allegations. • SJC investigated claims by [redacted] (friend of Ramirez) and determined that she had no firsthand knowledge of the allegations. • SJC reviewed text message screenshots from Kavanaugh's Yale classmates referred by Senator Blumenthal. • SJC investigated emails from [redacted], who had information regarding Ramirez's behavior in college, and [redacted], a character witness regarding Ramirez.

		• SJC received a letter from a college classmate of Ramirez and who knew Kavanaugh while he was in law school regarding Kavanaugh's character. • Senate requested that the White House order the FBI to investigate all "current credible allegations." • SJC investigated text messages from Kerry Berchem, including calling her to discuss. • SJC received statement from Yale classmate of Brett Kavanaugh and Deborah Ramirez. • SJC investigators spoke to two Yale classmates of Judge Kavanaugh and Ramirez, as well as the attorney for another Yale classmate of Ramirez. One of those interviewed was a former roommate of Ramirez. • SJC investigators interviewed [redacted]., a Yale student and member of Kavanaugh's fraternity who provided information regarding an individual (not Kavanaugh), who had a reputation for exposing himself at parties.
Julie Swetnick (anonymously reported on 9/23; named on 9/26)	Kavanaugh participated in the systematic and premeditated gang rape of multiple drugged women while in high school. Referred to FBI; SJC investigating	• SJC investigators contacted her attorney, Michael Avenatti, as soon as the allegations were public and before Avenatti or his client contacted SJC. • Avenatti provided SJC with a signed affidavit from Swetnick, but he has refused to produce any evidence to substantiate Swetnick's allegations, despite repeat requests from SJC investigators for evidence or an interview with Swetnick. • SJC investigators interviewed and/or investigated Dennis Ketterer (Swetnick's ex-boyfriend), [redacted] ([redacted]) [redacted] (Swetnick's friend), [redacted] (knowledge of [redacted]), and [redacted] (knowledge of Swetnick's claims regarding Georgetown Prep uniforms). • SJC investigators interviewed Judge Kavanaugh on this allegation twice, both before and after the actual accuser was named, both times Judge Kavanaugh unequivocally denied the allegations. • SJC investigators received a statement from Judge Kavanaugh's high school friend regarding his reputation and Swetnick's allegations. • SJC investigators spoke with numerous classmates and individuals who worked at the same company as Ms. Swetnick regarding her character, litigiousness, and priorities. • Senate requested that the White House order FBI to investigate all "current credible allegations."

		• SJC investigators received statements from two of Swetnick's ex-boyfriends regarding their history together and her character. • Committee staff spoke with three individuals who were close to Ms. Swetnick and her immediate family.
Anonymous Colorado Resident (9/24)	Kavanaugh shoved his girlfriend (the accuser's daughter's friend) against a wall "very sexually and aggressively" in 1998. Refuted by Judge Kavanaugh's then-girlfriend	• Senator Gardner referred an anonymous letter to SJC. • SJC investigators interviewed Judge Kavanaugh on these allegations who unequivocally denied the allegations. • SJC investigators contacted Judge Dabney Friedrich, who dated Judge Kavanaugh in 1998. In a letter to SJC, she called these allegations "offensive and absurd," and she denied that Kavanaugh ever shoved her against a wall. She has "never observed (nor [is she] aware of) Brett acting in a physically inappropriate or aggressive manner toward anyone."
[redacted] (referred to SJC without identifying information on 9/25)	In August of 1985, a close acquaintance was sexually assaulted by Kavanaugh and a man named Mark on a boat at a Newport, RI harbor. [redacted] and another individual learned of the incident a few hours later and physically assaulted Kavanaugh and his friend. Recanted by accuser; referred for criminal investigation	• Senator Whitehouse relayed the allegations to SJC. • Because Senator Whitehouse did not provide contact information for [redacted], and because [redacted] provided no details except Kavanaugh's name, SJC investigators could only investigate by speaking to Kavanaugh. • Kavanaugh unequivocally denied the allegations. • [redacted] tweeted at 4:51 PM on 9/26, "Do [*sic*] everyone who is going crazy about what I had said I have recanted because I have made a mistake and apologize for such mistake." • SJC referred for criminal investigation [redacted] apparent false statements alleging misconduct by Kavanaugh.
Anonymous Jane Doe from Oceanside, California (9/25)	According to a handwritten letter, Kavanaugh and his friend, among other things, took turns raping her in the backseat of a car.	• Senator Harris referred the letter to SJC. • Because the allegations contain only one name and no other details, SJC investigators were only able to investigate by speaking to Kavanaugh. • Kavanaugh unequivocally denied the allegations. • [redacted] emailed various staffers claiming to be Jane Doe using the version of the letter identical to the transcript from the call with Kavanaugh, but different from the handwritten note submitted by the initial Jane Doe. SJC investigators attempted to reach her..

The New York Times

A Liberal's Case for Brett Kavanaugh

By Akhil Reed Amar
Mr. Amar is a professor at Yale Law School.

July 9, 2018

The nomination of Judge Brett Kavanaugh to be the next Supreme Court justice is President Trump's finest hour, his classiest move. Last week the president promised to select "someone with impeccable credentials, great intellect, unbiased judgment, and deep reverence for the laws and Constitution of the United States." In picking Judge Kavanaugh, he has done just that.

In 2016, I strongly supported Hillary Clinton for president as well as President Barack Obama's nominee for the Supreme Court, Judge Merrick Garland. But today, with the exception of the current justices and Judge Garland, it is hard to name anyone with judicial credentials as strong as those of Judge Kavanaugh. He sits on the United States Court of Appeals for the District of Columbia Circuit (the most influential circuit court) and commands wide and deep respect among scholars, lawyers and jurists.

Judge Kavanaugh, who is 53, has already helped decide hundreds of cases concerning a broad range of difficult issues. Good appellate judges faithfully follow the Supreme Court; great ones influence and help steer it. Several of Judge Kavanaugh's most important ideas and arguments — such as his powerful defense of presidential authority to oversee federal bureaucrats and his skepticism about newfangled attacks on the property rights of criminal defendants — have found their way into Supreme Court opinions.

Except for Judge Garland, no one has sent more of his law clerks to clerk for the justices of the Supreme Court than Judge Kavanaugh has. And his clerks have clerked for justices across the ideological spectrum.

Most judges are not scholars or even serious readers of scholarship. Judge Kavanaugh, by contrast, has taught courses at leading law schools and published notable law review articles. More important, he is an avid consumer of legal scholarship. He reads and learns. And he reads scholars from across the political spectrum. (Disclosure: I was one of Judge Kavanaugh's professors when he was a student at Yale Law School.)

This studiousness is especially important for a jurist like Judge Kavanaugh, who prioritizes the Constitution's original meaning. A judge who seeks merely to follow precedent can simply read previous judicial opinions. But an "originalist" judge — who also cares about what the

Constitution meant when its words were ratified in 1788 or when amendments were enacted — cannot do all the historical and conceptual legwork on his or her own.

Judge Kavanaugh seems to appreciate this fact, whereas Justice Antonin Scalia, a fellow originalist, did not read enough history and was especially weak on the history of the Reconstruction amendments and the 20th-century amendments.

A great judge also admits and learns from past mistakes. Here, too, Judge Kavanaugh has already shown flashes of greatness, admirably confessing that some of the views he held 20 years ago as a young lawyer — including his crabbed understandings of the presidency when he was working for the Whitewater independent counsel, Kenneth Starr — were erroneous.

Although Democrats are still fuming about Judge Garland's failed nomination, the hard truth is that they control neither the presidency nor the Senate; they have limited options. Still, they could try to sour the hearings by attacking Judge Kavanaugh and looking to complicate the proceedings whenever possible.

This would be a mistake. Judge Kavanaugh is, again, a superb nominee. So I propose that the Democrats offer the following compromise: Each Senate Democrat will pledge either to vote yes for Judge Kavanaugh's confirmation — or, if voting no, to first publicly name at least two clearly better candidates whom a Republican president might realistically have nominated instead (not an easy task). In exchange for this act of good will, Democrats will insist that Judge Kavanaugh answer all fair questions at his confirmation hearing.

Fair questions would include inquiries not just about Judge Kavanaugh's past writings and activities but also about how he believes various past notable judicial cases (such as Roe v. Wade) should have been decided — and even about what his current legal views are on any issue, general or specific.

Everyone would have to understand that in honestly answering, Judge Kavanaugh would not be making a pledge — a pledge would be a violation of judicial independence. In the future, he would of course be free to change his mind if confronted with new arguments or new facts, or even if he merely comes to see a matter differently with the weight of judgment on his shoulders. But honest discussions of one's current legal views are entirely proper, and without them confirmation hearings are largely pointless.

The compromise I'm proposing would depart from recent confirmation practice. But the current confirmation process is badly broken, alternating between rubber stamps and witch hunts. My proposal would enable each constitutional actor to once again play its proper constitutional role: The Senate could become a venue for serious constitutional conversation, and the nominee could

demonstrate his or her consummate legal skill. And equally important: Judge Kavanaugh could be confirmed with the ninetysomething Senate votes he deserves, rather than the fiftysomething votes he is likely to get.

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POLITICS & SOCIETY EDITORIALS

The Editors: It is time for the Kavanaugh nomination to be withdrawn

The Editors
September 27, 2018

Dr. Christine Blasey Ford's testimony before the Senate Judiciary Committee today clearly demonstrated both the seriousness of her allegation of assault by Judge Brett M. Kavanaugh and the stakes of this question for the whole country. Judge Kavanaugh denied the accusation and emphasized in his testimony that the opposition of Democratic senators to his nomination and their consequent willingness to attack him was established long before Dr. Blasey's allegation was known.

Evaluating the credibility of these competing accounts is a question about which people of good will can and do disagree. The editors of this review have no special insight into who is telling the truth. If Dr. Blasey's allegation is true, the assault and Judge Kavanaugh's denial of it mean that he should not be seated on the U.S. Supreme Court. But even if the credibility of the allegation has not been established beyond a reasonable doubt and even if further investigation is warranted to determine its validity or clear Judge Kavanaugh's name, we recognize that this nomination is no longer in the best interests of the country. While we previously endorsed the nomination of Judge Kavanaugh on the basis of his legal credentials and his reputation as a committed textualist, it is now clear that the nomination should be withdrawn.

The nomination of Judge Kavanaugh has become a referendum on how to address allegations of sexual assault.

If this were a question of establishing Judge Kavanaugh's legal or moral responsibility for the assault described by Dr. Blasey, then far more stringent standards of proof would apply. His presumption of innocence might settle the matter in his favor, absent further investigation and new evidence. But the question is not solely about Judge Kavanaugh's responsibility, nor is it any longer primarily about his qualifications. Rather it is about the prudence of his nomination and potential confirmation. In addition to being a fight over policy issues, which it already was, his nomination has also become a referendum on how to address allegations of sexual assault.

Somewhere in the distant past, at least before the word "Borked" was coined to describe a Supreme Court nomination defeated by ideological opposition, Senate confirmation hearings might have focused on evaluating a nominee's judicial character or qualifications as a legal thinker. But that time is long past. Many cases decided by the Supreme Court itself and thus also presidential nominations to that body (and the Senate hearings that follow) are now thoroughly engaged in deciding "policy by other means." Neither the country nor the court are well served by this arrangement, but refusing to recognize it does nothing to help reverse it.

When Republican leaders in the Senate refused even to hold hearings on the nomination of Judge Merrick Garland, they were not objecting to his qualifications or character but to the likely outcome of his vote on the court were he to be confirmed. When Senate Democrats were mostly united in opposition to Judge Kavanaugh well in advance of any hearings (and before any rumor of Dr. Blasey's accusation was known), they were using the same calculus. While regrettable in both cases, such results are, as we have said before, the predictable outcome of the fact that "fundamental questions of social policy are increasingly referred to the court for adjudication as constitutional issues."

What is different this time is that this nomination battle is no longer purely about predicting the likely outcome of Judge Kavanaugh's vote on the court. It now involves the symbolic meaning of his nomination and confirmation in the #MeToo

era. The hearings and the committee's deliberations are now also a bellwether of the way the country treats women when their reports of harassment, assault and abuse threaten to derail the careers of powerful men.

This nomination battle is no longer purely about predicting the likely outcome of Judge Kavanaugh's vote on the court.

While nomination hearings are far from the best venue to deal with such issues, the question is sufficiently important that it is prudent to recognize it as determinative at this point. Dr. Blasey's accusations have neither been fully investigated nor been proven to a legal standard, but neither have they been conclusively disproved or shown to be less than credible. Judge Kavanaugh continues to enjoy a legal presumption of innocence, but the standard for a nominee to the Supreme Court is far higher; there is no presumption of confirmability. The best of the bad resolutions available in this dilemma is for Judge Kavanaugh's nomination to be withdrawn.

If Senate Republicans proceed with his nomination, they will be prioritizing policy aims over a woman's report of an assault. Were he to be confirmed without this allegation being firmly disproved, it would hang over his future decisions on the Supreme Court for decades and further divide the country. Even if one thinks that Dr. Blasey's allegations are not credible, demonstrating them not to be would require further investigations and testimony. This would include calling additional witnesses and assessing further allegations against Judge Kavanaugh from other women, to which Republicans on the committee have been unwilling to commit and which would be divisive in any case.

The best of the bad resolutions available in this dilemma is for Judge Kavanaugh's nomination to be withdrawn.

There are many good reasons to support the nomination of a qualified judge who is committed to a textualist interpretation of the Constitution to the Supreme Court. Over time, such an approach may return the question of abortion to the states, where it belongs given the Constitution's silence on the matter, and where a more just and moral outcome than is currently possible under Roe v. Wade may be

achieved. Restoring such a morally complex question to the deliberation of legislators rather than judges may also bring the country closer to a time when confirmation hearings can truly focus on the character and qualifications of the nominee rather than serving as proxy battles over every contentious issue in U.S. politics.

We continue to support the nomination of judges according to such principles—but Judge Kavanaugh is not the only such nominee available. For the good of the country and the future credibility of the Supreme Court in a world that is finally learning to take reports of harassment, assault and abuse seriously, it is time to find a nominee whose confirmation will not repudiate that lesson.

More: SUPREME COURT / SEXUAL ABUSE / US POLITICS

The American Association of People with Disabilities Opposes the Nomination of Judge Brett Kavanaugh to the US Supreme Court

August 15, 2018

The American Association of People with Disabilities (AAPD) opposes the nomination of Judge Brett Kavanaugh to the United States Supreme Court based on his previous rulings as a DC Circuit Court Judge that have devalued the lives and liberty of people with disabilities. Judge Kavanaugh's rulings and statements on health care, self-determination, employment, and education threaten the rights of all Americans with disabilities.

The Affordable Care Act (ACA) allowed millions more people with disabilities to gain access to health care by prohibiting discrimination on the basis of a pre-existing condition. Judge Kavanaugh has repeatedly expressed public skepticism of the ACA and has ruled in several cases to undermine elements of the law and hinder its implementation. These rulings set a dangerous precedent for the disability community. AAPD will not support a Supreme Court nominee whose actions and record jeopardize disabled individuals' access to health care and, therefore, impact their ability to live, work, and participate in their communities.

The principle of self-determination holds that people with disabilities must have the freedom and authority to exercise control over their own lives. Based on his ruling in *Doe ex rel. Tarlow v. D.C.*, Judge Kavanaugh believes otherwise. The *Doe* plaintiffs were subjected to elective surgeries based on the consent of DC officials; Judge Kavanaugh dismissed the notion that the plaintiffs could express a choice or preference regarding medical treatment on the basis of their intellectual disability. AAPD will not support a Supreme Court nominee who does not affirm the rights and abilities of people with disabilities to determine the course of their own lives.

Regarding employment discrimination, Judge Kavanaugh has consistently ruled in favor of employers while routinely disregarding the experiences of people with disabilities. He has time and time again, demonstrated undue deference to employers and a narrow understanding of anti-discrimination protections. AAPD will not support a Supreme Court nominee who does not protect the rights of workers with disabilities.

Judge Kavanaugh is also a strong proponent of school voucher programs. Typically, students with disabilities who participate in these programs are forced to waive their rights under the Individuals with Disabilities Education Act (IDEA), including the right to receive a free and appropriate education (FAPE). Given the ongoing threats to a quality education for

students with disabilities, AAPD will not support a Supreme Court nominee who is willing to trade away these protections.

"The nomination of Judge Brett Kavanaugh to the US Supreme Court is a very real threat to the lives and liberty of people with disabilities," said Ted Kennedy, Jr., Chair of the AAPD Board of Directors. "His record gives every indication that as a Supreme Court Justice, Judge Kavanaugh's rulings will turn back the progress of the disability rights movement to a pre-ADA era. We cannot be silent here. The Senate must hear from the disability community about the dangers of this nomination."

AAPD urges other organizations as well as individuals to take action by educating yourself and others about Judge Kavanaugh's record; and then contact your Senators to express your opposition and underscore the importance of health care and self-determination for all Americans with disabilities.

For a thorough review of disability-related cases involving Judge Brett Kavanaugh, please refer to this report by the Bazelon Center for Mental Health Law.

* * *

The American Association of People with Disabilities (AAPD) is a convener, connector, and catalyst for change, increasing the political and economic power of people with disabilities. As a national cross-disability rights organization, AAPD advocates for full civil rights for the over 56 million Americans with disabilities.

Life After Rape: The Sexual Assault Issue No One's Talking About

womenshealthmag.com/life/a19899018/ptsd-after-rape

September 13, 2016

The sickening truth about PTSD among survivors.

By Carrie Arnold
Sep 13, 2016

**Identifying details have been omitted.*

After singing at a music festival in New York City—the biggest performance of her career—29-year-old classical vocalist Lucy awoke to find that making sound, any sound, was almost impossible. "It felt like someone was strangling me from the inside," she says. An ear, nose, and throat specialist diagnosed a paralyzed vocal cord. He couldn't identify the cause of her injury, but it was permanent, he said. Irreversible.

Devastated, Lucy spent days poring over obscure medical journals, searching for answers. That's where she stumbled across the accounts of two women who had lost their voices after being raped. Lucy began to sob. A decade earlier, she'd been sexually assaulted in a college dorm room. She had almost never spoken about it. It dawned on her that unacknowledged stress from her attack might have taken physical form. Her long-ago rape was now, quite literally, silencing her career.

As a therapist would later confirm, Lucy's seemingly random voice loss was actually a mark of post-traumatic stress disorder (PTSD). Although we tend to associate the condition with battle-scarred soldiers, studies show rape survivors have more severe PTSD, and a harder time overcoming it, than combat veterans. While between 10 to 20 percent of war vets develop the disorder, about 70 percent of sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime.

PTSD typically takes the form of nightmares, flashbacks, and feelings of guilt and shame that can surface right away or years after a trauma. But it can also manifest in physical ways, like chronic pain, intestinal problems, muscle cramps, or, as in Lucy's case, a paralyzed vocal cord. For 94 percent of survivors, symptoms last at least two weeks; for a full half of them, they persist for years, even decades—sometimes long after the victim thinks she has laid the ghosts to rest. Consider the women, some now in their sixties, still grappling with the effects of decades-old alleged assaults by comedian Bill Cosby. German researchers found a third of women raped during World War II had PTSD symptoms nearly 70 years later.

Any trauma can lead to PTSD, but sexual assault is a particularly potent cause. Although rape is, at its core, about power, sex is analogous with pleasure and connection. Violating that

intimacy can shatter a victim's trust in all relationships, fracturing the bonds with family and friends that are critical for healing. And since 75 percent of victims are attacked by someone they know, every person they meet and every situation they're in can feel dangerous, making sexual assault difficult to cope with, says Ananda Amstadter, Ph.D., an associate professor of psychiatry and psychology at Virginia Commonwealth University.

As a society, we're starting to talk more about sexual violence. Lady Gaga performed her anti-rape anthem "Til It Happens to You" at the Oscars; the assault by former Stanford swimmer Brock Turner on an unconscious woman behind a Dumpster ignited a social media firestorm—and an open letter to the victim from Vice President Joe Biden. While this dialogue is crucial to prevention, there has been a woeful silence and lack of understanding about the long-term damage and repercussions many survivors endure.

Fear and Self-Loathing

Lucy, then an 18-year-old freshman, was handed a beer as she kicked back at a party near campus. As she downed the last drops, the room started spinning. Not a big drinker, she blamed a low tolerance. When a tall athlete led her out of the party, Lucy's friend flashed a thumbs-up (she didn't intervene, thinking Lucy was just tipsy). You're hooking up with a hot athlete! Score!

He didn't take her home. Instead, he brought her to his dorm room. As Lucy faded in and out of consciousness, he took off her clothes. He rolled on a condom and used his spit as lube. Then he raped her.

Lucy woke up hours later, groggy, a scratchy blanket thrown over her half-naked body. She heard her rapist get something to eat. When one of his friends stopped by, her attacker smirkingly introduced her; it felt like he was bragging. It was all she could do not to throw up from rage and guilt. She waited for her attacker to fall asleep. Finally, at 5 a.m., Lucy snatched her clothes and walked back to her dorm. Friends brushed it off as a hookup gone wrong. "I felt like somehow I had caused it," says Lucy.

Self-recrimination is a common reaction among victims and can ultimately contribute to PTSD, says Patricia Resick, Ph.D., a psychologist at Duke University. A recent study found a full 62 percent of college rape survivors blamed themselves for the attack; 52 percent said their rapist was "not at all" at fault. Society reinforces this belief. In the aftermath of rape, we ask: "What did she expect if she was wearing a short skirt? If she was drunk?" It's a response that partly stems from our culture's near-puritanical discomfort with women's sexuality. Photos of breastfeeding women are taken off Facebook; school dress codes ban girls, but not boys, from wearing tank tops.

> PTSD typically takes the form of nightmares, flashbacks, and feelings of guilt and shame that can surface right away or years after a trauma.

Victim blaming—by both men and women—is also an attempt to feel in control of our own lives. "It's easier to believe the victim did something wrong than to believe the men we know could be rapists, or that we could one day be raped ourselves," says Heidi Zinzow, Ph.D., an associate professor of psychology at Clemson University. That piling on of culpability has a devastating consequence: It becomes a secondary victimization that prevents survivors from seeking help, leaving the door wide open for distress to morph into PTSD.

And as mind-boggling as it sounds, some victims even blame themselves for that. Newspaper reporter Joanna Connors, 63, author of *I Will Find You*—a recent book about the aftermath of her assault—was raped at knifepoint at a university while on a work assignment more than 30 years ago. "I felt ashamed that I was 'weak.' That I didn't put myself right back together," says Joanna, whose PTSD took the form, over the decades, of panic attacks, OCD, agoraphobia, and trichotillomania (pulling out her own hair).

Downward Spiral

After the attack, nightmares regularly tore Lucy from sleep. Her grades plummeted. She found it hard to date; any hint of intimacy caused paralyzing flashbacks. She started binge-drinking several nights a week to shut out what had happened. She sought out a therapist but didn't discuss the rape; she just wanted to forget about it.

Lucy's reactions were caused by a biological maelstrom. In the days and weeks following a rape, the body is flooded with stress hormones, triggering a fight-or-flight response that can disrupt sleep and cause women to pull back from loved ones. Victims often feel on high alert, unable to relax. As long as these feelings and behaviors subside within a month, they are normal parts of the healing process, says Resick.

But often, that healing process gets stalled. Reminders of the assault—day-to-day activities like going to the gynecologist, as well as more overt events, like seeing someone who resembles the rapist—can spark negative thoughts; trying to avoid the thoughts can lead to PTSD. Dorri, now 54 and a Web designer, was gang-raped at 13. For nearly four decades, every rock song she heard (it had been playing on the radio during her assault) caused her to relive the rape. "But I didn't get help because I didn't understand what I was experiencing was PTSD," she says. For 35-year-old writer Maureen, it's been 20 years since her assault, but when she reads stories of rape in the news, "I feel like I've been punched in the stomach," she says.

That kind of chronic stress is linked to heart disease, fibromyalgia, and memory problems. About 30 percent of survivors will sink into depression or numb their pain with booze and drugs, which studies show can raise the odds of being sexually assaulted again—and another rape only solidifies their conviction that they are worthless and damaged. Others develop long-term sexual problems. Even if a woman seeks to treat the outward symptoms, the litany of health issues that stem from PTSD can worsen and amplify if the rape itself isn't addressed.

Rape Culture in Action

An important element in someone getting "stuck" in processing their trauma and descending into long-term PTSD is the lack of support from our medical and justice systems. A Michigan State University study found that, after reporting their rapes, most women felt guilty, depressed, distrustful, and "reluctant to seek further help"—all symptoms linked to PTSD. When Lucy went to the student health center to be tested for sexually transmitted infections after the rape (the results, thankfully, were negative), the physician was brusque, roughly pushing the speculum into Lucy's vagina. She seemed annoyed with yet another freshman girl seeking testing. She asked Lucy if she had been forced to have sex. Lucy said no—not an unusual response. Many survivors who seek medical attention after an assault don't disclose the rape out of embarrassment or shame, according to a study. The doctor noted in Lucy's chart that the testing was for "a sexual encounter that went further than intended" and sent her on her way. The mortifying experience made Lucy reluctant to discuss her rape again, even with family, whose support might have helped ward off her PTSD.

Women who go to law enforcement are met with an equally harrowing process. Reports show some police are dismissive of women's claims or don't attempt to gather forensic proof of the attack. When they do, it involves an invasive, hours-long exam to collect evidence for a rape kit. The victim's mouth, vagina, and anus are swabbed. Blood and urine samples are taken. Her underwear is often collected. Photos may be taken of her naked body. The most disturbing violation: The kit may never be processed.

> "I didn't get help because I didn't understand what I was experiencing was PTSD."

Hundreds of thousands of untested rape kits dating back more than two decades are currently gathering dust in police stations around the country (due to a variety of factors, from lack of time and money to a detective's decision not to act). Recent efforts to clear the backlog have meant contacting survivors years after their attack, which can elicit or worsen PTSD. "Survivors expect evidence will be treated responsibly. That it's not sends a message that what happened didn't matter. They feel—rightly—that the system let them down," says Ilse Knecht, director of policy and advocacy at the Joyful Heart Foundation, a nonprofit group that's advising cities as they work through untested kits. Few police departments have the resources to handle the psychological effects of notification, or to guide survivors through the legal system.

Further damaging: Victims may not be able to do anything with the information. In most states, women are informed when a previously untested rape kit yields DNA evidence identifying their attacker—regardless of whether it's too late to press charges. (The statute of limitations varies by state: In some, it's as short as three years; in others, a rapist can be charged anytime.) Some women find that learning their rapist's identity, even if prosecuting the perpetrator isn't possible, provides validation and closure. For others, it can cause crippling powerlessness that can interfere with healing, says Knecht.

Feelings of helplessness can intensify if, at any point, a victim decides to go to trial. DNA evidence can make or break a case—but it's not a slam-dunk. Rapists often claim sex was consensual, which once again places the woman under a microscope. With or without forensic

evidence, a victim must recount her assault over and over, in graphic detail. On the stand, she may be ruthlessly cross-examined by the rapist's attorney.

These reactions from doctors and the criminal justice system are another form of secondary victimization so traumatic that many survivors describe it as a "second rape," says psychologist Amy Street, Ph.D., of the U.S. Department of Veterans Affairs' National Center for PTSD. As a result, under 35 percent of all rapes are reported, and even fewer go to trial.

Even a conviction can contribute to PTSD. Reporter Joanna's rapist was sentenced to 30 years in prison. "I told myself, 'Now it's over. Move on.' " She buried her trauma for over 20 years, until her daughter started looking at colleges—the scene of Joanna's assault.

Regaining Your Voice

Although difficult, it is possible to recover from a years-or even decades-old assault. Reaching out to a professional sooner may lessen the psychological and physical toll, but "survivors should seek help whenever it feels right to them," says Cameron Clark, a clinical therapist at the Sexual Assault Center in Nashville. Just talking about it out loud can relieve some of the emotional burden. The National Sexual Assault Hotline (800-656-HOPE) is staffed around the clock; RAINN, the Rape, Abuse, and Incest National Network, has a 24/7 live chat (rainn.org) and a directory of local rape crisis centers that can help you find affordable support in your area. And they're not just for newly victimized women: While researching her book, Joanna volunteered at a local rape crisis hotline. "More of their calls came from people whose rapes happened 20 years ago than from recent victims," she says.

> Hundreds of thousands of untested rape kits dating back more than two decades are currently gathering dust in police stations around the country.

Psychological therapies for rape and PTSD are effective whether you seek help right after a trauma or years down the line. To unravel the PTSD fed by Lucy's decade of silence, she had three years of Eye Movement Desensitization and Reprocessing along with somatic experiencing, a therapy that helps release physical tension in the body after a trauma. "It helped me get in touch with a subconscious layer that was always freaking out," says Lucy. Physical therapy restored her voice, proving the ENT physician wrong, to Lucy's great relief.

Even just telling a friend can be therapeutic. Research shows survivors with a strong support network are significantly less likely to develop PTSD. But pick the people you come out to carefully, says Zinzow: Studies have shown that getting an unsympathetic reaction can amplify existing PTSD. Lucy confided in her then-boyfriend (now her husband); Maureen found strength from her women's studies class in college. "I just blurted it out one day. Everyone was so kind and understanding. They just let me talk and cry," she says.

Lucy, Joanna, Dorri, Maureen, and other brave women say speaking out about rape, privately or publicly, lessens PTSD, even years later. "Trauma is like an onion—you just keep peeling it away. You're never really done with it," says Lucy. "But it doesn't have to define you."

To learn which therapies are especially effective in helping victims of sexual assault, how to help a friend who's been raped, and more, pick up the October issue of Women's Health, *on newsstands now.*

AUCD

ASSOCIATION OF UNIVERSITY CENTERS ON DISABILITIES

THE LEADERSHIP, EDUCATION, ADVOCACY & RESEARCH NETWORK

AUCD Opposes the Nomination of Judge Brett Kavanaugh to the Supreme Court of the United States

The Association of University Centers on Disabilities (AUCD) is a national organization that supports the right of self-determination for individuals with intellectual and other disabilities. After carefully reviewing opinions that fail to affirm this right and jeopardize access to healthcare for people with disabilities, AUCD has decided to oppose the nomination of Judge Brett Kavanaugh to serve on the U.S. Supreme Court. "The appointment of Judge Kavanaugh threatens civil rights protections for people with disabilities including access to health care," said Andrew Imparato, Executive Director of AUCD. "Judge Kavanaugh's record on the D.C. Circuit has failed to support the critical principle of self-determination for people with intellectual disabilities and the importance of access to healthcare for millions of Americans with disabilities." Two cases in Judge Kavanaugh's record form the primary basis for our concerns.

In the 2007 ruling *DOE v. District of Columbia and Mental Retardation and Developmental Disabilities Administration*, Judge Kavanaugh ruled that people with intellectual disabilities could be presumed incompetent to make medical decisions:

Judge Kavanaugh overruled multiple district court orders that had given people with intellectual disabilities who had been deemed not legally competent the right to have input into whether or not they would be subject to elective surgery. The lower courts had affirmed that a legally incompetent individual may be capable of expressing a choice or preference regarding medical treatment. The court therefore ordered the District of Columbia to make "documented reasonable efforts to communicate" with patients "regarding their wishes." If communication was unsuccessful and a patient's wishes couldn't be determined, however, the lower court had allowed the government to determine the patient's "best interests" by considering the "totality of the circumstances."

In his written decision, Judge Kavanaugh neither acknowledged nor appeared to consider that a person could have an intellectual disability but still might understand the nature of a surgery or have a right to know, think about, or decide whether to undergo a procedure. Making an effort to communicate was viewed as an unnecessary standard to apply to the government when it wanted to perform surgery on a person with an intellectual disability because, in Judge Kavanaugh's words, they were "by definition" incompetent so their input was not relevant to the decision. In his view, the Constitution would not protect people with intellectual disabilities from a state agency policy that allowed non-emergency

elective surgery without informing them or making any effort to ascertain whether they wanted it. Liz Weintraub, Senior Advocacy Specialist at AUCD, commented on the ruling, "As a woman with an intellectual disability, I know what it is like for other people to try to make decisions about my life, my relationships, and my body. Judge Kavanaugh seems to think people like me don't deserve a say in our own healthcare, and that to me is dangerous, discriminatory, and shows he doesn't really understand the idea of 'nothing about us without us'."

Judge Kavanaugh's dissent in *Seven-Sky v. Holder* illustrates his belief that the Affordable Care Act is unconstitutional:

Judge Kavanaugh's dissent from the D.C. Circuit Court ruling that upheld the Affordable Care Act reflects his view that the law is unconstitutional and beyond the power of Congress. He rejected all of the government's defenses of the ACA, concluding specifically that the individual mandate to purchase health insurance could not be justified under either the Taxation or Spending Clauses of the Constitution. Judge Kavanaugh's rationale for overturning on the ACA was so extensive that it formed the basis of the four-vote dissent that would have struck down the ACA at the Supreme Court. "The Affordable Care Act is what stopped insurance companies from excluding people with pre-existing conditions, making it foundational to the lives of people with disabilities. If Judge Kavanaugh leads the Supreme Court to overturn the ACA, people with disabilities will lose access to health insurance and affordable medical care," says AUCD Executive Director Andrew Imparato.

ACT

AUCD urges individuals and organizations to learn about Judge Kavanaugh's record on the DC Circuit and use this opportunity to educate your Senators about the importance of self-determination and access to healthcare for millions of Americans with disabilities and their families.

The Association of University Centers on Disabilities, located in Silver Spring, MD, is a national, nonprofit organization that promotes and supports the national network of interdisciplinary centers advancing policy and practice through research, education, leadership, and services for and with individuals with developmental and other disabilities, their families, and communities. For more information, visit www.aucd.org or contact aucdinfo@aucd.org.

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The New York Times

Who Is Brett Kavanaugh?

Contrary to what supporters say, he's no originalist.

By Emily Bazelon and Eric Posner
Ms. Bazelon is a staff writer at The New York Times Magazine. Mr. Posner is a professor at the University of Chicago Law School.

Sept. 3, 2018

Brett Kavanaugh's supporters call him an originalist. It's a natural label to apply to the conservative judge who is President Trump's choice for the Supreme Court.

In theory, originalism gives judges a method for transcending politics by interpreting the Constitution based on its meaning when it was ratified in 1788 or later amended. Since the 1970s, originalism has been both an animating principle and a marketing success for conservative jurisprudence. Fairly or not, conservatives have used it as a cudgel against liberal judges, attacking them for inventing new rights to protect minorities, political dissenters and criminal suspects. Its selling point has been its claim to neutrality.

But Judge Kavanaugh hasn't earned his originalist badge. It's being fixed to him to mask the fact that as an appeals court judge, he relentlessly pressed forward a Republican agenda favoring business and religious interests.

Judge Kavanaugh leaned a bit toward an originalist approach in two opinions, one in 2008, the other in 2011. But when he was asked in 2016 whether he considered himself an originalist, he didn't answer, and in a 2017 lecture, he expressed caution. "History and tradition, liberty, and judicial restraint and deference to the legislature," he explained, "compete for primacy of place in different areas of the Supreme Court's jurisprudence."

To a pure originalist, this is an incoherent mixing of methodologies. Any ruling that departs from the original meaning should be thrown out. Judge Kavanaugh has called for no such thing.

Instead, he has proudly said that he's a textualist, which means that he gives primacy to the ordinary meanings of the words of a statute, or the Constitution itself. Textualists steer away from other sources of meaning, like legislative history. Conservatives have often touted textualism for its neutral deference to the legislature. Three of the court's conservative members — Chief Justice John Roberts and Justices Samuel Alito and Neil Gorsuch — lay claim to textualism as a guiding principle.

But textualism doesn't serve as an overarching theory for conservative jurisprudence. Textualist interpretation can produce liberal as well as conservative interpretations of statutes. And because ambiguous phrasing in laws leaves judges with choices to make, it doesn't put much of a restraint on judges. As Judge Kavanaugh has said, quoting the liberal-moderate Justice Elena Kagan, "We are all textualists now." This means that textualism offers neither a clear dividing line from liberals nor the historical gravitas of originalism.

If Judge Kavanaugh is confirmed, there will be only one dyed-in-the-wool originalist left among the justices — Clarence Thomas — who is also, at 70, the oldest member of the court's conservative wing. The court's other leading originalist, Antonin Scalia, died in 2016. This shift away from originalism is a window into the conservative movement's priorities as it prepares to lock in a five-member Supreme Court majority. Originalism is no longer the powerful tool it once was for advancing a conservative jurisprudence.

This is clear from the conservatives' expansive interpretation of the First Amendment's guarantee of free speech, an approach that has no historical support from the time the First Amendment was written. Despite this, in a series of decisions, from Citizens United in 2010, which opened a faucet of campaign donations and spending, to Janus v. AFSCME in June, which diminished the clout of unions by stopping them from collecting dues from all the workers they represent, conservatives have used the First Amendment to strike

down laws that regulate corporations, help unions and limit the influence of money on politics. Tellingly, the court has accepted far more cases involving challenges to regulations of conservative speech than previous courts, with a win rate of 69 percent, compared with 21 percent for cases involving liberal speech. Judge Kavanaugh, too, has embraced this business-friendly interpretation of the First Amendment.

Nor is there founding-era evidence for some of the new anti-regulatory doctrines the court has begun to accept. In the past few decades, conservatives put considerable energy into attacking the administrative state. The most radical idea is that regulatory agencies like the Environmental Protection Agency lack the authority to issue regulations; a more modest version is that they can do so only if Congress is crystal clear about it. In his opinions and other writings, Judge Kavanaugh has pushed this theme as well.

On questions about the scope of presidential power, the founding-era evidence also suggests significant limits. But Judge Kavanaugh has signaled that he rejects them. He has written that it's "debatable" that a president can be indicted while in office and criticized a case that allowed Congress to create an independent counsel to investigate executive branch officials. Again, there is no historical evidence to support that view. Here, once more, principled originalism could give way to the modern conservative position favoring a strong presidency.

With five reliable members, the court's conservative wing will be in a position to accomplish much, and for the most part it will be easier to achieve its goals without originalism. Expect a reappearance, however, when it comes time to reconsider the constitutional right to abortion access established in Roe v. Wade. With that important exception, originalism has largely served its purpose and can be cast away.

That creates a problem for conservatives. Judge Kavanaugh's supporters call him an originalist rather than the pro-business Republican he is because of the theory's claim that it separates law from politics. As the gap between originalism and the greater goals

of conservative jurisprudence widens, however, the claim that the Supreme Court stands above the political fray, already damaged, will become harder to sustain.

To his credit, Judge Kavanaugh has struggled with the politicization of the court he is poised to join. "When we watch the Supreme Court, too many Americans think the decision is pre-baked based on the party of the president who appointed the justices," he has said. Yet his record and public statements suggest that his tenure on the court will confirm this view.

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Follow The New York Times Opinion section on Facebook and Twitter (@NYTopinion), and sign up for the Opinion Today newsletter.

***Correction:** September 4, 2018*

An earlier version of this article misspelled the given name of a Supreme Court justice. He is Neil Gorsuch, not Neal.

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A version of this article appears in print on Sept. 4, 2018, on Page A21 of the New York edition with the headline: Who Is Brett Kavanaugh?

"I'M A LIBERAL FEMINIST LAWYER. HERE'S WHY DEMOCRATS SHOULD SUPPORT JUDGE KAVANAUGH" BY LISA BLATT

I'm a Liberal Feminist Lawyer. Here's Why Democrats Should Support Judge Kavanaugh.

politico.com/magazine/story/2018/08/02/im-a-liberal-feminist-heres-why-i-support-judge-kavanaugh-219081

Sometimes a superstar is just a superstar. That is the case with Judge Brett Kavanaugh, who had long been considered the most qualified nominee for the Supreme Court if Republicans secured the White House. The Senate should confirm him.

I have argued 35 cases before the Supreme Court, more than any other woman. I worked in the Solicitor General's Office for 13 years during the Clinton, Bush and Obama administrations. Because I am a liberal Democrat and feminist, I expect my friends on the left will criticize me for speaking up for Kavanaugh. But we all benefit from having smart, qualified and engaged judges on our highest court, regardless of the administration that nominates them.

What happened to Merrick Garland was a disgrace. His nomination was the Democratic equivalent of Kavanaugh's. Garland, too, is brilliant, admired, experienced, sober and humane. Indeed, Kavanaugh himself called Garland "supremely qualified" for the Supreme Court. That he made that statement while Garland's nomination was pending—and was the subject of intense partisan warfare—says a great deal about Kavanaugh's character.

But unless the Democrats want to stand on the principle of an eye for an eye—and I don't think they should—folks should stop pretending that Kavanaugh or his record is the issue. He is supremely qualified. Although this fact is distressing, Republicans control both the White House and Senate. In comparable circumstances, when President Barack Obama was in office, our party appointed two justices to the Supreme Court.

I first met Kavanaugh in 2009, shortly after I left the Solicitor General's Office. He spontaneously emailed to say he liked an article I had written for *The Green Bag*, an irreverent legal magazine, about my experience arguing in front of the Supreme Court. I had just started my own appellate practice, and his note was extremely thoughtful.

Months later, I asked Kavanaugh to join a panel at Georgetown Law School to review a film about college debate. He responded that he knew nothing about debate but nevertheless was happy to help. When a law student asked him how debate had shaped his career, he answered: "I actually never debated, but I did play football, and the two are basically the same." He then offered this advice: "Practice, learn to get along with all of your teammates, learn from your mistakes, and have fun." It was clear that judge cared about mentoring and teaching law students and was invested in helping others to succeed.

Since then, I've kept in regular contact with the judge, mostly to talk about kids and work-life balance, including the challenges I've had as a woman trying to raise two children while practicing law. Kavanaugh is a great listener, and one of the warmest, friendliest and kindest individuals I know. And other than my former boss, Justice Ruth Bader Ginsburg, I know of no

other judge who stands out for hiring female law clerks. My profession is overrun with men, and unless institutions like the Supreme Court do more to hire women, the upper echelons of my profession will never fully include women.

I do not have a single litmus test for a nominee. My standard is whether the nominee is unquestionably well-qualified, brilliant, has integrity and is within the mainstream of legal thought. Kavanaugh easily meets those criteria. I have no insight into his views on *Roe v. Wade*—something extremely important to me as a liberal, female Democrat and mother of a teenage girl. But whatever he decides on *Roe*, I know it will be because he believes the Constitution requires that result.

It's easy to forget that the 41 Republican senators who voted to confirm Ginsburg knew she was a solid vote in favor of *Roe*, but nonetheless voted for her because of her overwhelming qualifications. Just as a Democratic nominee with similar credentials and mainstream legal views deserves to be confirmed, so too does Kavanaugh—not because he will come out the way I want in each case or even most cases, but because he will do the job with dignity, intelligence, empathy and integrity.

Democrats should quit attacking Kavanaugh—full stop. It is unbecoming to block him simply because they want to, and they risk alienating intelligent people who see the obvious: He is the most qualified conservative for the job.

This article tagged under:

Editorial: Nix the toxic, give Brett Kavanaugh a shot

bostonherald.com/opinion/editorials/2018/07/editorial_nix_the_toxic_give_brett_kavanaugh_a_shot

Herald Staff Tuesday, July 10, 2018

With the prime-time announcement that Judge Brett Kavanaugh is President Trump's nominee for the Supreme Court last night, we can begin the confirmation process in earnest.

The Senate Judiciary Committee should give Judge Kavanaugh a fair but thorough vetting.

Obviously, the temptation by Democrats, this year more than ever, will be to make a sideshow of the proceedings and use the entire matter to denigrate the president and Republicans as we head into the midterm elections.

In fact, even hours before they knew who the president's pick was, a number of high-profile anti-Trumpers were pledging to vote the nominee down.

U.S. Sen. Bob Casey (D-Pa.) tweeted, "I will oppose the nomination the President will make tonight because it represents a corrupt bargain with the far Right, big corporations, and Washington special interests."

Sen. Liz Warren also signaled that a Trump pick would be unacceptable, tweeting, "Every single judge on @realDonaldTrump's short list for the Supreme Court has been pre-approved by right-wing extremists. They've shown their willingness to side with the wealthy & powerful over the rights of women, workers, voters, & minorities. But we're ready to fight back."

Kavanaugh is a solid pick for the Supreme Court. He is a true conservative and considered a brilliant thinker by his contemporaries.

Our political leaders have a chance to stem the tide of toxic division during this confirmation process. The people deserve the best from those on Capitol Hill. Not a rubber stamp by any means but also not a calculated charade in which a man's reputation is destroyed for political ends.

Let us see if they rise to the occasion.

Gov. Phil Bryant: Brett Kavanaugh best choice for Supreme Court

clarionledger.com/story/opinion/columnists/2018/07/26/gov-phil-bryant-brett-kavanaugh-best-choice-supreme-court/841198002/

Gov. Phil Bryant: Brett Kavanaugh best choice for Supreme Court

Judge Kavanaugh's professional and legal career has proven that he is a true public servant.

Gov. Phil Bryant, Guest Columnist Published 9:58 a.m. CT July 26, 2018

On July 9, President Donald Trump nominated Judge Brett M. Kavanaugh to replace Justice Anthony Kennedy on the United States Supreme Court.

The President promised to select a candidate who would apply the law and rely on the Constitution in order to deliver justice. President Trump kept that promise.

Judge Kavanaugh's credentials are impeccable. After graduating from Yale Law School, he clerked for Third Circuit Court of Appeals Judge Walter King Stapleton and Ninth Circuit Court of Appeals Judge Alex Kozinski, before serving as a clerk for Justice Kennedy. He built a distinguished professional career, serving as senior associate counsel, associate counsel to the president and staff secretary in the George W. Bush White House.

Judge Kavanaugh's judicial record from his 12 years of service on the United States Court of Appeals for the D.C. Circuit includes more than 300 published opinions that reflect an original understanding of the Constitution. He has not engaged in judicial activism or made policy from the bench. A judge's judge, he has been an intellectual leader among his peers. Judges around the country have cited him. In his published opinions, Judge Kavanaugh has rejected agency overreach, supported the free expression of religion in the public square, and protected the unborn while simultaneously adhering to precedent.

In his commitment to protecting private citizens from government overreach, Judge Kavanaugh has ruled against federal agency action 75 times. For example, in White Stallion Energy Center LLC v. EPA, he rejected the Obama EPA's efforts to impose massive emissions regulations without considering costs.

In addition to protecting citizens from overreach, Judge Kavanaugh has a history of respecting religious beliefs. He has consistently defended citizens' rights to exercise their sincerely held beliefs without government interference. In Newdow v. Roberts, he upheld participants' rights to hold an opening prayer at government ceremonies.

Judge Kavanaugh has extended that protection to the unborn. In Garza v. Hargan, he rejected the ACLU's argument for a new constitutional right for illegal immigrant minors in U.S. custody to obtain abortions on-demand.

Judge Kavanaugh's influence extends beyond the courtroom. As a D.C. native, he has been committed to serving his community. He regularly volunteers with Catholic Charities to serve meals to needy families. He has acted as a reader at his church and has tutored children in elementary school. He has kept active by running marathons and coaching his daughter's basketball teams in the Catholic Youth Organization.

Judge Kavanaugh's professional and legal career has proven that he is a true public servant. He has exemplified the values of a Supreme Court justice — integrity, humility, and an even, thoughful temperament — throughout his career. President Trump promised that he would nominate a judge who has a deep reverence for the laws and Constitution of the United States. By choosing Judge Kavanaugh, President Trump once again stood by his promise and delivered to the American people.

Judge Kavanaugh is an outstanding nominee, and the single most qualified person in the country to serve on the United States Supreme Court. He deserves swift confirmation by the United States Senate.

Mississippi Gov. Phil Bryant is the 64th governor of the state. He has held the position since 2012.

The Center for Public Representation Opposes the Nomination of Judge Kavanaugh

The Center for Public Representation (CPR) joins other disability, civil rights, and health care organizations in opposing the nomination of Judge Brett Kavanaugh to the United States Supreme Court.

CPR is a national legal advocacy organization that promotes the full inclusion and integration of people with disabilities in all aspects of life. For more than four decades, CPR has advanced the civil rights of people with disabilities and fought against disability discrimination in federal courts across the country, including the Supreme Court. We have advocated for laws that ensure individuals with disabilities have the same rights and opportunities as all individuals to live full and meaningful lives and make their own decisions. We know first-hand how important the federal courts are in ensuring these laws are enforced.

Based on Judge Kavanaugh's record, we are gravely concerned that if confirmed to the Supreme Court, he would undermine disability rights and reverse progress on many issues important to people with disabilities. Once appointed, his views will impact Supreme Court decisions for decades to come.

The Supreme Court Impacts the Rights of People with Disabilities

The Supreme Court makes final decisions about what federal laws and the U.S. Constitution mean. This includes many laws that are crucial to people with disabilities, such as the Americans with Disabilities Act (which prohibits disability discrimination and provides a right to community integration), Medicaid (which provides a right to critical health care services for people with disabilities), the Individuals with Disabilities Education Act (which ensures students with disabilities receive a Free and Appropriate Public Education), the Affordable Care Act (which expands access to health care and provides protections for people with pre-existing conditions), the 14th Amendment to the Constitution (which mandates equal protection under the law), and many others. How the current nominee or any Supreme Court Justice interprets these laws will have a huge impact on the opportunity for people for disabilities to participate, learn, work, and live in the community. The best way to understand how a judge will interpret these laws is to look at his or her record.

Justices are appointed for life to the Supreme Court. That's why the Constitution requires the President to submit Supreme Court nominations to the Senate for their review and confirmation. The current nomination process is the one chance for the public and the Senate to take a close look at Judge Kavanaugh's record and decide whether he is the right person to serve on the Supreme Court. A review of Judge Kavanaugh's record raises serious concerns about the decisions he would likely make about health care, disability, education and civil rights issues if he has a role as final decision-maker on the Supreme Court, potentially for decades to come.

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Serious Disability Concerns in Judge Kavanaugh's Record

- **Health care**

Access to health care, particularly Medicaid-funded services, is crucial to ensuring that people with disabilities are able to live, work, and participate in their communities. That is why the disability community fought so hard against attempts by Congress to repeal the Affordable Care Act (ACA) and cut Medicaid. But those wins are at risk if Judge Kavanugh were to be confirmed to the Supreme Court. Judge Kavanaugh has already written three separate opinions and made public comments that show a willingness to undermine the ACA's fundamental protections, like those related to people with pre-existing health conditions, and even to strike down the entire ACA as unconstitutional.

- **Self-Determination**

The right to make our own life choices and exercise personal preferences is at the heart of the individual liberty protected by our laws. But people with disabilities have too often been denied the right to make their own decisions and instead, that right is given to someone else. The law gives these appointed decision-makers certain authorities and responsibilities, and courts play a role in interpreting them. Unfortunately, Judge Kavanaugh has demonstrated a disturbing lack of regard for the rights of people with disabilities to have input in even the most fundamental, private aspects of their own lives. Judge Kavanaugh ruled in a case involving people with intellectual disabilities who were subjected to elective surgeries (including unwanted abortions) after government officials gave their consent. These officials had signed off on every proposed elective surgery for this group for 30 years, making clear this was a rubber-stamp process. Judge Kavanaugh sided with the government officials, disregarding any consideration of the individuals' wishes, despite a D.C. law requiring that decision-makers try to determine the wishes of the individual. His reasoning suggests he believes there is no place for people with disabilities to express their choices and preferences, even in fundamental health care decisions.

- **Enforcement of Civil Rights Laws**

Congress has passed civil rights laws like the ADA to prohibit a broad a range of discrimination against all people with disabilities. Yet Judge Kavanaugh's decisions in several cases involving discrimination under the ADA and other civil rights statutes have attempted to narrow the law's protections and coverage. He also has repeatedly sided with employers in employment discrimination cases and upheld a restrictive voting identification law. Judge Kavanaugh's record raises serious concerns about whether he would support vigorous enforcement of civil rights laws.

- **Education**

Access to an equal education and ensuring the protections of the IDEA's guarantee of a Free and Appropriate Education (FAPE) are key to the disability community. Judge Kavanaugh has a long history of advocacy on behalf of school voucher programs, including as part of the Federalist Society's "School Choice Practice Group." The disability community has long raised concerns about vouchers because families often are forced to waive their rights under IDEA to be permitted to use them. Judge Kavanaugh's views on vouchers might impact how he views the importance of the IDEA's protections for students with disabilities.

- **Balance of powers**

Federal agencies, like the Departments of Justice, Health and Human Services, and Education, play an important role in the lives of people with disabilities, often through issuing regulations to implement laws like the ADA, IDEA and Medicaid. Judge Kavanaugh's writings and court decisions show that he does not support a strong role for federal agencies. He even has gone so far as stating that a President can choose not to enforce the law if the President concludes that enforcing it would be unconstitutional. Judge Kavanagh's views raises serious concerns about how he would rule in cases involving agency regulations and policies related to issues like disability discrimination, access to health care or special education. It is also extremely concerning that he suggests the President is above the law.

For more detail on Judge Kavaugh's record on these and more disability issues, see a "Review of Disability Related Cases Involving Judge Brett Kavanaugh" by the Bazelon Center.

The Voice of the Disability Community Must Be Heard

The appointment of a Supreme Court Justice is a very serious matter. Once appointed, a Justice is a Justice for life. There is no do-over. Now is the time to make clear that the disability community needs a fair and impartial Justice who is committed to civil and disability rights.

CPR encourages people with disabilities, their families and allies to learn more about Judge Kavanaugh's record and what his confirmation could mean to the disability community. Make your voice heard. Educate your Senators on the issues that are most import to you, and raise your concerns about Judge Kavanaugh's record as your Senators are evaluating him. CPR and many other disability, civil rights and health care organizations oppose Judge Kavanaugh's nomination based on his record, and we encourage you to tell your Senators to oppose him too.

Learn more and keep updated about Judge Kavanaugh's nomination at https://centerforpublicrep.org/kavanaugh-nomination/.

CENTER FOR REPRODUCTIVE RIGHTS

An Analysis of the Testimony of Judge Brett Kavanaugh on Issues Relating to Reproductive Rights Before the Senate Judiciary Committee

September 10, 2018

Judge Brett Kavanaugh testified before the Senate Judiciary Committee from September 4-6, 2018, providing an opening statement and testifying in response to questions for two days. His record going into the hearing raised grave concerns about how he would rule in reproductive rights cases. His opinions, speeches and writings evince a judicial philosophy fundamentally hostile to reproductive rights. His testimony heightens those concerns.

As an appellate judge, Judge Kavanaugh ignored and misapplied Supreme Court precedent to allow the government to continue blocking an undocumented minor from accessing an abortion. He has voiced support for a narrow, backward-looking approach to the scope of individual liberty rights contrary to the foundations of the right to abortion. In speeches, he has praised then-Justice William Rehnquist's dissent in *Roe v. Wade* (1973) and Justice Antonin Scalia's dissent in *Planned Parenthood v. Casey* (1992), where each justice rejected the constitutional right to abortion. He has given a high degree of deference to religiously-affiliated employers who wish to avoid "complicity" in women's use of contraception.[1]

During the confirmation hearing, Judge Kavanaugh faced extensive questioning about his views on reproductive rights and related issues. This report analyzes his responses and how he failed to meaningfully answer those questions. In the Appendix, we have set forth those questions and answers in detail. Judge Kavanaugh repeatedly declined to answer whether he believes that *Roe* and *Casey* were correctly decided. When asked about the Supreme Court's cases on the constitutional right to contraception, he chose to agree only with a narrow concurring opinion authored by Justice Byron White, who would later dissent in *Roe* and subsequently called for its overruling.

In sum, Judge Kavanaugh's testimony yielded scant new information about his views and in no way rebutted the evidence in his record that he does not support the nearly half-century of Supreme Court jurisprudence supporting women's reproductive rights.

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[1] For a full discussion of Judge Kavanaugh's record, see The Report of the Center for Reproductive Rights on the Nomination of Judge Brett Kavanaugh to be Associate Justice of the United States Supreme Court (August 30, 2018), available at https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/PublicReportonJudgeBrettKavanaugh.pdf.

I. Abortion

A. Judge Kavanaugh refused to answer whether *Roe v. Wade* and its progeny were correctly decided.

Judge Kavanaugh was asked on at least fifteen separate occasions to explain his views on *Roe v. Wade* (1973) and its progeny cases. Citing "nominee precedent" set by previous Supreme Court nominees, he consistently declined to discuss whether he agrees or disagrees with the decisions finding that the Constitution guarantees a right to abortion.[2] He instead summarized the state of the jurisprudence, unremarkably calling *Roe* "settled as a precedent of the Supreme Court entitled the respect under principles stare decisis."[3] He also testified that *Planned Parenthood v. Casey* (1992) was "precedent on precedent."[4]

Judge Kavanaugh's testimony is best read as simply describing the history of Supreme Court rulings on abortion rights – not as any reassurance of whether he would ultimately uphold *Roe* and *Casey*. Indeed, "nominee precedent" refers to strikingly similar recitations that have been made by justices who have gone on to rule against abortion rights or call for the reversal of *Roe* once on the Court.

When Chief Justice John Roberts was asked at his confirmation hearing to explain what he meant when he previously called *Roe* "the settled law of the land," he offered an indisputable fact: that *Roe* is "settled as a precedent of the Court, entitled to respect under principles of stare

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[2] September 5, 2018 p.m. (See Appendix at A-4).

[3] September 5, 2018 a.m. (See Appendix at A-1).

[4] September 5, 2018 a.m. (See Appendix at A-2). In failing to answer whether he agrees with decades-old decisions, Judge Kavanaugh testified that he would follow the "nominee precedent" of the eight current justices on the Supreme Court, who he characterized as not answering whether they agreed or disagreed with specific cases. Judge Kavanaugh did testify about his agreement with a few "older cases." He testified that *United States v. Nixon*, 418 U.S. 683 (1974) was a "correct decision" and that its "holding is one of the four greatest moments in Supreme Court history." (September 6, 2018 p.m.) Yet, he declined to discuss the merits of *Roe*, even though it was decided a year after *Nixon*. Judge Kavanaugh also testified that *Brown v. Board of Education*, 347 U.S. 483 (1954) was correctly decided. When asked why he was able to comment on *Brown* but not *Roe*, Judge Kavanaugh testified that *Brown* was among a group of "historical cases where there is no prospect of coming back" before the Court, unlike *Roe*. (September 6, 2018 p.m.) However, the Supreme Court heard a school desegregation case only eleven years ago in *Parents Involved v. Seattle*, 551 U.S. 701 (2007).

"Nominee precedent" was a new term in this confirmation hearing which replaced the so-called "Ginsburg standard" invoked by previous nominees. This switch in terminology may be because Justice Ruth Bader Ginsburg did testify about her agreement that the Constitution protects a woman's "right to decide whether or not to bear a child," which she testified was "central to a woman's life [and] to her dignity." *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 482, 207 (1993). When asked whether he agreed with this statement by Justice Ginsburg, Judge Kavanaugh declined to answer, saying that "Justice Ginsburg was talking about something she had previously written." (September 5, 2018 p.m. (See Appendix at A-3).) Senator Harris pointed out that Judge Kavanaugh too had previously written and given speeches about *Roe* and the right to abortion.

decisis."[5] Similarly, at his confirmation in 2006, Justice Samuel Alito testified that *Roe* is "an important precedent of the Supreme Court," and "a precedent that is entitled to respect."[6]

After their confirmations, Chief Justice Roberts and Justice Alito ruled against abortion rights both times that they had the opportunity. In 2007, both upheld a federal criminal law banning a safe second trimester procedure.[7] And in 2016, both voted to uphold sham regulations that would have shut down more than 75 percent of the abortion clinics in Texas — a position that would have gutted *Roe* and *Casey* if it had been adopted by the majority, such that virtually any abortion restriction thereafter would stand.[8]

Another striking example of why discussions of precedent are no replacement for a nominee's straight up answer to these questions is the confirmation hearing of Justice Clarence Thomas in 1991. When asked about *Roe*, Thomas gave a descriptive answer, saying, "The Supreme Court, of course, in the case *Roe v. Wade* has found . . . as a fundamental interest a woman's right to terminate a pregnancy."[9] Yet less than a year after joining the Court, Justice Thomas joined a dissent in *Casey*, which argued: "We believe that *Roe* was wrongly decided, and that it can and should be overruled."[10]

B. Judge Kavanaugh's 2003 email stating not all legal scholars view *Roe* as "settled law."

Judge Kavanaugh was also asked about a March 24, 2003 email that he sent while working on judicial nominations in the Bush White House. He was commenting on a draft op-ed which said that legal scholars accept that *Roe* and its progeny are settled law. Kavanaugh responded that not all legal scholars refer to *Roe* as "settled law" since the "Court can always overrule its precedent, and three current Justices on the Court would do so."[11] He was referring to Chief Justice Rehnquist and Justices Scalia and Thomas, who had ruled that *Roe* was wrongly decided and should be overturned.[12] When questioned about his email, Judge Kavanaugh said he was describing the state of scholarship for accuracy.[13] The email, however, makes clear that

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[5] *Nomination of John G. Roberts, Jr., to be Chief Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 158, 145 (2005), https://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf.

[6] *Nomination of Samuel A. Alito, Jr., to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 277, 455 (2006), https://www.gpo.gov/fdsys/pkg/GPO-CHRG-ALITO/pdf/GPO-CHRG-ALITO.pdf.

[7] *Gonzales v. Carhart*, 550 U.S. 124 (2007).

[8] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting, joined by Roberts, C.J., and Thomas, J.).

[9] *Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 1084, 127 (1991).

[10] *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting, joined by White, J., Scalia, J., and Thomas, J.).

[11] *See* Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html.

[12] *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting, joined by White, J., Scalia, J., and Thomas, J.).

[13] September 6, 2018 a.m. (Appendix at A-10).

Judge Kavanaugh is aware of the obvious: the Supreme Court can gut or overturn precedent when given the opportunity and underscores the empty assurance of Judge Kavanaugh's description of *Roe* and *Casey* as precedent.

C. Judge Kavanaugh's dissent in *Garza v. Hargan*.

Judge Kavanaugh was questioned extensively about his 2017 dissenting opinion in *Garza v. Hargan*. *Garza* involved an undocumented immigrant minor, known in court as "Jane Doe," who entered the United States from Central America without her parents. Jane was detained and placed in a federally-funded shelter in Texas, where she discovered that she was pregnant and decided to have an abortion. With the assistance of a guardian ad litem and an attorney ad litem, Jane obtained an order from a state-court judge that she had the maturity to make the abortion decision for herself as a minor. However, acting under government directive,[14] the shelter refused to release Jane to her guardian ad litem to go to the clinic for the abortion.

When Jane challenged this policy in court, Judge Kavanaugh issued an order allowing the government to continue blocking her abortion. When his order was reversed by the full U.S. Court of Appeals for the D.C. Circuit, he dissented.

During his confirmation hearing, Judge Kavanaugh was asked several times to explain his reasoning for continuing to block Jane's abortion. He told the Senate that *Garza* was unique because it involved a minor alone in the United States, and that he applied precedent, including the Supreme Court's precedents on parental consent.[15]

This argument, however, fails to justify continuing to block Jane's abortion. Jane had already obtained a state court order deeming her capable of choosing to have an abortion. At that point, she was constitutionally entitled to have the procedure without further obstruction. While Judge Kavanaugh claimed to be applying Supreme Court precedent, he failed to cite *Bellotti v. Baird* (1979), which held that minors must be able to complete a confidential judicial bypass with "sufficient expedition to provide an effective opportunity for an abortion to be obtained."[16] In her en banc concurrence in *Garza*, Judge Patricia Millett noted that Judge Kavanaugh's view was inconsistent with controlling Supreme Court precedent: "[Jane], like other minors in the United States who satisfy state-approved procedures, is entitled under binding Supreme Court precedent to choose to terminate her pregnancy. *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622 (1979)." She explained, "The [en banc] opinion gives effect to that concession; it does not create a 'radical' 'new right' . . . by doing so," she wrote, explicitly rebutting Judge Kavanaugh's dissenting opinion.[17]

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[14] In 2017, the Office of Refugee Resettlement prohibited shelters from taking "any action that facilitates" abortion for unaccompanied minors.
[15] September 5, 2018 p.m. (See Appendix at A-11).
[16] 443 U.S. 622, 644 (1979).
[17] *Garza v. Hargan*, 874 F.3d 735, 737 (D.C. Cir. 2017) (en banc) (Millett, J., concurring).

Judge Kavanaugh also failed to cite or apply the Supreme Court's most recent abortion rights case, *Whole Woman's Health v. Hellerstedt* (2016).[18] That ruling necessitated that the court weigh the potential harms to Jane stemming from a further delay against the purported benefits of the delay. Judge Millett's en banc concurrence, on the other hand, correctly recognized that *Whole Woman's Health* is part of a line of Supreme Court cases "establish[ing] that the government may not put substantial and unjustified obstacles in the way of a woman's exercise of her right to an abortion pre-viability."[19]

Judge Kavanaugh further testified that, at the time of his decision, Jane was "still several weeks away" from Texas' twenty-week limit on abortion.[20] However, Judge Kavanaugh's order allowing the government to block Jane's abortion and granting eleven more days for the government to find a sponsor (after already failing to do so after several weeks) would have delayed Jane until she was between 16 and 17 weeks pregnant, leaving her with three weeks or less to obtain an abortion in Texas. After the eleven days, Judge Kavanaugh would not have required that Jane be permitted to immediately access an abortion, but rather he would have required that Jane go back into court to request another order which the government could appeal—in other words, she could start her case all over again.

Judge Kavanaugh also testified that he "did not join the separate opinion of another dissenter who said that there was no constitutional right at all for the minor," issued by D.C. Circuit Judge Karen Henderson.[21] That he did not join an extreme opinion does not negate the fact that he misapplied precedent and blocked Jane's abortion.[22] Furthermore, unlike Judge Millett, Kavanaugh did not explicitly disavow Judge Henderson's opinion in his dissent.

Senator Blumenthal noted that in his *Garza* dissent, Judge Kavanaugh referred to *Roe v. Wade* as "*existing* Supreme Court precedent." (Emphasis added) Senator Blumenthal pointed out that this was an unusual way for an appellate judge to describe precedent, unless he was "opening the possibility of overturning that precedent." Senator Blumenthal compared it to "somebody introducing his wife to you as my current wife."[23]

II. Contraception

A. Judge Kavanaugh limited his agreement with *Griswold v. Connecticut* (1965) to Justice White's narrow concurrence.

Judge Kavanaugh initially declined to answer questions about whether he agreed with two Supreme Court cases that recognized a constitutional right to access contraception. In

[18] 136 S. Ct. 2292 (2016).
[19] *Garza*, 874 F.3d at 737.
[20] September 5, 2018 p.m. (See Appendix at A-12).
[21] September 5, 2018 p.m. (See Appendix at A-13).
[22] Judge Henderson's dissent argued that undocumented immigrants like Jane Doe do not receive any liberty protection under the Constitution. Judge Henderson's position is flatly contradicted by Supreme Court precedent stating that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).
[23] September 5, 2018 p.m. (See Appendix at A-13).

Griswold v. Connecticut (1965),[24] the Supreme Court held that the Constitution's liberty guarantee protected the right of married couples to use and obtain contraception. In *Eisenstadt v. Baird* (1972),[25] the Court extended this right to unmarried adults, explaining that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[26]

When pressed on whether he believed the contraceptive cases were correctly decided, Justice Kavanaugh's answer was telling: he testified only to agreement with Justice White's concurrence, which he found "is a persuasive application" that he has "no quarrel with."[27]

Justice White's concurrence in *Griswold* was limited to a right of marital privacy. Indeed, he found the government's goal of deterring "promiscuous or illicit sexual relationship" to be "concededly a permissible and legitimate government goal."[28] Justice White made clear how narrow he viewed the *Griswold* decision by not joining the Court's opinion in *Eisenstadt*—which extended the right to contraception to non-married people—and limiting his concurrence to the right of married couples.[29] Significantly, Justice White dissented in *Roe*, finding "nothing in the language or history of the Constitution" to support it.[30] Over the next two decades, even as he acknowledged the importance of stare decisis,[31] Justice White's subsequently called on the Supreme Court to overrule *Roe*.[32]

B. Judge Kavanaugh's Dissent in *Priests for Life*

Judge Kavanaugh was also asked at least twice about his opinion dissenting from a denial of rehearing en banc in *Priests for Life v. Health & Human Services*.[33] In this case, non-profit employers with religious objections to the Affordable Care Act's contraceptive coverage benefit challenged the accommodation granted to such employers. The accommodation enables employers to opt out of providing coverage by filling out a two-page form while preserving employees' access to contraception directly from the health insurer.

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[24] 381 U.S. 479 (1965).
[25] 405 U.S. 438 (1972).
[26] *Id.* at 453.
[27] September 5, 2018 p.m. (See Appendix at A-15).
[28] *Griswold v. Connecticut*, 381 U.S. 479, 505 (1965) (White, J., concurring) (finding "no reason for reaching the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried").
[29] *Eisenstadt v. Baird*, 405 U.S. 438, 465 (1972) (White, J., concurring).
[30] *Roe v. Wade*, 410 U.S. 179, 221 (1973) (White, J., dissenting, joined by Rehnquist, J.). Justice White also authored the majority opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which rejected a right to sexual intimacy for LGBT people (a decision later overturned by *Lawrence v. Texas*, 539 U.S. 558 (2003).
[31] *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 786 (1986) (White, J., dissenting, joined by Rehnquist, J.).
[32] *See id.*; *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., White, J., and Thomas, J.).
[33] 808 F.3d 14 (D.C. Cir. 2014).

In his testimony, Judge Kavanaugh said that the contraceptive accommodation was "quite clearly" a substantial burden on the religiously-affiliated employers' religious exercise.[34] He described the case as a challenge to the two-page form that the employers believed "would make them complicit in the provision of the *abortion-inducing drugs* that they . . . – as a religious matter, objected to."[35] (Emphasis added) Notably, the case involved only FDA-approved methods of contraception, not "abortion-inducing drugs." Judge Kavanaugh's adoption in his testimony of the objecting employers' inaccurate factual claim is consistent with the high degree of deference he gave to the employers in his dissent, where he asserted that courts could not question the "correctness or reasonableness" of a religious belief, only its sincerity.[36]

During his testimony, Judge Kavanaugh also said that his finding of a substantial burden in *Priests for Life* was "based on the [*Burwell v.*] *Hobby Lobby* precedent[37] which I was bound to follow."[38] However, his opinion extended *Hobby Lobby*; it did not merely apply it. In *Hobby Lobby*, for-profit employers would have been required to provide contraception coverage without being afforded an accommodation, and the Supreme Court held the accommodation was an alternative that could be made available to for-profit employers under the Religious Freedom Restoration Act ("RFRA"). The non-profit employers in *Priests for Life* challenged the accommodation itself, and Judge Kavanaugh would have held it violated RFRA.[39]

III. Judge Kavanaugh repeated his praise for a narrow, backward-looking approach to defining the scope of individual liberty under the Constitution.

Judge Kavanaugh received several questions about his 2017 speech praising Chief Justice Rehnquist's dissents in *Roe* and *Casey*, which reject a constitutional right to abortion. Kavanaugh particularly had praised Rehnquist's application of a standard limiting constitutionally-protected liberties to only those "deeply rooted in the Nation's history and tradition."[40]

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[34] September 6, 2018 p.m. (See Appendix at A-16).
[35] *Id.*
[36] *Priests for Life*, 808 F.3d at 17 (Kavanaugh, J., dissenting).
[37] *See* 134 S. Ct. 2751 (2014) (invalidating the requirement that closely-held, for-profit businesses with religious objections to contraception nonetheless must buy health-insurance coverage for their employees that pays for contraception, or else face taxes or penalties).
[38] September 6, 2018 p.m. (See Appendix at A-17).
[39] Judge Kavanaugh did confirm in his testimony that in *Priests for Life*, he "did find a compelling interest for the government in ensuring access." However, in his opinion, he left open the question of whether there would be a compelling state interest for government to facilitate access to contraceptives that some would consider to be "abortifacients." *Priests for Life*, 808 F.3d at 23 n.10. His use of the term "abortifacients" in his dissent is similar to his use of "abortion-inducing drugs" in his testimony in that it adopts anti-abortion groups' inaccurate and unscientific description of contraception.
[40] *From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist* at the American Enterprise Institute (Sept. 18, 2017), http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf. For further information, see our report of August 30, 2018 at https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/PublicReportonJudgeBrettKavanaugh.pdf.

In his testimony, Judge Kavanaugh reiterated his support for the "history and tradition" approach to defining individual liberty, relying on the Supreme Court's decision in *Washington v. Glucksberg* (1997),[41] which rejected a constitutional right to assisted suicide for the terminally ill. Kavanaugh testified: "All roads lead to the *Glucksberg* test as the test that the Supreme Court has settled on as the proper test" for determining the scope of individual liberty.[42]

Justice Kavanaugh's reliance on *Glucksberg* is telling. Less than a year ago, he said: "[E]ven a first-year law student could tell you that the *Glucksberg* approach to unenumerated rights was not consistent with the approach of the abortion cases such as *Roe v. Wade* in 1973—as well as the 1992 decision reaffirming *Roe*, known as *Planned Parenthood v. Casey*."[43]

Moreover, Judge Kavanaugh is incorrect to say that the Supreme Court has "settled" on *Glucksberg*'s history and tradition test. In *Obergefell v. Hodges* (2015), which held that same-sex couples have a constitutional right to marry, Justice Kennedy wrote for the Court that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries," because "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[44]

Judge Kavanaugh also testified that Justice Elena Kagan said during her confirmation hearing that *Glucksberg*'s "history and tradition" approach was the standard for defining liberty rights.[45] However, in a written response to a question submitted by Senator John Cornyn, Justice Kagan made clear that the *Glucksberg* test is merely the "*starting point* for any consideration of a due process liberty claim."[46] (Emphasis added)

Judge Kavanaugh was also asked about a portion of his 2017 speech that criticized the Warren Court for "enshrining its policy views into the Constitution."[47] When asked which cases he had in mind for this criticism, Judge Kavanaugh said "I referred to them in the speech."[48] The speech specifically referred to *Roe*, praising Chief Justice Rehnquist's dissenting opinion, which rejected a constitutional right to abortion.[49]

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[41] 521 U.S. 702 (1997).
[42] September 5, 2018 p.m. (See Appendix at A-18).
[43] *From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist* at the American Enterprise Institute at 16 (Sept. 18, 2017), http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.
[44] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598, 2602 (2015).
[45] September 6, 2018 p.m. (See Appendix at A-18, A-19).
[46] *Nomination of Elena Kagan to be Associate Justice of the Supreme Court of the United States: Responses to Supplemental Questions from Senators Jeff Sessions, Orrin Hatch, Charles Grassley, Jon Kyl, Lindsey Graham, John Cornyn, and Tom Coburn* (July 2, 2010), https://www.judiciary.senate.gov/imo/media/doc/ElenaKagan-QFRs.pdf.
[47] *From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist* at the American Enterprise Institute at 5 (Sept. 18, 2017), http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.
[48] September 6, 2018 p.m. (See Appendix at A-21).
[49] *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) ("[T]he asserted right to an abortion is not so rooted in the traditions and conscience of our people as to be ranked as fundamental").

Conclusion

Judge Kavanaugh's writings, speeches, opinions, and testimony evince a judicial philosophy fundamentally hostile to the protection of reproductive rights under the U.S. Constitution. All Senators who care about ensuring that the Supreme Court uphold the constitutional protections for women's reproductive rights should oppose his confirmation.

APPENDIX:
SUMMARY OF JUDGE KAVANAUGH'S TESTIMONY
RELATED TO REPRODUCTIVE RIGHTS[50]

The right to abortion under *Roe v. Wade* and its progeny

SENATOR FEINSTEIN: Let me give you a couple of other quotes, because I'm going to change the subject. Do you agree with Justice O'Connor, that a woman's right to control her reproductive life impacts her ability to, quote, "participate equally in the economic and social life of the nation," end quote?

JUDGE KAVANAUGH: Well, as a general proposition, I understand the importance of the precedent set forth in *Roe v. Wade*. So *Roe v. Wade* held, of course, and it reaffirmed in *Planned Parenthood v. Casey*, that a woman has a constitutional right to obtain an abortion before viability subject to reasonable regulation by the state up to the point where that regulation constitutes an undue burden on the woman's right to obtain an abortion.

(September 5, 2018 a.m.)

* * *

SENATOR FEINSTEIN: It's been reported that you have said *Roe* is now settled law. The first question I have of you is what do you mean by settled law? I tried to ask earlier do you believe that it's correct law? Have your views on whether *Roe* is settled precedent or could be overturned, and has your views changed since you were in the Bush White House?

JUDGE KAVANAUGH: Senator, I said that it's settled as a precedent of the Supreme Court entitled the respect under principles stare decisis. And one of the important things to keep in mind about *Roe v. Wade* is that it has been reaffirmed many times over the past 45 years, as you know, and most prominently, most importantly reaffirmed in *Planned Parenthood v. Casey* in 1992.

(September 5, 2018 a.m.)

* * *

SENATOR FEINSTEIN: But I want to switch subjects and one last question. What would you say your position today is on a woman's right to choose?

JUDGE KAVANAUGH: As a judge...

SENATOR FEINSTEIN: As a judge.

JUDGE KAVANAUGH: As a judge, it is an important precedent of the Supreme Court. By it I mean *Roe v. Wade* and *Planned Parenthood v. Casey*; been reaffirmed many times. *Casey* is

[50] These excerpts are from transcripts published by Bloomberg Government as of September 8, 2018, available at https://www.bgov.com/core/search/transcripts (subscription required).

precedent on precedent, which itself is an important factor to remember. And I understand the significance of the issue, the jurisprudential issue and I understand the significance, as best I can -- I always try and I do here -- of the real world effects of that decision, as I try to do of all the decisions of my court and of the Supreme Court.

(September 5, 2018 a.m.)

* * *

SENATOR GRAHAM: Yeah. Can you, in 30 seconds, give me the general holding of *Roe v. Wade*?

JUDGE KAVANAUGH: As elaborated upon in *Planned Parenthood vs. Casey*, a woman has a Constitutional right, as interpreted by the Supreme Court, in the Constitution to obtain an abortion up to the point of viability, subject to reasonable regulations by the state, so long as those reasonable regulations do not constitute an undue burden on the woman's right.

SENATOR GRAHAM: OK. As to how the system works, can you sit down with five -- you and four other judges, and overrule *Roe v. Wade* just because you want to?

JUDGE KAVANAUGH: Senator, *Roe v. Wade*'s an important precedent of the Supreme Court; been reaffirmed...

(September 5, 2018 a.m.)

* * *

SENATOR GRAHAM: When it comes to overruling a long-standing precedent of the court, is there a formula that you use?

[. . .]

JUDGE KAVANAUGH: So first of all, you start with the notion of precedent and as I've said to Senator Feinstein in this context, this is a precedent that's been re-affirmed many times over 45 years, including in *Planned Parenthood v. Casey*, where they specifically consider whether to overrule and reaffirmed and applied all of the stare decisis factors that importantly became precedent on precedent in this -- this context.

But you look at -- there are factors you look at whenever you are considering any precedent.

(September 5, 2018 a.m.)

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SENATOR BLUMENTHAL: Well, let me just ask you then, can you commit, sitting here today, that you would never overturn *Roe v. Wade*?

JUDGE KAVANAUGH: So Senator, each of the eight justices currently on the Supreme Court, when they were in this seat, declined to answer that question.

(September 5, 2018 p.m.)

* * *

SENATOR HARRIS: Do you believe the right to privacy protects a woman's choice to terminate a pregnancy?

JUDGE KAVANAUGH: That is a question that, of course, implicates *Roe v. Wade*. And following the lead of the nominees for the Supreme Court, all eight current -- sitting justices of the Supreme Court have recognized that two principles that are important. One, we shouldn't talk about in this position cases or issues that are likely to come before the Supreme Court or could come before the Supreme Court. And secondly, I think Justice Kagan provided the best articulation of commenting on precedent. She said we shouldn't give a thumbs up or thumbs down.

SENATOR HARRIS: I appreciate that. And I did hear you make reference to that, that perspective earlier. But you also, I'm sure, know that Justice Ginsburg at her confirmation hearing said, quote, this is -- on this topic of *Roe* -- quote, "This is something central to a woman's life, to her dignity. It's a decision she must make for herself. And when government controls that decision for her, she's being treated as less than a fully adult human responsible for her own choices." Do you agree with the statement that Justice Ginsburg made?

JUDGE KAVANAUGH: So Justice Ginsburg I think there was talking about something she had previously written about *Roe v. Wade*. The other seven justices currently on the Supreme Court have been asked about that and have respectfully declined to answer about that or many other preferences, all the -- whether it was Justice Marshall about *Miranda* or about *Heller* or *Citizens United*.

[. . .]

SENATOR HARRIS: No, I appreciate that. But on -- but I'm glad you mentioned that Justice Ginsburg had written about it before, because you also have written about *Roe* when you praised Justice Rehnquist's *Roe* dissent. So in that way, you and Justice Ginsburg are actually quite similar, that you both have previously written about *Roe*.

So my question is, do you agree with her statement? Or in the alternative, can you respond to the question of whether you believe a right to privacy protects a woman's choice to terminate her pregnancy?

JUDGE KAVANAUGH: So I have not articulated a position on that. And consistent with the principle articulated, the nominee precedent that I feel duty-bound to follow as a matter of judicial independence, none of the seven other justices of -- when they were nominees -- have talked about that, nor about *Heller*, nor about *Citizens United*, nor about *Lopez v. United States*, Thurgood Marshall, about *Miranda*, Justice Brennan asked about...

SENATOR HARRIS: Respectfully judge, as it relates to this hearing, you're not answering that question, and we can move on.

Can you think of any laws that give government the power to make decisions about the male body?

JUDGE KAVANAUGH: I'm happy to answer a more specific question. But...

SENATOR HARRIS: Male versus female.

JUDGE KAVANAUGH: There are medical procedures.

SENATOR HARRIS: That the government -- that the government has the power to make a decision about a man's body?

JUDGE KAVANAUGH: Thought you were asking about medical procedures that are unique to men.

SENATOR HARRIS: I'll repeat the question. Can you think of any laws that give the government the power to make decisions about the male body?

JUDGE KAVANAUGH: I'm not -- I'm not -- I'm not thinking of any right now, Senator.

SENATOR HARRIS: When referring to cases as settled law, you have described them as precedent and, quote, "precedent on precedent." You've mentioned that a number of times today and through the course of the hearing. As a factual matter, can five Supreme Court justices overturn any precedent at any time if a case comes before them on that issue?

JUDGE KAVANAUGH: You start with the system of precedent that's rooted in the Constitution.

SENATOR HARRIS: I know, but just as a factual matter, five justices, if an agreement can overturn any precedent, wouldn't you agree?

JUDGE KAVANAUGH: Senator, there's a reason why the Supreme Court doesn't do that.

SENATOR HARRIS: But do you agree that it can do that?

JUDGE KAVANAUGH: Well, it has overruled precedent at various times in our history, the most prominent example being *Brown v. Board of Education*, the *Erie* case, which overruled *Swift v. Tyson*. There are tons.

SENATOR HARRIS: So we both agree. We both agree the court has done it and can do it.

JUDGE KAVANAUGH: There are times, but there's a series of conditions, important conditions that, if faithfully applied, make it rare. And the system of precedents rooted in the Constitution, it's not a matter of policy to be discarded at whim.

(September 5, 2018 p.m.)

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SENATOR FEINSTEIN: During your service at the White House, . . . 2001 to 2006, did you work on any issues related to women's reproductive health or choice?

JUDGE KAVANAUGH: There -- President Bush was a pro-life president. And so, his policy was pro-life, and those who worked for him, therefore, had to assist him, of course, in pursuing those policies whether they were regulatory. There was partial birth legislation that was passed as well.

And some of those things might have crossed my desk.

(September 6, 2018 a.m.)

* * *

SENATOR GRAHAM: Now, there are a lot of people that like it, a lot of people don't. It's an emotional debate in the country. The -- is there anything in the Constitution about a right to abortion, is anything written in the document?

JUDGE KAVANAUGH: Senator, the Supreme Court has recognized to right to abortion since the 1973 *Roe v. Wade* case...

[. . .]

SENATOR GRAHAM: ... but my question is, did they find a phrase in the Constitution that said that the state cannot interfere with a woman's right to choose until medical viability occurs? Is that in the Constitution?

JUDGE KAVANAUGH: The Supreme Court applying the liberty...

SENATOR GRAHAM: It's a pretty simple, no, it's not, Senator Graham.

JUDGE KAVANAUGH: ... Well, the - I want to just be...

SENATOR GRAHAM: But those words.

JUDGE KAVANAUGH: ... I want to be very careful because this is a...

SENATOR GRAHAM: OK.

JUDGE KAVANAUGH: ... topic, on which...

SENATOR GRAHAM: No, if you'll just follow me, I'll let you talk. But the point is, will you tell me, yes or no, is there anything in the document itself talking about limiting the state's ability to protect the unborn before viability? Is there any phrase in the Constitution about abortion?

JUDGE KAVANAUGH: The Supreme Court has found it under the liberty clause, but you're right that specific...

SENATOR GRAHAM: Was there anything in the liberty clause talking about abortion?

JUDGE KAVANAUGH: ... The liberty clause refers to liberty, but not --

SENATOR GRAHAM: OK. Well, the last time I checked, liberty...

JUDGE KAVANAUGH: Yes.

SENATOR GRAHAM: ... didn't equate to abortion, I - the Supreme Court said it did. But here's the point, what are the limits on this concept? You had five, six, seven, eight or nine judges. What are the limits on the ability of the court to find a penumbra of rights that apply to a particular situation?

What are the checks and balances of the people in your business? If you can find five people who agree with you to confer a right, whether the public likes it or not, based on this concept on a penumbra of rights? What are the outer limits to this?

JUDGE KAVANAUGH: The Supreme Court in the *Glucksberg* case, which was in the late '90s -- and, Justice Kagan talked about this at her hearing -- is the -- the test that the Supreme Court uses to find unenumerated rights under the liberty clause of the Due Process Clause of the 14th Amendment. And that refers to rights rooted in the history and tradition of the -- of the country, so as to prevent...

SENATOR GRAHAM: So let me ask you this. Is there any right rooted into history and traditions of the country, where legislative bodies could not intercede on the behalf of the unborn before medical viability? Is that part of our history?

JUDGE KAVANAUGH: The Supreme Court precedent has recognized the right to abortion. I'm...

SENATOR GRAHAM: I'm just saying, what part of the history of our -- I don't think our founding fathers – people mentioned our founding fathers, I don't remember that being part of American history. So how did the court determine that it was?

JUDGE KAVANAUGH: The court applied the precedent that existed. And found, in 1973, that under the liberty clause...

SENATOR GRAHAM: Yes, but before 1970 -- I mean, when you talk about the history of the United States, the court has found that part of our history is for the legislative bodies not to have a say about protecting the unborn until medical viability.

I don't - I haven't - whether you agree with it or not, I don't think that's part of our history. So fill in the blank. What are the limits of people in your business applying that concept to almost anything that you think to be liberty?

JUDGE KAVANAUGH: And that -- that is the concern that some have expressed about the concept of unenumerated rights.

(September 6, 2018 a.m.)

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SENATOR HARRIS: In 2016, *Whole Woman's Health* was decided wherein the Supreme Court invalidated the Texas restrictions. Was *Whole Woman's Health* correctly decided, yes or no? And we can keep it short and move on.

JUDGE KAVANAUGH: Senator, consistent with the approach of nominee...

SENATOR HARRIS: You will not be answering that.

JUDGE KAVANAUGH: ... following that nominee precedent.

SENATOR HARRIS: OK. I'd like to ask you another question, which I believe you can answer. You've said repeatedly that *Roe v. Wade* is an important precedent. I'd like to understand what that really means for the lives of women. We've had a lot of conversations about how the discussion we're having in this room will impact real people out there.

And so my question is what, in your opinion, is still unresolved? For example, can a state prevent a woman from using the most common or widely accepted medical procedure determining her pregnancy? Do you believe that that is still an unresolved issue? I'm not asking how you would decide it.

JUDGE KAVANAUGH: So I don't want to comment on hypothetical cases. *Roe v. Wade* is an important precedent. It has been reaffirmed many times.

SENATOR HARRIS: So are you willing to say that it would be unconstitutional for a state to play such a restriction on women...

JUDGE KAVANAUGH: Senator...

SENATOR HARRIS: ... per *Roe v. Wade*?

JUDGE KAVANAUGH: ... you can -- the process in the Supreme Court was -- *Roe* was reaffirmed in *Parenthood v. Casey*, of course, and that's precedent on precedent. And there are a lot of cases applying the undue burden standard. And -- and those themselves are important precedence, and I had to apply them.

[. . .]

SENATOR HARRIS: Can Congress ban abortions nationwide after 20 weeks of pregnancy?

JUDGE KAVANAUGH: Senator, that's -- it would require me to comment on potential legislation that I understand, and therefore I -- I shouldn't -- as a matter of judicial independence following the precedent of the other [nominees] . . .

(September 6, 2018 p.m.)

Judge Kavanaugh's 2003 email that not all legal scholars view *Roe* as "settled law"

SENATOR FEINSTEIN: Have your views about whether *Roe* is settled precedent changed since you were in the Bush White House?

[. . .]

JUDGE KAVANAUGH: Well, I'll tell you what my views -- I'm not sure what it's referring to about Bush White House, but I will tell you what my view right now is. Which is it's important precedent Supreme Court that's been reaffirmed many times, but then *Planned* -- and this is the point I want to make that I think is important. *Planned Parenthood v. Casey* reaffirmed *Roe* and did so by considering the stare decisis factors. So Casey now becomes a precedent on precedent.

It's not as if it's just a run-of-the-mill case that was decided and never been reconsidered, but *Casey* specifically reconsidered it, applied the stare decisis factors and decided to reaffirm it. That makes *Casey* a precedent on precedent. Another example of that -- because you might say there are other cases like that -- is *Miranda*.

So *Miranda*'s reaffirmed a lot but then in the *Dickerson* case in 2000, Chief Justice Rehnquist writes the opinion, considering the stare decisis factors and reaffirming *Miranda*, even though Chief Justice Rehnquist, by the way, had been a fervent critic of *Miranda* throughout his career, he decided that it had been settled too long, had been precedent too long and he reaffirmed it.

(September 5, 2018 a.m.)

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SENATOR BLUMENTHAL: Is it a fact, judge, also that while you were in the Bush White House, you took the position that not all legal scholars actually believe that *Roe v. Wade* is the settled law of the land and that the Supreme Court could always overturn it as precedent -- and in fact there were a number of justices who would do so?

JUDGE KAVANAUGH: I think that's what legal scholars have -- some -- some legal scholars have undoubtedly said things like that over time, but that -- that's different from what I as a judge -- my position as a judge is that there's 45 years of precedent and there's *Planned Parenthood v. Casey*, which reaffirmed *Roe*. So that's precedent on precedent, as I've explained, and that's important. And that's an important precedent to the Supreme Court.

(September 5, 2018 p.m.)

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Note: The email that Senator Blumenthal referenced in his 9/5 questioning was released on 9/6. Commenting on a draft op-ed in support of then-nominee to the Fifth Circuit Priscilla Owen, Kavanaugh wrote in the 2003 email: "I am not sure that all legal scholars refer to Roe as the settled law of the land at the Supreme Court level since Court can always overrule its precedent, and three current Justices on the Court would do so."

SENATOR FEINSTEIN: Thank you, Mr. Chairman. I'm going to go back to *Roe*, because most of us look at you as the deciding vote. And I asked yesterday if your views on *Roe* have changed since you were in the White House.

You said something to the effect that you didn't know what I meant. And we have an e-mail that was previously marked confidential but is now public and shows that you asked about making edits to an op-ed that read the following, and I quote, "first of all it is widely understood, accepted by legal scholars across the board, that *Roe v. Wade* and its progeny are the settled law of the land", end quote.

You responded by saying, and I quote, "I'm not sure that all legal scholars refer to Roe as a settled law of the land at the Supreme Court level, since court can always overrule its precedent. And three current justices on the court would do so."

This has been viewed as you saying that you don't think *Roe* is settled. I recognize the words said is what legal scholars refer to, so please, once again, tell us why you believe *Roe* is settled law and if you could, do you believe it is correctly settled?

JUDGE KAVANAUGH: So thank you, Senator Feinstein, in that draft letter, it was referring to the views of legal scholars and I think I -- I think my comment in the e-mail was that might be overstating the position of legal scholars and so it wasn't a technically accurate description in the letter of what legal scholars thought. At that time, I believe, Chief Justice Rehnquist and Justice Scalia were still on the court at that time.

But the -- the broader points was simply that I think it was overstating something about legal scholars. And I'm always concerned with accuracy and I thought that was not quite accurate description of legal -- all legal scholars, because it referred to all. To your point, your broader point, *Roe v. Wade* is an important precedent of the Supreme Court.

(September 6, 2018 a.m.)

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SENATOR HATCH: Well, I -- I want to return to the e-mail Senator Feinstein was asking you about. You were asked for your comments on an op-ed that was going to be published by a group of pro-choice women in support of a circuit court nominee. You said, quote, "I am not sure that all legal scholars refer to Roe as the settled law of the land at the Supreme Court level since court can always overrule its precedent," unquote. You then added, quote, "the point there is in the inferior court point," unquote.

Were you giving your opinion on *Roe* there or were you talking about what law scholars might say?

JUDGE KAVANAUGH: I was talking about what legal scholars might say, and I thought the op-ed should be accurate about what -- in describing legal scholars.

(September 6, 2018 a.m.)

Judge Kavanaugh's dissent in *Garza v. Hargan*

SENATOR DURBIN: In your dissent in *Garza v. Hargan*, you wrote that the court had created, quote, "a new right for unlawful immigrant minors in the United States government detention to obtain immediate abortion on demand, thereby barring any government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision."

[. . .]

Do you believe that this was an abortion on demand?

JUDGE KAVANAUGH: Senator, the *Garza* case involved first and foremost a minor; it's important to emphasize it was a minor.

SENATOR DURBIN: Yes.

JUDGE KAVANAUGH: So she had been -- and she's in an immigration facility in the United States. She's from another country, she does not speak English, she's -- and she's by herself. If she had been an adult, she would have a right to obtain the abortion immediately.

As a minor, the government argued that it was proper or appropriate to transfer her quickly first to an immigration sponsor. Who is an immigration sponsor, you ask? It is a family member or friend who she would not be forced to talk to, but she could consult with if she wanted about the decision facing her.

So we had to analyze this first as a minor and then for me, the first question was, what's the precedent? The precedent on point from the Supreme Court is there is no case on exact point, so you do what you do in all cases -- you reason by analogy from the closest thing on point.

What's the closest body of law on point? The parental consent decisions of the Supreme Court, where they've repeatedly upheld parental consent laws over the objection of dissenters who thought that's going to delay the procedure too long, up to several weeks.

[. . .]

SENATOR DURBIN: Judge -- well, I -- before you get to the point, you've just bypassed something. You just bypassed the judicial bypass, which she received from the state of Texas when it came to parental consent. That's already happened here.

JUDGE KAVANAUGH: But that -- that...

SENATOR DURBIN: And you're still stopping her.

JUDGE KAVANAUGH: I -- I -- I'm not. The -- the government is arguing that placing her with an immigration sponsor would allow her, if she wished, to consult with someone about the decision. That is not the purpose of the state bypass procedure, so I just want to be very clear about that.

SENATOR DURBIN: But Judge, the clock is ticking.

JUDGE KAVANAUGH: It is.

SENATOR DURBIN: The clock is ticking. A 20 week clock is ticking.

JUDGE KAVANAUGH: And I...

SENATOR DURBIN: She made the decision early in the pregnancy, and all that I've described to you and the judicial decisions, the clock is ticking. And you are suggesting that she should've waited to have a sponsor appointed who she may or may not have consulted in making this decision.

JUDGE KAVANAUGH: Again, this is -- I'm a Judge; I'm not making the policy decision. My job is to decide whether that policy is consistent with law. What do I do? I look at precedent, and the most analogous precedent is the parental consent precedent.

From *Casey* has this phrase, so page 895 -- "minors benefit from consultation about abortion" -- it's a quote, talking about consultation with parents.

(September 5, 2018 p.m.)

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SENATOR BLUMENTHAL: [Your *Garza* dissent] would have delayed [Jane's abortion], and it would have set it perilously close to the 20-week limit under Texas law, correct?

JUDGE KAVANAUGH: No. We were still several weeks away. I said several things that are important, I think.

[. . .]

I was trying to follow precedent of the supreme court on parental consent, which allows some delays in the abortion procedure, so as to fulfill the consent -- parental consent requirements. I was reasoning by analogy from those. People can disagree, I understand, on whether we were following precedent, you know, how to read that precedent, but I was trying to do so as faithfully as I could and explain that.

(September 5, 2018 p.m.)

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SENATOR BLUMENTHAL: Well, let's talk about the dissent though. In that dissent, three times you used the term, abortion on demand. Abortion on demand, as you know, is a code word in the anti-choice community.

In fact, it's used by Justices Scalia and Thomas in their dissents from Supreme Court opinions that affirm *Roe v. Wade*. They used it numerous times in those dissents and it is a word used in the antichoice community.

And in addition in that dissent, you refer to *Roe v. Wade* as existing Supreme Court precedent. You don't refer to it as *Roe v. Wade* protecting Jane Doe's right to privacy or the right to an abortion. You refer to it as existing Supreme Court precedent. Not Supreme Court precedent, existing Supreme Court precedent.

Now, I don't refer -- I don't recall seeing a judge refer to existing Supreme Court precedent in other decisions, this is certainly not commonly unless they're opening the possibility of overturning that precedent. It's a little bit like somebody introducing his wife to you as my current wife; you might not expect that wife to be around for all that long. My current wife, existing Supreme Court precedent.

JUDGE KAVANAUGH: [. . .] I was referring to the parental consent cases as well, which I just talked about at some length there, and my disagreement with the other judge was that I thought I was, as best I could, faithfully following the precedent on a parental consent statutes, which allowed reasonable regulation, as *Casey* said, minors benefit from consultation about abortion, that's an exact quote from Casey. [. . .] And so an existing Supreme Court precedent, I put it all together, *Roe v. Wade*, plus the parental consent statutes. And I said, different people disagree about this from different direction, but we have to follow it as faithfully as possible, and the parental consent, were the -- was the model -- not the model, the precedent.

Can I say on abortion on demand, I don't -- I'm not familiar with the codeword, what I am familiar with is Chief Justice Burger and his concurrence on *Roe v. Wade* itself. So he joined the majority in *Roe v. Wade*, and he wrote a concurrence that specifically said that the court to date does not uphold abortion on demand, that's his phrase, and he joined the majority in *Roe v. Wade*. And what that meant in practice over the years, over the last 45 years is that reasonable regulations are permissible, so long as they don't constitute an undue burden, and that's then the parental consent, the informed consent, the 24 hour waiting period, parental notice laws. And that's what I understood Chief Justice Burger to be contemplating and what I was recognizing when I used that term.

[. . .]

I'll just say two other things, Senator? One, I did not join the separate opinion of another dissenter who said that there was no constitutional right at all for the minor in that case; I did not join that opinion. And secondly I -- or I'll say three things -- secondly, I said in a footnote, joined by Judge Henderson and Judge Griffith that -- the whole -- my whole dissent was joined by both of them -- that the government could not use this transfer to be a sponsor procedure as a ruse to delay the abortion past unsafe time...

[. . .]

And I said thirdly that if the nine days or seven days expired, that the minor, at that point, unless the government had some other argument it had not unfolded yet that was persuasive and I -- since they hadn't unfolded it yet, I'm not sure what that would have been, that the minor would have to be allowed to obtain the abortion at that time.

So the whole point was simply -- and it wasn't my policy, but my question was to review the policy set forth by the government. And the question was was that policy consistent with precedent. And it was a delay, undoubtedly, but a delay consistent as I saw it with the Supreme Court precedent on parental consent provisions.

(September 5, 2018 p.m.)

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SENATOR HIRONO: Does the fact that you didn't join [Judge Henderson's dissent] mean that undocumented persons do have a constitutional right to an abortion?

JUDGE KAVANAUGH: Well, I decided that case based on the precedent of the Supreme Court and the arguments that were presented in the case. I made clear that I was following as carefully as I could the precedent.

[. . .]

SENATOR HIRONO: Since you've mentioned several times that you did not join the dissent and the crux of the dissent was that there was no constitutional right for an alien minor to have an abortion. I want to ask you did you join or did you not join that consent because you disagree with that. That in fact alien minors do have a right to an abortion in our country.

JUDGE KAVANAUGH: Well as a general proposition -- first of all, the government did not argue in that case that aliens lack constitutional right generally to obtain an abortion.

SENATOR HIRONO: Yes, even they didn't argue it because probably they figured that that's -- that is a decided issue but maybe you don't think so. Do you think that is an open question as to whether or not alien minors or in fact, aliens in our country have a right to -- constitutional right to an abortion? Do you think that is an open case?

JUDGE KAVANAUGH: The Supreme Court has recognized that persons in the United States have constitutional rights.

(September 5, 2018 p.m.)

The constitutional right to contraception

SENATOR HARRIS: Thank you. In *Griswold* and *Eisenstadt*, the Supreme Court said that states could not prohibit either married or unmarried people from using contraceptives. Do you believe *Griswold* and *Eisenstadt* were correctly decided?

JUDGE KAVANAUGH: So those cases followed from the Supreme Court's recognition of unenumerated rights in the *Pierce* and *Meyer* cases earlier. And so what those cases held is that there is a right of privacy...

SENATOR HARRIS: And do you agree -- do you personally agree that these cases, those two cases were correctly decided? So I'm asking not what the court held, but what you believe.

JUDGE KAVANAUGH: I mean, so I -- so to just go back to *Pierce* and *Meyer*, those cases recognized a right of privacy, the ability -- one might say family autonomy or privacy, is the term, under the liberty clause of the due process clause of the 14th Amendment.

SENATOR HARRIS: And with due respect then, Judge, I'm asking, do you agree that those cases were rightly decided, correctly decided?

JUDGE KAVANAUGH: So I think *Griswold* -- for -- so in *Griswold*, I think that Justice White's concurrence is a persuasive application, because that specifically rooted the *Griswold* result. In the *Pierce* and *Meyer* decisions, I thought that was a persuasive opinion and no...

SENATOR HARRIS: Do you believe that it's correctly decided?

JUDGE KAVANAUGH: No quarrel with that. It's...

SENATOR HARRIS: Do you believe it was correctly decided? Words matter. Again, words matter. Do you believe it was correctly decided?

JUDGE KAVANAUGH: I think -- given the *Pierce* and *Meyer* opinions, like I said, Justice White's concurrence in Griswold was a persuasive application of *Pierce* and *Meyer*. I have no quarrel with it. I...

SENATOR HARRIS: So there's a term that actually both Chief Justice Roberts and Justice Alito used, I believe, and affirmed in their confirmation hearings that these cases were correct. And so I'm asking you the same question. Are you willing in this confirmation hearing to agree that those cases were correctly decided?

JUDGE KAVANAUGH: Given the precedent of *Pierce* and *Meyer*, I agree with Chief -- Justice Alito and Chief Justice Roberts, what they said.

SENATOR HARRIS: That it was correctly decided?

JUDGE KAVANAUGH: That's what they said.

(September 5, 2018 p.m.)

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SENATOR COONS: And here's the most important thing about Justice Kagan's jurisprudence, she did not apply the *Glucksberg* test in *U.S. v. Windsor*, in *Obergefell* or *Whole Woman's Health*.

So, the question I want to get to is what would it mean to go and apply this test in a range of setting? So, first, is judicial protection of the fundamental right to access and use contraception consistent with the *Glucksberg* test? Just simply yes or no question, Judge.

JUDGE KAVANAUGH: I disagree that it's a simple yes or no question. What I've said here is that the precedent of the Supreme Court on that question, what Justice Alito and Chief Justice Roberts said about those . . . , Justice White's concurrence in *Griswold* as first way of application of precedent.

(September 6, 2018 p.m.)

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SENATOR CRUZ: Another case you were involved in as a judge is you wrote a dissent from denial of rehearing en banc in -- in the *Priests for Life* case. Can you tell this committee about that case and your opinion there?

JUDGE KAVANAUGH: That was a group that was being forced to provide a certain kind of health coverage over their religious objection to their employees, and under the Religious Freedom Restoration Act, the question was first, was this a substantial burden on the religious exercise? And it seemed to me quite clearly it was. It was a technical matter of filling out a form, in that case with -- that -- they said filling out the form would make them complicit in the provision of the abortion-inducing drugs that they were – as a religious matter, objected to.

The second question was did the government have a compelling interest nonetheless in providing the coverage to the employees and applying the governing Supreme Court precedent from Hobby Lobby I said that the answer to that was yes, the government did have a compelling interest, following Justice Kennedy's opinion in *Hobby Lobby*. He said the government did have a compelling interest in ensuring access.

(September 6, 2018 p.m.)

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SENATOR HIRONO: In recent years, a wide range of individuals and institutions have received special dispensation to impose their beliefs on others. And of course, most notably, this is the *Hobby Lobby v. Burwell* case. So a case that raised those kinds of issues came before you in the *Priests for Life*.

[. . .]

So my question to you is, do you believe that the freedom of religion cause - supersedes other rights?

JUDGE KAVANAUGH: No, Senator, I made on that decision, that the Religious Freedom Restoration Act has a three-part test. For a substantial burden, I found that satisfied there based on the *Hobby Lobby* precedent which I was bound to follow, in the *Wheaton College*.

Second, compelling interests - I did find a compelling interest there for the government, in ensuring access. [. . .]

SENATOR HIRONO: Let me get to the first problem which is - whether this was unduly burdensome. So you determined that filling out a two-page from was unduly burdensome, did you not?

JUDGE KAVANAUGH: I concluded that penalizing someone thousands and thousands of dollars for failing to fill a form, when they didn't fill it out because of their religious beliefs, was [a substantial burden].

(September 6, 2018 p.m.)

Judge Kavanaugh's judicial philosophy regarding individual liberty

SENATOR LEE: How does textualism relate to or differ from originalism?

JUDGE KAVANAUGH: So originalism, as I see it, has, to my mind, means in essence constitutional textualism, meaning the original public meaning of the constitutional text. Now originalism -- it's very careful when you talk about originalism to understand that people are hearing different things sometimes.

So Justice Kagan, again at her -- at her confirmation hearing said we're all originalists now, which was her comment. By that she meant the precise texts to the constitution matters, and by that the original public meaning, of course informed by history and tradition and precedent, those -- those matter as well.

(September 5, 2018 p.m.)

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SENATOR CRUZ: What you make of the ninth amendment? Robert Bork famously described it as an -- as an ink blot. Do you share that assessment?

JUDGE KAVANAUGH: So I think the Ninth Amendment and the privileges and immunities clause and the Supreme Court's doctrine of substantive due process are three roads that someone might take that all really lead to the same destination under the precedent of the Supreme Court now, which is that the Supreme Court precedent protects certain unenumerated rights so long as the rights are, as the Supreme Court said in the *Glucksberg* case, rooted in history and tradition.

And Justice Kagan explained this well in her confirmation hearing, that the *Glucksberg* test is -- is quite important for allowing that protection of unenumerated rights that are rooted in history and tradition, which the precedent definitely establishes, but at the same time making clear that when doing that, judges aren't just enacting their own policy preferences into the Constitution.

And an example of that is the old *Pierce* case where Oregon passed a law that said everyone in the state of -- this is in the 1920s -- everyone in the state of Oregon had to attend -- every student had to attend a public school. And a challenge was brought by that by parents who wanted to send their children to a parochial school, a religious school. And the Supreme Court ultimately upheld the rights of the parents to send their children to a religious parochial school and struck down that Oregon law.

And that's of the foundations of the unenumerated rights doctrine that's folded into the *Glucksberg* Test and rooted in history and tradition. So how you get there is -- as you know well, Senator, there are stacks of law reviews written to the ceiling on all that. Whether it's privileges and immunities, substantive due process, or Ninth Amendment. But I think all roads lead to the *Glucksberg* test as the test that the Supreme Court has settled on as the proper test.

(September 5, 2018 p.m.)

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SENATOR HIRONO: In 2017 you gave a tribute to the late Chief Justice William Rehnquist. You explained that you chose the topic because it pains me -- you – that many young lawyers and law students, even Federalist Society-types have little or no sense of the jurisprudence and importance of William Rehnquist to modern constitutional law.

And then they -- you went on -- they do not know about his role in turning the Supreme Court away from its 1960s Warren Court approach where the court in some cases has seemed to be simply enshrining its policy views in to the Constitution, or so the critics charged. And then you praised Chief Justice Rehnquist because he righted the ship of constitutional jurisdiction.

What decisions of the Warren Court were you referring to as simply enshrining its policy views in to the Constitution? Were you thinking about *Brown*? Were you think about *Loving*? Were you thinking about any of the Warren Court decisions that created rights for individuals? Privacy rights?

There's a whole array, so which were the Warren Court decisions that you thought needed to be righted by the Rehnquist court?

JUDGE KAVANAUGH: ... I -- and I said, or so the critics charged. I identified the areas where Chief Justice Rehnquist had helped the court, I think, reach consensus or maybe a middle ground on areas such as criminal procedure, that is -- religion clause cases, and identified all those in the speeches.

(September 6, 2018 p.m.)

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SENATOR KENNEDY: Can you tell me what in God's name a penumbra is?

JUDGE KAVANAUGH: Senator, the -- the Supreme Court, as I think you're referring to, once used that term, but it -- it doesn't use that term anymore for figuring out what otherwise unenumerated rights are protected by the Constitution of the United States. What it refers to now is a test in the *Glucksberg* case -- and Justice Kagan talked about this in her confirmation hearing when she was sitting in this seat -- the *Glucksberg* case sets forth a test where unenumerated rights will be recognized if they're rooted in history and tradition.

[. . .]

SENATOR KENNEDY: Is it a -- is it -- is it something that Americans have cherished for a long time, or can it be something that is a -- is a -- is a more of contemporary society?

JUDGE KAVANAUGH: So when the court has referred to deeply rooted in history and tradition, it is -- it has looked to history. Now, how deep the history must be is -- there -- I don't think there's a one-size-fits-all answer to that, and how much contemporary practice matters, I also don't think there's a one-size-fits-all, but the important thing is the court -- and again, Justice Kagan emphasized this in her hearing, that the *Glucksberg* test means that the court is not simply doing what your role is, which is to figure out the best policy and to enshrine it into the law, in the Constitution, in the case of the court, but rather is looking for, as best it can, objective indicia of rights that are not explicitly enumerated in the Constitution but that are nonetheless protected. The best example I think is the *Pierce* case.

(September 6, 2018 p.m.)

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SENATOR HARRIS: So, what we're talking about is the right to vote. That's an unenumerated right. The right to have children, the right to control the upbringing of your children, the right to refuse medical care, the right to love the partner of your choice, the right to marry, and the right to have an abortion.

Now, putting those unenumerated rights in the context of the statement you made, which was to praise the stemming of the general tide of freewheeling creation of unenumerated rights, which means you were -- the interpretation there is you were praising the -- the -- the quest to end those unenumerated rights. My question to you is which of the rights that I just mentioned do you want to put an end to or roll back?

JUDGE KAVANAUGH: Three points, I believe, Senator. First, the constitution, it is in the book that I carry. The constitution protects unenumerated rights. That's what the Supreme Court has said.

SENATOR HARRIS: But that does not explicitly protect the rights that I just listed in. And we both know that that's the case.

JUDGE KAVANAUGH: Right, so that's point one. Point two *Glucksberg*, the case you're referring to, specifically cited *Planned Parenthood v. Casey* as authority in that case. So *Casey* reaffirmed *Roe*. *Casey* is cited as authority in *Glucksberg*. That's point two. And point three, Justice Kagan, when she sat in this chair, pointed repeatedly the *Glucksberg* as the test for recognizing unenumerated rights going forward. I -- in describing the precedent, I agree with her description of that in her hearing.

(September 6, 2018 p.m.)

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SENATOR HIRONO: In 2017 you gave a tribute to the late Chief Justice William Rehnquist. You explained that you chose the topic because it pains me -- you -- that many young lawyers and law students, even Federalist Society-types have little or no sense of the jurisprudence and importance of William Rehnquist to modern constitutional law.

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There's a whole array, so which were the Warren Court decisions that you thought needed to be righted by the Rehnquist court?

JUDGE KAVANAUGH: ... I -- and I said, or so the critics charged. I identified the areas where Chief Justice Rehnquist had helped the court, I think, reach consensus or maybe a middle ground on areas such as criminal procedure, that is -- religion clause cases, and identified all those in the speeches. When he -- when he passed away, and even before he passed away many of the justices who worked with him were very much praiseworthy of Chief Justice Rehnquist for fiercely defending the independence of the judiciary...

SENATOR HIRONO: I'd really be interested to know the particular cases that you're referring to -- not general kinds of cases -- particular cases.

JUDGE KAVANAUGH: I think I referred to them in the speech, but thank you, Senator.

(September 6, 2018 p.m.)

Kavanaugh the right choice

postandcourier.com/opinion/editorials/kavanaugh-the-right-choice/article_ff2de5ce-945f-11e8-9dbf-a7ff54985b12.html

July 10, 2018

Brett Kavanaugh is a highly qualified "originalist" who will help return the Supreme Court to its proper function in American society. The Senate should quickly confirm him.

Judge Kavanaugh, who serves on the U.S. Court of Appeals for the District of Columbia, the nation's top appellate court, fits President Donald Trump's promise to appoint judges known to adhere strictly to the original language of the Constitution and its amendments, and to closely follow the law as laid down by Congress.

That does not mean one can safely predict how he will rule in cases where there are clear political differences. But his rulings show a steady impartiality in applying the law as he sees it.

For example, he has ruled in favor of the Affordable Care Act, a major legacy of the Obama presidency. But he also chided President Obama's attempt to kill the Yucca Mountain nuclear waste repository in Nevada by stopping a review of the proposal mandated by Congress.

"The president may not decline to follow a statutory mandate or prohibition simply because of policy objections," he wrote in an opinion for the D.C. Court of Appeals finding for the plaintiffs including the state of South Carolina.

He also chided Congress in rejecting a law establishing the Public Company Accounting Oversight Board because it sheltered the agency from political accountability. His view in a 2008 case dissented from a majority ruling of the appeals court, but the Supreme Court upheld his reasoning in overturning the lower court's decision.

As a federal judge, Mr. Kavanaugh appears to have taken the orthodox conservative view that Congress is the preeminent policy-making body of the federal government except where the Constitution gives policy-making powers to the executive; that Congress, the executive branch and the judiciary are all bound by the Constitution as it has been interpreted over time, leaning in the direction of original meanings and precision; and that judges and the president are further bound by the permissible decisions of Congress.

It would be a welcome change to see the court allow the political branches of government to decide most political questions rather than the court.

Mr. Kavanaugh has not taken a doctrinaire position for or against the principle of legal precedent, an issue of great concern to those who fear that the Supreme Court might some day overrule Roe v. Wade, its 1973 decision that legalized abortion. Instead, in "The Law of Judicial Precedent" he joined a number of other distinguished legal experts and judges,

including now-Justice Neil Gorsuch, in describing in great detail the legal reasoning that must be followed in deciding if there is a conflict between a legal precedent and the facts of a particular case.

One area of controversy where Judge Kavanaugh has expressed disagreement with current precedent concerns the doctrine of deference by the courts to the rulings of independent federal agencies.

If his nomination is approved, he would join Justice Gorsuch as a second vote against rigid adherence to the precedent known as Chevron deference, a reference to a 1984 Supreme Court decision that said agencies may make decisions in areas not expressly assigned to them by Congress if the agency's ruling is based on what the Supreme Court called a "permissible construction" of the law.

A different ruling that held that in such gray areas Congress, not the agency, has the last voice would make it easier to sue federal agencies, such as the Environmental Protection Agency, if plaintiffs think they are guilty of overreaching.

Senate Democrats can find lots of political reasons to oppose Judge Kavanaugh. After clerking on the Supreme Court for Justice Anthony Kennedy, whom he would replace, he was a member of the independent counsel investigation of Democratic President Bill Clinton headed by Kenneth Starr and then joined the White House of Republican President George W. Bush, where he served as staff secretary.

Except for the possibility that his views on Chevron deference alarm legislators who think Congress should be allowed to write blank checks to federal agencies, opponents will find it hard to argue against him on his track record as a judge. This should be a quick and easy decision for the Senate.

Judging Judge Kavanaugh

chicagotribune.com/news/opinion/editorials/ct-edit-supreme-court-trump-20180709-story.html

Editorial Board

The suspense ended Monday night: After brief remarks, President Donald Trump announced that he's nominating federal appellate Judge Brett Kavanaugh to be the 114th justice of the U.S. Supreme Court. If confirmed by the Senate, Kavanaugh will replace the justice for whom he clerked a quarter century ago, Anthony Kennedy. How should the U.S. senators who will or won't confirm him — how should all Americans — judge Judge Kavanaugh?

There was a time when court nominees were evaluated primarily on the basics: ability, experience, knowledge and temperament. Recall that Antonin Scalia, regarded now as a sharp-edged conservative, was confirmed in 1986 by a 98-0 vote of the Senate. Seven years later, Ruth Bader Ginsburg, today's liberal icon, sailed through 96-3. They were superbly qualified, and that was pretty much that.

Times have changed. Nominations such as Trump's choice of Kavanaugh have become more partisan and ideological as the court has assumed a bigger role in issues once left to the elected branches. Voters, especially on the right, pay more attention to it than they did 50 years ago. One big factor in Trump's election was the confidence of conservatives that whatever his ideological unreliability, he would pick conservatives such as Kavanaugh for the court: In 2016 exit polling, 56 percent of Trump voters said Supreme Court appointments were "the most important factor" in their decision, compared to only 41 percent of Clinton voters.

In turn, presidents now give much weight to the judicial philosophy of candidates — in part to avoid unpleasant surprises. Abolition of the filibuster for Supreme Court nominations means a president such as Trump, whose party controls the Senate, has little need to choose appointees who can win votes across the aisle.

Nominating Kavanaugh to replace Kennedy will reaffirm approval of Trump among the president's supporters and disapproval among his detractors — as did Trump's 2017 nomination of Neil Gorsuch to fill the seat vacated by the death of Scalia.

The Tribune's policy has been to favor candidates who have demonstrated their fitness on objective grounds. In 2010, we praised Elena Kagan, nominated by Barack Obama, as "a first-rate legal mind, a respected scholar and accomplished administrator." In 2016, we admired Merrick Garland for amassing a "long and stellar record on the federal bench" that "has won nearly universal admiration." We opposed Harriet Miers in 2005 because she appeared ill-prepared for the job.

All of us should evaluate Kavanaugh not on how he is likely to vote on abortion rights, the Second Amendment or affirmative action, but on more fundamental characteristics. Predicting how a judge will rule on any particular question is a fool's errand: Ask conservatives who were

shocked when Chief Justice John Roberts provided the deciding vote to uphold Obamacare.

More important is weighing whether Kavanaugh will do the job in a careful, conscientious way, with a deep respect for the text of the Constitution, the language of statutes and the different responsibilities of the three branches of government. A justice who acts mainly to advance some political agenda will be wrong even if he or she votes in the way we would prefer.

Kavanaugh's record suggests that by these standards, he's highly qualified. In 12 years on the U.S. Court of Appeals for the District of Columbia, which deals with especially complex regulatory cases, he's authored some 300 decisions. Taken as a body of work, they reflect a great allegiance to the words of the Constitution. By the time he faces a confirmation hearing, backers and foes of his nomination will have scrutinized his every word.

Trump's selection of Kavanaugh will displease Americans who would prefer more liberal justices. Once again, though, all of us are left with the verity that elections have consequences. Voters who object to a president's choices can turn over the White House and the Senate to the opposing party, which would make very different selections.

In picking Kavanaugh, Trump is nominating an experienced jurist of strong character and principles. Now senators will vet him and decide whether he's worthy of the highest court in the land.

Kavanaugh Is a Mentor To Women

I can't think of a better judge for my own daughter's clerkship.

By
Amy Chua
July 12, 2018 6:48 p.m. ET

Judge Brett Kavanaugh's jurisprudence will appropriately be dissected in the months ahead. I'd like to speak to a less well-known side of the Supreme Court nominee: his role as a mentor for young lawyers, particularly women. The qualities he exhibits with his clerks may provide important evidence about the kind of justice he would be.

I've gotten to know this side of Judge Kavanaugh while serving on Yale Law School's Clerkships Committee for most of the past 10 years. It also affects me personally: Last year my daughter accepted an appellate clerkship from Judge Kavanaugh, which was set to begin next month.

A judicial clerkship is typically a one-year stint after law school. Federal appellate judges usually have three to four clerks at a time. Clerks help the judge to prepare for argument, analyze cases and write opinions.

Many judges use ideological tests in hiring clerks. Judge Kavanaugh could not be more different. While his top consideration when hiring is excellence—top-of-the-class grades, intellectual rigor—he actively seeks out clerks from across the ideological spectrum who will question and disagree with him. He wants to hear other perspectives before deciding a case. Above all, he believes in the law and wants to figure out, without prejudging, what it requires.

Judge Kavanaugh's clerks are racially and ethnically diverse. Since joining the Court of Appeals for the D.C. Circuit in 2006, a quarter of his clerks have been members of a minority group. More than half, 25 out of 48, have been women. In 2014, all four were women—a first for any judge on the D.C. Circuit.

In the past decade, I have helped place 10 Yale Law School students with Judge Kavanaugh, eight of them women. I recently emailed them to ask about their clerkship experiences. They all responded almost instantaneously. They cited his legendary work ethic ("He expected us to work really hard, but there was always one person working harder than us—the Judge"), his commitment to excellence ("he

wants every opinion that comes out of his chambers to be perfect; it is not uncommon to go through 30-50 drafts"), his humility ("He can take a great joke just as easily as he can land one"), and his decency ("I've never seen him be rude to anyone in the building").

To a person, they described his extraordinary mentorship. "When I accepted his offer to clerk," one woman wrote, "I had no idea I was signing up for a lifelong mentor who feels an enduring sense of responsibility for each of his clerks." Another said: "I can't imagine making a career decision without his advice." And another: "He's been an incredible mentor to me despite the fact that I'm a left-of-center woman. He always takes into account my goals rather than giving generic advice."

These days the press is full of stories about powerful men exploiting or abusing female employees. That makes it even more striking to hear Judge Kavanaugh's female clerks speak of his decency and his role as a fierce champion of their careers.

If the judge is confirmed, my daughter will probably be looking for a different clerkship. But for my own daughter, there is no judge I would trust more than Brett Kavanaugh to be, in one former clerk's words, "a teacher, advocate, and friend."

Ms. Chua is a professor at Yale Law School and author, most recently, of "Political Tribes: Group Instinct and the Fate of Nations."

It's hard to find a federal judge more conservative than Brett Kavanaugh

washingtonpost.com/news/monkey-cage/wp/2018/09/05/its-hard-to-find-a-federal-judge-more-conservative-than-brett-kavanaugh

By Kevin Cope and Joshua Fischman

September 5

The Senate Judiciary Committee's Supreme Court confirmation hearings for Judge Brett Kavanaugh are off to a contentious start, replete with protesters and an accusation of "mob rule." The hearings will likely provide more drama than substance, however. Republicans will defend Kavanaugh as principled, Democrats will brand him as extreme, and Kavanaugh himself will reveal as little as possible.

If confirmed, Kavanaugh will replace retired Supreme Court Justice Anthony M. Kennedy, whose votes and views often made him the fulcrum on a divided bench.

So just how conservative is Kavanaugh?

Kavanaugh served a dozen years on the D.C. Circuit Court of Appeals, a court viewed as first among equals of the 12 federal appellate courts. Probing nearly 200 of Kavanaugh's votes and over 3000 votes by his judicial colleagues, our analysis shows that his judicial record is significantly more conservative than that of almost every other judge on the D.C. Circuit. That doesn't mean that he'd be the most conservative justice on the Supreme Court, but it strongly suggests that he is no judicial moderate.

This is how we did our research

To compare Kavanaugh with his colleagues, we collected data on D.C. Circuit decisions from 2003 (to include John Roberts's tenure) until 2018 in four issue areas: criminal, environmental, labor and employment discrimination law. These may not be as flashy as Kavanaugh's decisions involving abortion and gun control, but they are just as important in shaping Americans' lives.

We looked at a total of 1,085 cases; Kavanaugh participated in 188 of them. We coded decisions as liberal if they sided with criminal defendants; supported stricter enforcement of environmental rules; upheld the labor unions' rights; or sided with plaintiffs alleging discrimination.

Here's what we found.

1. Kavanaugh consistently cast conservative votes

In every policy area, Kavanaugh had the most conservative or second-most conservative voting record on the D.C. Circuit.

Across all the cases studied, Kavanaugh took a liberal position about 30 percent of the time. To put that record in perspective, the rest of his colleagues took the liberal position about 40 percent of the time. His most liberal colleagues took a liberal position nearly half the time.

We can see these differences in each of the policy areas studied.

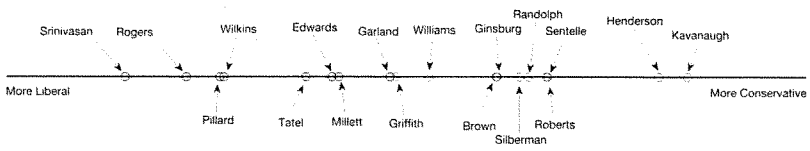
In criminal cases, Kavanaugh supported defendants 14 percent of the time, compared with a quarter of the time for the rest of his colleagues and about a third of the time for the most defendant-friendly judge. Each of the other issue areas revealed similar results: Kavanaugh adopted the conservative position roughly 10 percentage points more often than his average colleague and about 20 percentage points more than the most liberal judges.

2. Kavanaugh is one of the most conservative judges on the D.C. Circuit

Two features of the federal appellate courts allow us to compare Kavanaugh's record to those of his colleagues. First, the court randomly assigns three judges to each panel that hears a case. That means that each judge will deliberate and compromise with a roughly similar mix of colleagues over time. Second, cases are randomly assigned to the three-judge panels, so each judge encounters a roughly similar set of cases over time.

As you can see in the figure below, we estimated ideological scores for each of the judges based on their votes in all four issue areas combined.

How Brett Kavanaugh's ideology compares to other appellate judges



Blue dots represent Democratic appointees; red dots represent Republican appointees

Three key points stand out. First, as you can see, Kavanaugh joins Judge Karen LeCraft Henderson (appointed by President George H.W. Bush in 1990) at the conservative end of the spectrum. Kavanaugh is significantly more conservative than every other judge except current Supreme Court Chief Justice John Roberts and noted conservative jurists Laurence Silberman and David Sentelle.

Second, President Barack Obama's last nominee, Merrick Garland — whom Senate Republicans refused to consider — sits in the ideological center of the D.C. Circuit. But Garland's record on criminal justice issues has been nearly as conservative as Kavanaugh's, even if more liberal over all.

Third, Kavanaugh is more conservative than Douglas Ginsburg, who was nominated to the Supreme Court in 1986 but withdrew because of his controversial admission that he'd used marijuana.

3. Will Kavanaugh remain conservative if he reaches the Supreme Court?

We should be cautious in predicting how Kavanaugh might vote if confirmed. First, Supreme Court justices choose which cases they want to consider, while the circuit courts must decide all federal appeals. As a result, cases in the D.C. Circuit aren't representative of the cases the Supreme Court hears. Second, past Supreme Court decisions, known as "legal precedents," constrain lower court decisions. Supreme Court justices are less bound by precedent.

Still, many of the D.C. Circuit cases that we studied involved value judgments about the law and its application. Kavanaugh consistently leaned to the right in those cases. Our best guess is that he would do the same on the Supreme Court.

We conducted a similar study on Neil Gorsuch, Trump's first appointment to the Supreme Court. Gorsuch's 10th Circuit Court of Appeals record on immigration and employment cases was relatively moderate. Seventeen months later, there's no doubt that Justice Gorsuch usually votes with his conservative colleagues.

But while some predicted that he'd be an extreme conservative, one measure places Gorsuch in the middle of the court's conservative wing. In fact, he agreed with Justice Kennedy more than any other justice last term. We hesitate to draw strong conclusions from this comparison. But we find no comparable evidence of moderation in Kavanaugh's appellate court record.

On Tuesday morning, Kavanaugh said, "A good judge must be an umpire — a neutral and impartial arbiter who favors no litigant or policy" and that he doesn't "decide cases based on personal or policy preferences." But that's overly simplistic. The data show that judges cannot always avoid their "personal or policy preferences" in deciding cases. And Kavanaugh's policy preferences are perhaps the most conservative on the country's second-most-important court.

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COUNCIL for
NATIVE HAWAIIAN
ADVANCEMENT

STATEMENT IN OPPOSITION TO KAVANAUGH CONFIRMATION

September 17, 2018: The Council for Native Hawaiian Advancement (CNHA)is a member-based nonprofit organization focused on enhancing the cultural, economic, political and community development of the Native Hawaiian people through self-determination and self-governance. Its more than 100 members are Native Hawaiian organizations and individuals active in direct service to Native Hawaiian communities. CNHA's Annual Native Hawaiian Convention and Policy Center has been a consistent forum and voice in law and policies impacting Native Hawaiians, particularly at the federal level.

CNHA joins indigenous nations across the country in strong opposition of the appointment of Judge Brett Kavanaugh as an Associate Justice of the United States Supreme Court. We concur with the position taken by the Alaska Federation of Natives on September 12, 2018, articulating the legal and practical implications of Kavanaugh's erroneous thinking on the Indian Commerce Clause, the Special Trust Responsibility the United States has to Indian Tribes, and his understanding of how an Indian Tribe is defined in terms of its current and historical attributes.

Entitled to His Own Opinion, but Not His Own Facts
In 1999, Kavanaugh penned an editorial for the Wall Street Journal entitled, "*Are Hawaiians Indians? The Justice Department Thinks So*" wherein he erroneously asserts that Native Hawaiian preferences are based on race in order to make a partisan and unfounded attack on the Justice Department.

The Native Hawaiian people have exercised their inherent sovereignty in Hawaii from time immemorial, through first western contact with the arrival of Captain James Cook in 1778, and for more than 100 years through a system of ruling chiefs, and later a constitutional monarchy. In 1893, the United States violated treaties of friendship with the Kingdom of Hawaii to land U.S. troops in support of a regime change. In 1993, the United States apologized for "the suppression of the inherent sovereignty of the Native Hawaiian people" and acknowledged that though the government of the Native Hawaiian people had been destroyed, they never relinquished their inherent sovereignty as a people or over their national lands (P.L. 103-150).

Despite these facts, Kavanaugh demonstrates a willful ignorance about Hawaii and the Native Hawaiian people, and a clear and deliberate use of misinformation to achieve a desired end. Kavanagh attempts to frame Native Hawaiians simply as a racial or ethnic minority akin to African-Americans, Crotian-Americans or Irish-Americans by concluding, "After all, Hawaiians originally came from Polynesia, yet the department calls them 'indigenous,' so why not the same for groups from Africa or Europe?" He punctuates the false-equivalency between indigenous peoples and racial minorities by ending the editorial with Justice Scalia's quote, "In the eyes of the government, we are just one race here. It is American."

Contrary to Kavanaugh's assertion, Native Hawaiians did not come *from* Polynesia. Hawaii is the northern-most point in Polynesia, and the Native Hawaiian people are Hawaii's first people. Unlike groups from Africa or Europe who came to the United States (by choice or by force), it was the United States who came to the Native Hawaiian people and Hawaii, just as it came to

American Indian and Alaska Native communities throughout what is now the contiguous 48 states and Alaska.

It is worth noting that Captain Cook's journal entry upon arriving in Hawaii in 1778 says, "The next morning we stood in for the land and were met by several Canoes filled with people, some of them took courage and ventured on board. I never saw *Indians* [emphasis added] so much astonished at the entering a ship before, their eyes were continually flying from object to object." This and many other historical documents illustrate that the term "Indian" was used contemporaneously with the Constitution to describe indigenous peoples anywhere. Native Hawaiians were clearly described as such.

Just as the indigenous peoples of Alaska prefer to be called Alaska Natives, the indigenous peoples of Hawaii prefer to be called Native Hawaiian or Hawaiian. This preference does not alter their indigeneity, inherent sovereignty, or continuing right of self-determination. That Congress has generally respected Alaska Native and Native Hawaiian preferences in legislation does not alter the fact that they fall within the meaning of terms "Indian Tribe" in the Constitution.

What is Indigenous Enough?
Many if not all Indian Tribes require lineal descent from a tribal member as one of the criteria required to acquire tribal membership. At the time the framers of the Constitution recognized the sovereignty of Indian Tribes, most tribes they encountered were racially or ethnically homogenous, and as a result, many remain so today. That does not make them a racial minority.

Kavanaugh says, "To convert this express recognition of Indian tribal sovereignty into a sweeping license for favorable race-based treatment of the descendants of indigenous people is to allow political correctness to trump the Constitution." By these terms, any Indian Tribe who defines its membership primarily through lineal descent could find itself acknowledged by the Supreme Court only as a constitutionally suspect racial minority, particularly if the exercise of its tribal sovereignty is through non-traditional mechanisms like a corporation, association, or other non-governmental means.

Differing Federal Treatment Among Indian Tribes
Since annexation, Congress has enacted over 150 pieces of legislation using its plenary authority over Indian Affairs to implement the trust responsibility to the Native Hawaiian people, beginning with the Hawaiian Homes Commission Act of 1920 (HHCA). Over the years, Congress has addressed key elements of the federal trust responsibility to Native Hawaiians in a manner consistent with its general treatment of other Indian Tribes.

It is clear that Congress has long-recognized the Native Hawaiian people as being within the meaning of Indian Tribe pursuant to the Constitution. It has cited Article I, Section 8 as the source of its authority in enacting statutes for Native Hawaiians. The Senate Committee on Indian Affairs is the primary committee with jurisdiction over Native Hawaiian legislation, and has been ever since the Committee was re-established in 1974. Native Hawaiians are included in the Native American Programs Act and the Native American Housing and Self-Determination

Act. Congress has enacted separate legislation for Native Hawaiians in the areas of health and education.

This is not unusual. In 1971, in order to express a shift in policy towards encouraging self-determination and to address the specific claims of Alaska Natives, the Congress enacted the Alaska Native Claims Settlement Act. It was unprecedented when it was enacted, and remains unparalleled in many ways. Congress has legislated for specific Indian Tribes to resolve particular issues like water rights, access to subsistence resources, or to address needs of a single tribe.

While the Constitutional meaning of Indian Tribe refers to a sovereign indigenous people, Congress routinely defines the term "Indian Tribe" to mean their government for the purposes of the Act wherein it is being defined. This definition can vary from Act to Act. Since Native Hawaiians have not yet reorganized a government, but instead rely on non-governmental organizations to implement federal trust responsibilities, there is little reason for Congress to define "Indian Tribe" to include Native Hawaiians in legislation.

What Defines an Indian Tribe: A Review of Kavanaugh's Indicia
In the Op-Ed, Kavanaugh articulates what he believes to be the six prerequisite indicators of an Indian Tribe when he argues "the reason is obvious" that "Native Hawaiians couldn't possibly qualify" as an Indian Tribe. He based this position on a cursory review of the administrative process for unrecognized tribes to petition for recognition through the Department of the Interior and falsehoods about the history and continuity as a community of the Native Hawaiian people. As noted above, at the time Kavanaugh wrote his editorial, that process was inapplicable to Native Hawaiians because they were already recognized by Congress.

As outlined below, if Kavanaugh should carry his views of the "indicia necessary to qualify as an Indian tribe" into the Supreme Court, it could have widespread and sweeping consequences to the recognition of the rights of already federally-recognized Alaska Natives and American Indians throughout the United States, if applied.

Kavanaugh says, **"They don't have their own government."** The concept that a government is required for there to be an Indian Tribe is a narrow view of tribal sovereignty and self-governance, and inconsistent with existing Federal Indian Law. Moreover, it is inconsistent with the Constitution itself. The sovereignty of indigenous peoples is enshrined in the U.S. Constitution. Article I, Section 8 empowers Congress treat with foreign nations, the states, and Indian tribes as political communities independent of the United States. The Constitution's preamble makes clear that sovereignty belongs to peoples, and governments are tools constructed by peoples to exercise it. As such, peoples can organize governments or reorganize them, and peoples can be self-governing without them through customs and traditions if they so choose.

Yet Kavanaugh identifies a government as a defining trait to the existence of an Indian Tribe. This view could have damaging repercussions for Alaska Natives in particular, since the Alaska Native Claims Settlement Act created for-profit corporations with shareholders as the mechanism for self-governance of their lands. It could also call into question the constitutionality of the Indian Reorganization Act of 1934 and tribe-specific acts like the

Menominee Restoration Act of 1973. These laws were enacted, in part, to assist Indian Tribes in organizing their governments. If having a government is interpreted as a prerequisite to being an Indian Tribe (and therefore within the purview of Congress' authority), then the legitimacy of these Indian Tribes could also be at risk.

"**They don't have their own elected leaders,**" writes Kavanaugh. The first irony of this criticism is his opinion on Native Hawaiians was developed in an amicus brief in *Rice v. Cayetano*, a case questioning the constitutionality of the state's 20-year practice of holding exclusive elections to allow Native Hawaiians to democratically elect their own leadership to the Board of Trustees for the state Office of Hawaiian Affairs (OHA). The second irony is few if any of the Indian Tribes known to the framers of the Constitution had elected leaders, and yet the framers were still able to recognize the peoples as sovereign. Finally, since the illegal overthrow of the Kingdom of Hawaii in 1893, the Native Hawaiian people have erected and maintained a number of civic, social and governmental institutions through which we govern ourselves. Many have a democratically-elected leadership.

"**They don't have their own system of laws,**" Kavanaugh states. If by that he means written laws codified in ordinances, then many smaller tribes who, like Native Hawaiians, rely heavily on unwritten traditional and customary laws to govern themselves could be viewed as unqualified for the designation of an Indian Tribe should Kavanaugh's views prevail. The Native Hawaiian people continue to govern themselves through a system of traditional and customary laws governing broad areas such as dispute resolution, child-rearing, land-use, resource conservation and care for the elderly.

Kavanaugh asserts, "**They don't even live together in Hawaii. Native Hawaiians are dispersed throughout the state of Hawaii and the United States.**" Nearly every federally-recognized Indian Tribe has members who live dispersed throughout the state and the United States. Tribal members are also American citizens, and have the freedom to live where they choose. Finally, Kavanaugh says of Native Hawaiians, "**They don't live on reservations or in territorial enclaves.**" As a result of a variety of federal policies on Indians, more than half of the federally-recognized tribes in the United States do not have reservations or have populations dispersed in large cities and off-reservation, including Indian Tribes in Alaska, Oklahoma and California.

As noted above, Congress enacted the Hawaiian Homes Commission Act, reserving 203,500 acres of federal lands to allot through 99-year leases to Native Hawaiians in furtherance of the federal trust responsibility. Implementation was closely modeled after the Native Allotment Act. As a result, there are more than 32 Native Hawaiian communities on trust lands throughout the state. There are also a number of Native Hawaiian enclaves that have maintained their character as uniquely Native Hawaiian communities and pre-date the annexation of Hawaii.

A Lack of Serious Contemplation on Constitutional Questions Affecting Real People
Kavanaugh and Robert Bork filed an amicus brief to the Supreme Court in *Rice*, wherein he argued that Native Hawaiians do not fall within the purview of the Indian Commerce Clause by writing, "First, the Constitution does not contain a Hawaiian Commerce Clause, but only an **Indian** Commerce Clause."

It is widely known that the Constitution was adopted in 1776, and Captain Cook first arrived in Hawaii in 1778. As noted above, the common vernacular for indigenous peoples at the time the Constitution was drafted was "Indians" and "Indian Tribes." Finally, the phrase "Indian Commerce Clause" isn't in the Constitution. It is a short-hand reference to Article I, Section 8, Clause 3, which is also referred to as the "Commerce Clause" because it describes Congress' authority with foreign nations and states, as well as Indian Tribes.

It's hard to know what to make of such a flippant and spurious argument made before the United States Supreme Court, especially from someone now seeking a seat on the bench. Supreme Court rulings can adversely affect thousands of people and institutions across the country should such recklessness prevail. It is concerning that Kavanaugh was willing make a significant point of the fact that "Hawaiian" and "Indian" are not the same words. "Commonwealth" and "state" are not the same words, but the Commonwealths of Virginia, Pennsylvania and Massachusetts are certainly within the Constitutional meaning of a state.

CNHA strongly urges the United States Senate to reject the nomination of Judge Brett Kavanaugh to become an Associate Justice of the U.S. Supreme Court. His position on Native Hawaiians, then and now, indicate how troubling his confirmation would be for all indigenous peoples and their institutions across the United States. His tactics for arriving at a desired conclusion that is unsupported by history or the truth is alarming. Kavanaugh's demonstrated willingness to advance and rely upon false-narratives to achieve a partisan or personal end is dangerous in an Associate Justice of the Supreme Court. It forecasts a kind of judicial activism where facts, history and the law do not matter to the outcome of a case. Native Americans and other communities are right to be concerned if he ascends to the Court.

Our editorial: Kavanaugh's record defies challenge

detroitnews.com/story/opinion/editorials/2018/07/10/our-editorial-kavanaughs-record-defies-challenge/770887002/

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Our editorial: Kavanaugh's record defies challenge

In making this pick, Trump should be commended for listening to the team he assembled to advise him

Brett Kavanaugh is an intelligent and deliberate judge who is poised to become a conservative thought leader on the U.S. Supreme court. His record on the appellate court suggests that President Trump's nominee to succeed Justice Anthony Kennedy will maintain a commitment to interpreting the law as it is written, and not how he may wish it had been crafted.

A neutral interpretation of the law is all anyone can ask of a Supreme Court justice. No one can say for certain how Kavanaugh will rule on challenges to Roe v. Wade, or the ability of states to restrict gay marriage or any of the other hot button issues that concern Democrats any time a Republican president gets to fill a court vacancy. But Kavanaugh can be counted on to defer to precedent and eschew partisanship. That's largely been his record for 12 years on the Court of Appeals for the District of Columbia, the second most important court in the country.

Kavanaugh has a long record of conservative jurisprudence. He is not likely to be a pick who changes his spots after he is seated on the court, as some past conservative picks have done.

He is well-liked by his colleagues on both sides of the aisle. Kavanaugh has genuine and longstanding friendships with liberals who are quick to praise his civility and his intellect. He has impeccable academic credentials as a Yale degree holder and he clerked for Justice Kennedy, whose seat he will take if approved.

His time in the George W. Bush administration means he has an understanding of the executive branch, with all of its advantages and disadvantages. Kavanaugh is noted for the number of law clerks he's placed with the Supreme Court, both serving conservative and liberal justices, and many of them have been women and minorities.

Kavanaugh is committed to the judicial branch's non-partisanship. "Check those political allegiances at the door when you become a judge," he said in 2015 in a speech at Catholic University's law school.

And as a judge serious about the rule of law, he is committed to stare decisis, the principal that precedent should be given considerable deference. He's not likely to overrule a past decision by the court simply because he disagrees with it.

The remarks he gave at his nomination affirmed his commitment to this important principle. His judicial philosophy is well-known. Kavanaugh is a process conservative, not a results conservative, which means he is committed to neutral principles applied neutrally.

In making this pick, Trump should be commended for listening to the team he assembled to advise him. Kavanaugh was the choice of White House Counsel Don McGahn and Leonard Leo of the Federalist Society. While the lead up to the nomination has revealed critics on the right who argue that Kavanaugh is not conservative enough, his two decades of work will speak for itself.

His credentials, his commitment to judicial independence, his unassailable character, his record as a judge dedicated to the Constitution and his likeability should overwhelm the Senate skeptics who will be tempted to oppose him simply because he was appointed by Trump.

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

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 Kavanagh'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.

KATZ, MARSHALL & BANKS, LLP

Joseph E. Abboud, Associate

By Electronic Mail
September 25, 2018

Mike Davis, Esquire
Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Davis:

Attached please find materials responsive to the requests for documents contained in Senator Grassley's letter dated September 23, 2018. We reserve the right to provide supplemental documents as necessary.

Sincerely,

Joseph E. Abboud
Attorney for Dr. Christine Blasey Ford

Encl.

cc: Heather Sawyer, Esquire

Christine Blasey MA, PhD, MS

Palo Alto, CA

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GPA 4.0

Doctor of Philosophy, Psychology, 1996
University of Southern California, Rossier School of Education (APA-accredited)
Specialization: Marriage and Family Therapy, Research Design and Statistics
Dissertation: Psychometric Development of a Measure of Children's Coping Strategies
GPA 3.9

Predoctoral Clinical Psychology Internship, 1994
University of Hawai'i at Manoa (APA-accredited)

Master of Arts, Clinical Psychology, 1991
Pepperdine University, 1991
Dean's Letter of Commendation
GPA 4.0

Bachelor of Arts, Experimental Psychology, 1988
University of North Carolina at Chapel Hill

High School, 1984
Holton-Arms School
Bethesda, Maryland

Current Employment

Current **Professor, PGSP-Stanford University Consortium for Clinical Psychology**
Stanford University School of Medicine Department of Psychiatry and Palo Alto University

Director of Student Research Competence.
Teach Statistics, Research Methods, Psychometrics, Dissertation Preparation Seminar, Advanced Statistics and Scientific Writing.
Mentor students and serve on 10-15 Dissertation Committees per year. Common student-led research areas include Evidence-based treatments for Depression, Anxiety, ADHD, Autism Spectrum and other Developmental Disorders, Trauma and other illnesses in Veteran populations
Golden Apple Award, Winner 2012 and 2018

Research Psychologist and Biostatistician, Stanford University School of Medicine Department of Psychiatry

Design studies and conduct statistical analyses supporting faculty research across child and adult psychiatry. Statistical expertise in centering, interaction effects, mediation and moderation. Studies focus on child and adulthood psychiatric conditions, their etiologies and effective treatments. Provide statistical expertise to faculty in other departments within the School of Medicine (e.g., cardiology)

Prior Employment

2012-4, 2017 **Consulting Biostatistician**, Titan Pharmaceuticals, San Francisco, CA
Conduct statistical analyses regarding the efficacy of novel treatments for opioid abuse disorders.

2012-4, 2017 **Consulting Biostatistician**, Brain Resource, Sydney, Australia
Conduct statistical analyses regarding the putative psychological and biological markers of treatment response to ADD and Antidepressant medications.

2010-2012 **Director, Corcept Therapeutics**

2005-2012 **Associate Director, Statistician, Corcept Therapeutics**

Led statistical activities of Phase 3 program for development of new medicines. Designed and constructed databases, chose analytic models, wrote statistical programs, co-authored Statistical Analysis Plans, co-authored Clinical Study reports (CSR), and co-wrote manuscripts for scientific publications. Presented at professional meetings including NCDEU and APA.

1999-current **Research Psychologist, Stanford University**

Provided data analytic and research design support for faculty and trainees in the Department of Psychiatry & Behavioral Sciences. Received formal mentoring from Helena C. Kraemer. Co-authored manuscripts, presented at professional conferences, taught statistics courses for MD and PhD postdocs and research fellows, provided training courses in SPSS. Taught statistics courses for 3 years in Child Psychiatry postdoctoral fellowship program and in the Stanford-PGSP Consortium.

1999-2001 **Biostatistician, The Children's Health Council**

Designed and conducted program evaluations. Provided project management and supervised Research Assistants in their research projects.

1995-98 **Visiting Professor, Pepperdine University**

Taught full time (10 classes per year) in the undergraduate and graduate psychology programs. Courses Taught: Psych 101 (small class and large lecture hall), Introductory Statistics, Intermediate Statistics, Computer Applications in Statistics, Psychological Testing and Assessment, Developmental Psychology, Personality Theory, Family Therapy. Nominee, Tyler Teacher of the Year Award, 1996.

Computer Skills
SPSS
QROC (signal detection)
SAS – Level 4

Statistical Reviewer
Multiple psychiatry and statistics journals

Sample of Awards and Invited Talks

2018 Invited Statistics Mentor, NIH-American Psychiatric Association Annual Meeting, New York

2017 Invited Statistics Mentor, NIH-American Psychiatric Association Annual Meeting, San Diego

2018 Golden Apple Teaching Award in Statistics, PGSP-Stanford Psy.D Consortium

2012 Golden Apple Teaching Award in Statistics, PGSP-Stanford Psy.D Consortium

2014-5 Roundtable Lead Discussant, Statistical Analysis in Industry-FDA Interactions. American Statistical Association Annual FDA meeting with Industry and Academic Statisticians. Washington, DC

1997 Ron Tyler Teaching Award Finalist, Pepperdine University

Book and Book Chapters

Kraemer HC and **Blasey C.** (2015) *How Many Subjects*? Los Angeles: Sage Publications.

Blasey C, DeBattista C, Belanoff J, Schatzberg A (2010). Psychopharmacology. In Koocher G (Editor), Psychologists Desk Reference.

****Sample Peer Reviewed Publications**

Williams N, Heiferts B, **Blasey C**, Sudheimer K, Schatzberg A. (August, 2018). Opioid Receptor Antagonism Attenuates the Antidepressant Effects of Ketamine. *American Journal of Psychiatry.*

Arnow BA, **Blasey CB** , Rush AJ. Beyond symptom reduction: Poor Quality of Life, Daily Functioning, and Life Satisfaction issues persist (*In preparation*).

Avery T, **Blasey C**, Rosen C, Bayley P. Psychological Flexibility and Set-Shifting Among Veterans Participating in a Yoga Program: A Pilot Study. Mil Med. 2018 Mar 26.

Elliott GR, **Blasey C**, Rekshan W, Rush AJ, Palmer DM, Clarke S, Kohn M, Kaplan C, Gordon E. Cognitive Testing to Identify Children With ADHD Who Do and Do Not Respond to Methylphenidate. J Atten Disord. 2017 Dec;21(14):1151-1160.

Cohen JM, **Blasey C**, Barr Taylor C, Weiss BJ, Newman MG Anxiety and Related Disorders and Concealment in Sexual Minority Young Adults. Behav Ther. 2016 Jan;47(1):91-101.

Korgaonkar MS, Rekshan W, Gordon E, Rush AJ, Williams LM, **Blasey C**, Grieve SM. Magnetic Resonance Imaging Measures of Brain Structure to Predict Antidepressant Treatment Outcome in Major Depressive Disorder. 2015 Dec3; 2 (1):37-45.

Arnow BA, **Blasey C**, Williams LM, Palmer DM, Rekshan W, Schatzberg AF, Etkin A,Kulkarni J, Luther JF, Rush AJ. Depression Subtypes in Predicting Antidepressant Response: A Report From the iSPOT-D Trial. Am J Psychiatry. 2015 Aug 1; 172 (8):743-50.

Abbasi F, **Blasey C**, Feldman D, Caulfield MP, Hantash FM, Reaven GM. Low circulating 25-hydroxyvitamin D concentrations are associated with defects in insulin action and insulin secretion in persons with prediabetes. J Nutr. 2015 Apr; 145 (4):714-9.

Rosenthal RN, Ling W, Casadonte P, Vocci F, Bailey GL, Kampman K, Patkar A, Chavoustie S, **Blasey C**, Sigmon S, Beebe KL. Buprenorphine implants for treatment of opioid dependence: randomized comparison to placebo and sublingual buprenorphine/naloxone. Addiction. 2013 Dec; 108 (12):2141-9.

Blasey C, McLain C, Belanoff J. (2013). Trough Plasma Concentrations of Mifepristone Correlate with Psychotic Symptom Reductions: A Review of Three Randomized Clinical Trials. *Current Psychiatry Reviews.*

Blasey C, Belanoff J, DeBattista C, Schatzberg A (2013). Adult Psychopharmacology. In Koocher, Norcross, Hill (Eds). Psychologist's Desk Reference. Oxford University Press.

Steidtmann D, Manber R, **Blasey C**, Markowitz JC, Klein DN, Rothbaum BO, Thase ME, Kocsis JH, Arnow BA. Detecting Critical Decision Points in Psychotherapy and Psychotherapy + Medication for Chronic Depression. *J Consult Clin Psychol.* 2013 Jun 10.

Arnow BA, Steidtmann D, **Blasey C**, Manber R, Constantino MJ, Klein DN,Markowitz JC, Rothbaum BO, Thase ME, Fisher AJ, Kocsis JH. The relationship between the therapeutic alliance and treatment outcome in two distinct psychotherapies for chronic depression. *J Consult Clin Psychol*. 2013 Aug; 81 (4):627-38.

Abbasi F, **Blasey C**, Reaven GM. Cardiometabolic risk factors and obesity: does it matter whether BMI or waist circumference is the index of obesity? *Am J Clin Nutr*. 2013 Sep; 98(3):637-40.

Bhat SL, Abbasi FA, **Blasey C**, Reaven GM, Kim SH. Beyond fasting plasma glucose: The association between coronary heart disease risk and postprandial glucose, postprandial insulin and insulin resistance in healthy, nondiabeticadults. *Metabolism*. 2013 Sep;62(9):1223-6.

Bhat S, Abbasi F, **Blasey C**, Reaven G, Kim Sh. Plasma glucose and insulin responses to mixed meals: impaired fasting glucose re-visited. *Diab Vasc Dis Res*.2011 Oct;8(4):271-5.

Andrade C, Shaikh SA, Narayan L, **Blasey C**, Belanoff J. Administration of a selective glucocorticoid antagonist attenuates electroconvulsive shock-induced retrograde amnesia. *J Neural Transm*. 2012 Mar;119(3):337-44.

Blasey C, Block T, Belanoff JK, Roe RL. Efficacy and Safety of Mifepristone for the treatment of Psychotic Depression. *Journal of Clinical Psychopharmacology*, 2011 Aug; 31(4): 436-440.

Asagami T, Belanoff JK, Azuma J, **Blasey C**, Tsao P. Selective glucocorticoid receptor (GR-II) antagonist reduces body weight gain in mice. *Journal of Nutrition and Metabolism*, 2011.

Arnow BA, **Blasey CM**, Hunkeler EM, Lee J, Hayward C. Does Gender Moderate the Relationship Between Childhood Maltreatment and Adult Depression? *Child Maltreat*. 2011 Jul 4.

Arnow BA, **Blasey CM**, Constantino MJ, Robinson R, Hunkeler E, Lee J, Fireman B,Khaylis A, Feiner L, Hayward C. Catastrophizing, depression and pain-related disability. *Gen Hosp Psychiatry*. 2011 Mar-Apr; 33 (2):150-6.

Belanoff JK, **Blasey CM**, Clark RD, Roe RL. Selective glucocorticoid receptor(type II) antagonists prevent weight gain caused by olanzapine in rats. *Eur J Pharmacol*. 2011 Mar 25;655(1-3):117-20.

Belanoff JK, **Blasey CM**, Clark RD, Roe RL. Selective glucocorticoid receptor (type II) antagonist prevents and reverses olanzapine-induced weight gain. *Diabetes Obes Metab*. 2010 Jun; 12 (6):545-7.

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Blasey CM, Debattista C, Roe R, Block T, Belanoff JK. A multisite trial of mifepristone for the treatment of psychotic depression: a site-by-treatment interaction. *Contemporary Clinical Trials*. 2009, 30(4):284-8.

Gross C, **Blasey CM**, Roe RL, Belanoff JK. Mifepristone reduces weight gain and improves metabolic abnormalities associated with risperidone treatment in normal men. *Obesity* (Silver Spring). 2010 Dec; 18(12):2295-300.

Gross C, **Blasey C**, Allen K, Block T, Belanoff J. Mifepristone treatment of olanzapine-induced weight gain in healthy men. *Advances in Therapy*, 2009 (20)576-586.

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Manber R, **Blasey C**, Allen JJ Depression symptoms during pregnancy. *Archives of Womens Mental Health*. 2008; 11(1):43-8.

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Beebe K, Block T, DeBattista C, **Blasey C**, Belanoff J. The efficacy of mifepristone in the reduction and prevention of olanzapine-induced weight gain in rats. *Behavioural Brain Research*, 2006, 171 (2), 225-9.

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Jutte D, Burgos A, Mendoza M, **Blasey** Ford C, Huffman LC. Use of the Pediatric Symptom Checklist in a Low-Income, Mexican American Population *Archives Pediatric and Adolescent Medicine*. 2003;157:1169-1176.

Piggot J, Kwon H, Mobbs D, **Blasey C**, Lotspeich L, Menon V, Bookheimer S, Reiss AL. Emotional attribution in high-functioning individuals with autistic spectrum disorder: a functional imaging study. *Journal of American Academy of Child and Adolescent Psychiatry*. 2004 Apr;43(4):473-80.

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Huffman L, Koopman C, **Blasey** C, Hill K. A program evaluation strategy in a community-based behavioral health and education services agency for children and families. *Journal of Applied Behavioral Science* Vol 38(2), Jun 2002, 191-215.

Feinstein C, Eliez S, **Blasey** C, Reiss A. Psychiatric disorders and behavioral problems in children with velocardiofacial syndrome: Usefulness as phenotypic indicators of schizophrenic risk. *Biological Psychiatry* Vol 51(4), Feb 2002, 312-318.

Chang K, **Blasey** C, Ketter T, Steiner H. Family environment of children and adolescents with bipolar parents. *Bipolar Disorders* Apr 2001, 73-78.

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Eliez S, **Blasey** C, Freund L, Reiss A. Brain anatomy, gender and IQ in children and adolescents with fragile X syndrome. *Brain* Vol 124(8), Aug 2001, 1610-1618.

Eliez S, **Blasey** C, Schmitt E. Velocardiofacial syndrome: Are structural changes in the temporal and mesial temporal regions related to schizophrenia? *American Journal of Psychiatry* Vol 158(3), Mar 2001, 447-453.cc

Sample of Professional Presentations (not updated, please refer to peer reviewed publications)

Arnow, B., Manber, R., & **Blasey**, C. (2002, November). Does reactance level predict outcome in medication, cognitive behavioral analysis system of psychotherapy or combined treatment for chronic depression? (R. Manber, Chair). Symposium presented at the 36th annual meeting of the Association for the Advancement of Behavior Therapy, Reno.

Manber, R., Arnow, B., & **Blasey**, C. (2002, November). Patient's skill acquisition and response to treatment (R. Manber, Chair). Symposium presented at the 36th annual meeting of the Association for the Advancement of Behavior Therapy, Reno.

Hunkeler, E.M., Arnow, B., Robinson, R., Lee, J., **Blasey**, C., & Fireman, B. Prevalence and characteristics of primary care patients with depression and chronic pain. (2002, December). Poster presented at the 41st annual meeting of the American College of Neuropsychopharmacology, San Juan, Puerto Rico.

Arnow, B.A., Hunkeler, E.M., **Blasey**, C., Fireman, B., Lee, J., Robinson, R., & Hayward, C. (2003, May). Prevalence and characteristics of patients with depression and/or chronic pain (David K. Gittelman, Chair). Symposium presented at the 156th annual meeting of the American Psychiatric Association, San Francisco.

Hunkeler, E.M., Arnow, B.A., Lee, J., **Blasey**, C., Fireman, B., Robinson, R.L., & Dea, R. (2004, May). Major depressive disorder and comorbid chronic pain, a costly condition. Poster presented at the 157th annual meeting of the American Psychiatric Association, New York.

Blasey, C., Lee, J., Hayward, C., Hunkeler, E., Constantino, M., Fireman, B., Robinson, R., Dea, R., & Arnow, B.A. (2004, July). Comorbidity of depression and pain among primary care patients. Paper presented at the 112th meeting of the American Psychological Association, Honolulu, Hawaii.

Arnow, B.A., Treatman, C., & **Blasey**, C. (2004, November). Noncompleters in clinical trials: Implications for research and treatment. Paper presented at the meeting of the North American Chapter of the Society of Psychotherapy Research, Springdale, Utah.

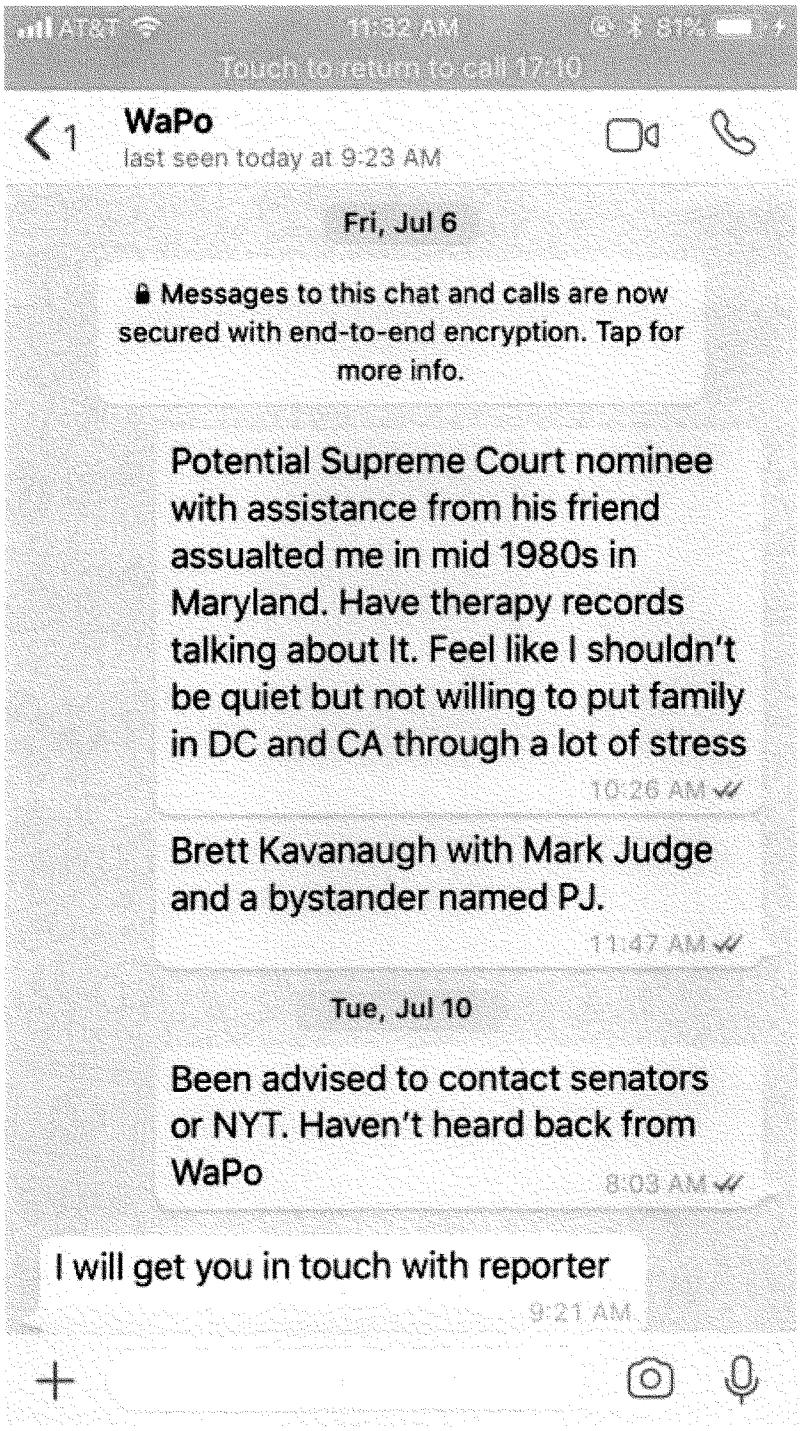
Arnow, B.A., **Blasey**, C., Manber, R., Markowitz, J.C., Klein, D.N., & Kocsis, J.H. (2010, June). Early therapeutic alliance and outcome in CBASP and BSP: Results from the REVAMP Trial. Paper presented at the 41st Annual Meeting of the Society for Psychotherapy Research, Asilomar, CA.

Arnow, B.A., **Blasey**, C., Steidtmann, D., & Manber, R. (2011, June). Cognitive behavioral analysis system of psychotherapy with and without medication for chronic depression: Is there an acute phase triage point? Importance of early response for treatment outcome in different mental health care settings (Bernd Puschner, Moderator). Symposium presented at the 42nd Annual Meeting of the Society for Psychotherapy Research, Berne, Switzerland.

Steidtmann, D., Arnow, B., **Blasey**, C., & Manber, R. (2011, September). Do patient's pre-treatment beliefs about illness causes and preference for treatment modality moderate therapeutic alliance quality and treatment outcome in two types of psychotherapy? Paper presented at the North American Society for Psychotherapy Research, Banff, Canada.

Personal Interests and Hobbies

Surfing, Surf travel (Hawai'i, Costa Rica, South Pacific Islands, French Polynesia), Oceanography, Hawai'ian and Tahitian Culture, Spanish Language, College Athletics, AAU Youth Basketball, Palo Alto Youth Soccer


AT&T
11:32 AM
81%
Touch to return to call 17:10
1
WaPo
last seen today at 9:23 AM
Fri, Jul 6
Messages to this chat and calls are now secured with end-to-end encryption. Tap for more info.
Potential Supreme Court nominee with assistance from his friend assualted me in mid 1980s in Maryland. Have therapy records talking about It. Feel like I shouldn't be quiet but not willing to put family in DC and CA through a lot of stress
10:26 AM
Brett Kavanaugh with Mark Judge and a bystander named PJ.
11:47 AM
Tue, Jul 10
Been advised to contact senators or NYT. Haven't heard back from WaPo
8:03 AM
I will get you in touch with reporter
9:21 AM

July 30, 2018

CONFIDENTIAL

Senator Dianne Feinstein

Dear Senator Feinstein:

I am writing with information relevant in evaluating the current nominee to the Supreme Court. As a constituent, I expect that you will maintain this as confidential until we have further opportunity to speak.

Brett Kavanaugh physically and sexually assaulted me during High School in the early 1980's. He conducted these acts with the assistance of his close friend, Mark G. Judge. Both were 1-2 years older than me and students at a local private school. The assault occurred in a suburban Maryland area home at a gathering that included me and 4 others. Kavanaugh physically pushed me into a bedroom as I was headed for a bathroom up a short stairwell from the living room. They locked the door and played loud music, precluding any successful attempts to yell for help. Kavanaugh was on top of me while laughing with Judge, who periodically jumped onto Kavanaugh. They both laughed as Kavanaugh tried to disrobe me in their highly inebriated state. With Kavanaugh's hand over my mouth, I feared he may inadvertently kill me. From across the room, a very drunken Judge said mixed words to Kavanaugh ranging from "go for it" to "stop". At one point when Judge jumped onto the bed, the weight on me was substantial. The pile toppled, and the two scrapped with each other. After a few attempts to get away, I was able to take this opportune moment to get up and run across to a hallway bathroom. I locked the bathroom door behind me. Both loudly stumbled down the stairwell, at which point other persons at the house were talking with them. I exited the bathroom, ran outside of the house and went home.

I have not knowingly seen Kavanaugh since the assault. I did see Mark Judge once at the Potomac Village Safeway, where he was extremely uncomfortable seeing me.

I have received medical treatment regarding the assault. On July 6, I notified my local government representative to ask them how to proceed with sharing this information. It is upsetting to discuss sexual assault and its repercussions, yet I felt guilty and compelled as a citizen about the idea of not saying anything.

I am available to speak further should you wish to discuss. I am currently vacationing in the mid-Atlantic until August 7th and will be in California after August 10th.

In Confidence,

Christine Blasey

Palo Alto, California

[redacted]

KATZ, MARSHALL & BANKS, LLP

By Electronic Mail
September 18, 2018

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

Thank you for reaching out yesterday afternoon. Dr. Christine Blasey Ford looks forward to working with you and the Committee.

As you know, earlier this summer, Dr. Ford sought to tell her story, in confidence, so that lawmakers would have a fuller understanding of Brett Kavanaugh's character and history. Only after the details of her experience were leaked did Dr. Ford make the reluctant decision to come forward publicly.

In the 36 hours since her name became public, Dr. Ford has received a stunning amount of support from her community and from fellow citizens across our country. At the same time, however, her worst fears have materialized. She has been the target of vicious harassment and even death threats. As a result of these kind of threats, her family was forced to relocate out of their home. Her email has been hacked, and she has been impersonated online.

While Dr. Ford's life was being turned upside down, you and your staff scheduled a public hearing for her to testify at the same table as Judge Kavanaugh in front of two dozen U.S. Senators on national television to relive this traumatic and harrowing incident. The hearing was scheduled for six short days from today and would include interrogation by Senators who appear to have made up their minds that she is "mistaken" and "mixed up." While no sexual assault survivor should be subjected to such an ordeal, Dr. Ford wants to cooperate with the Committee and with law enforcement officials.

As the Judiciary Committee has recognized and done before, an FBI investigation of the incident should be the first step in addressing her allegations. A full investigation by law enforcement officials will ensure that the crucial facts and witnesses in this matter are assessed in a non-partisan manner, and that the Committee is fully informed before conducting any hearing or making any decisions.

KATZ, MARSHALL & BANKS, LLP

We would welcome the opportunity to talk with you and Ranking Member Feinstein to discuss reasonable steps as to how Dr. Ford can cooperate while also taking care of her own health and security.

Sincerely,

Debra S. Katz

Lisa J. Banks
Attorneys for Dr. Christine Blasey Ford

cc: The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary

September 22, 2018

Dear Senator Grassley:

There has been a lot of back and forth between your staff and my counsel, and I appreciate the chance to communicate with you directly. I kindly ask you to use your best discretion regarding this personal letter.

When I first learned that Brett Kavanaugh was on the short-list of nominees to fill a Supreme Court vacancy, prior to the President's selection among a list of what seemed to me as similarly-qualified candidates, I contacted my Congressperson's office in an attempt to provide information that could be useful to you and the President when making the selection from among a list of candidates. The decision to first report the assault to my Congresswoman, Rep. Anna Eshoo, was a very difficult one, but I felt that this was something that a citizen couldn't NOT do. I felt agony yet urgency and a civic duty to let it be known, in a confidential manner, prior to the nominee being selected. While it was difficult, I was able to share my information with two contacts during the period between the short list announcement and Mr. Kavanaugh's selection.

Mr. Kavanaugh's actions, while many years ago, were serious and have had a lasting impact on my life. I thought that knowledge of his actions could be useful for you and those in charge of choosing among the various candidates. My original intent was first and foremost to be a helpful citizen – in a confidential way that would minimize collateral damage to all families and friends involved.

I then took the step of sending a confidential letter to one of my Senators, Ranking Member Feinstein, and I understand that you have a copy of that letter. I am certainly prepared to repeat the facts in the letter and to provide further facts under oath at a hearing. I would welcome the opportunity to meet with you and other Senators directly, person to person, to tell you what occurred. I will answer any questions you have. I hope that we can find such a setting and that you will understand that I have one motivation in coming forward – to tell the truth about what Mr. Kavanaugh and his friend Mark Judge did to me. My sincere desire is to be helpful to persons making the decision.

In addition to talking with you and other Senators directly, I have asked my lawyers to continue discussions with your staff about the conditions you have proposed. As I am not a lawyer or a Senator, I am relying on them and you to ensure that the Committee will agree to conditions that will allow me to testify in a fair setting that won't disrupt families and become a media TV show. While the nationwide outpouring of love has been heartwarming, I am spending considerable time managing death threats, avoiding people following me on freeways, and disconcerting media intrusion, including swarms of vans at my home and unauthorized persons entering my classroom and medical settings where I work. I have received an inordinate number of requests to appear on major TV shows to elucidate further information, to which I have not responded. My goal is to return soon to my workplace, once it is deemed safe for me and importantly, for students. Currently, my family has physically relocated and have divided up separately on many nights with the tremendous help of friends in the broader community. Through gracious persons here and across the country, we have been able to afford hiring security. While I am frightened, please know, my fear will not hold me back from testifying and

you will be provided with answers to all of your questions. I ask for fair and respectful treatment.

Kind regards,

Christine Blasey

DECLARATION OF RUSSELL FORD

I, Russell Ford, hereby state that I am over eighteen (18) years of age, am competent to testify, and have personal knowledge of the following facts:

1. I have a Master of Science degree and a Doctor of Philosophy degree in mechanical engineering from Stanford University.

2. I have been married to Christine Blasey Ford since June 2002. We have two children.

3. The first time I learned that Christine had any experience with sexual assault was around the time we got married, although she did not provide any details.

4. Christine shared the details of the sexual assault during a couple's therapy session in 2012. She said that in high school she had been trapped in a room and physically restrained by one boy who was molesting her while another boy watched. She said she was eventually able to escape before she was raped, but that the experience was very traumatic because she felt like she had no control and was physically dominated.

5. I remember her saying that the attacker's name was Brett Kavanaugh, that he was a successful lawyer who had grown up in Christine's home town, and that he was well-known in the Washington, D.C. community.

6. In the years following the therapy session, we spoke a number of times about how the assault affected her.

7. The next time she mentioned that Mr. Kavanaugh was the person who sexually assaulted her was when President Trump was in the process of selecting his first nominee for the Supreme Court. Before the President had announced that Judge Neil Gorsuch was the nominee, I remember Christine saying she was afraid the President might nominate Mr. Kavanaugh.

8. These conversations about Mr. Kavanaugh started again shortly after Justice Anthony Kennedy announced his resignation and the media began reporting that Mr. Kavanaugh was on the President's "short list."

9. Christine was very conflicted about whether she should speak publicly about what Mr. Kavanaugh had done to her, as she knew it would be emotionally trying for her to relive this traumatic experience in her life and hard on our family to deal with the inevitable public reaction. However, in the end she believed her civic duty required her to speak out.

10. In our 16 years of marriage I have always known Christine to be a truthful person of great integrity. I am proud of her for her bravery and courage.

I solemnly swear or affirm under the penalties of perjury that the matters set forth in this Declaration are true and correct to the best of my personal knowledge, information, and belief. Executed on this 25th day of September, 2018.

Russell Ford

DECLARATION OF KEITH KOEGLER

I, Keith Koegler, hereby state that I am over eighteen (18) years of age, am competent to testify, and have personal knowledge of the following facts:

1. I graduated from Amherst College in 1992 with a Bachelor's Degree in History. I earned my Juris Doctor degree from Vanderbilt Law School in 1997.

2. I have known Christine Blasey Ford and her husband, Russell Ford, for more than five years, and consider them close friends.

3. We met when I was coaching their son's baseball team. Our children are close friends and have played sports together for years. I have spent a lot of time with Christine and her husband traveling to and attending our kids' games. Our families have also gone on vacation together.

4. The first time I learned that Christine had experienced sexual assault was in early summer of 2016. We were standing together in a public place watching our children play together.

5. I remember the timing of the conversation because it was shortly after Stanford University student Brock Turner was sentenced for felony sexual assault after raping an unconscious woman on Stanford's campus. There was a common public perception that the judge gave Mr. Turner too light of a sentence.

6. Christine expressed anger at Mr. Turner's lenient sentence, stating that she was particularly bothered by it because she was assaulted in high school by a man who was now a federal judge in Washington, D.C.

7. Christine did not mention the assault to me again until June 29, 2018, two days after Justice Anthony Kennedy announced his resignation from the Supreme Court of the United States.

8. On June 29, 2018, she wrote me an email in which she stated that the person who assaulted her in high school was the President's "favorite for SCOTUS."

9. On June 29, 2018, I responded with an email in which I stated:

> "I remember you telling me about him, but I don't remember his name. Do you mind telling me so I can read about him?"

10. Christine responded by email and stated:

> "Brett Kavanaugh"

11. In all of my dealings with Christine I have known her to be a serious and honorable person.

I solemnly swear or affirm under the penalties of perjury that the matters set forth in this Declaration are true and correct to the best of my personal knowledge, information, and belief.

Executed on this 24th day of September, 2018.

Keith Koegler

DECLARATION OF ADELA GILDO-MAZZON

I, Adela Gildo-Mazzon, hereby state that I am over eighteen (18) years of age, am competent to testify, and have personal knowledge of the following facts:

1. I have known Christine Blasey Ford for over 10 years and consider her to be a good friend. Our children attended elementary school together.

2. In June of 2013, Christine and I met at a restaurant that was then called Pizzeria Venti Mountain View, located at 1390 Pear Avenue, Mountain View, California.

3. I remembered the year of the meeting because I was temporarily working in the South Bay at that time. I would pass Mountain View on my way home, so that restaurant was a convenient place to arrange a meeting. I believe this was the only time I ever went to this restaurant. I also have a receipt from the restaurant from that meal.

4. During our meal, Christine was visibly upset, so I asked her what was going on.

5. Christine told me she had been having a hard day because she was thinking about an assault she experienced when she was much younger. She said that she had been almost raped by someone who was now a federal judge. She told me she had been trapped in a room with two drunken guys, and that she then escaped, ran away, and hid.

6. Christine said it was a scary situation and that it has impacted her life ever since.

7. The last time I saw Christine was in May 2018.

8. After reading her first person account of the assault in *The Washington Post* on September 16, 2018, I contacted Christine's lawyers to advise them that she had told me about this assault in 2013.

I solemnly swear or affirm under the penalties of perjury that the matters set forth in this Declaration are true and correct to the best of my personal knowledge, information, and belief.

Executed on this 24th day of September, 2018.

Adela Gildo-Mazzon

DECLARATION OF REBECCA WHITE

I, Rebecca White, hereby state that I am over eighteen (18) years of age, am competent to testify, and have personal knowledge of the following facts:

1. I have been friends with Christine Blasey Ford for more than six years. We are neighbors and our kids went to the same elementary school.

2. In 2017, I was walking my dog and Christine was outside of her house. I stopped to speak with her, and she told me she had read a recent social media post I had written about my own experience with sexual assault.

3. She then told me that when she was a young teen, she had been sexually assaulted by an older teen. I remember her saying that her assailant was now a federal judge.

4. I have always known Christine to be a trustworthy and honest person.

I solemnly swear or affirm under the penalties of perjury that the matters set forth in this Declaration are true and correct to the best of my personal knowledge, information, and belief.

Executed on this 25 day of Sept, 2018.

Rebecca White

KATZ, MARSHALL & BANKS, LLP

Debra S. Katz, Partner
Lisa J. Banks, Partner

By Electronic Mail
September 26, 2018

Mike Davis, Esquire
Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Davis:

Attached please find additional materials responsive to the requests for documents contained in Senator Grassley's letter dated September 23, 2018. We reserve the right to provide supplemental documents as necessary.

We will not produce copies of Dr. Christine Blasey Ford's medical records. These records contain private, highly sensitive information that is not necessary for the Committee to assess the credibility of her testimony. Our client has already been forced to compromise her privacy and safety in order to provide the Committee with important information about the nominee's past conduct, and she will be available to answer any questions the Committee may have when she testifies tomorrow. Any request that she expose her private medical records for public inspection represents an unacceptable invasion of privacy to which no reasonable person would consent. Under no circumstances will we grant any such request.

Sincerely,

Debra S. Katz

Lisa J. Banks
Attorneys for Dr. Christine Blasey Ford

Encl.

cc: Heather Sawyer, Esquire

Jeremiah P. Hanafin

Polygraph Examiner and Consultant
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POLYGRAPH EXAMINATION REPORT

Date of Report
08/10/2018

Date of Examination
08/07/2018

Location of Examination
Hilton Hotel, 1739 West Nursery Road, Linthicum Heights, MD 21090

Examinee's Name
Christine Blasey

Synopsis
On August 7, 2018, Christine Blasey reported to the Hilton Hotel, 1739 West Nursery Road, Linthicum Heights, MD 21090, for the purpose of undergoing a polygraph examination. The examination was to address whether Blasey was physically assaulted by Brett Kavanaugh while attending a small party in Montgomery County, MD. This assault occurred in the 1980's when Blasey was a high school student at the Holton-Arms School. Accompanying Blasey was Attorney Lisa Banks of the firm Katz, Marshall & Banks. After introductions were made, this examiner left the room so Blasey and Attorney Banks could discuss this matter. During this discussion, Blasey provided a written statement to Banks detailing the events that occurred on the evening of the assault. The statement was provided to this examiner when he returned. Blasey stated that the statement was true and correct and signed it in the presence of this examiner and Banks attesting to its accuracy. A copy of this statement is attached to this report. After a brief discussion, Banks departed.

Blasey was then interviewed in an effort to formulate the relevant questions. During this interview, Blasey described the events that occurred on the night of the assault. She stated she attended a small party at a house where the parents were not home. Those attending the party were drinking beer. Blasey stated that Kavanaugh and his friend, Mark, became extremely intoxicated. Blasey stated that she had met Kavanaugh before at previous parties and she briefly dated one of his friends. She stated that Kavanaugh attended Georgetown Preparatory School and she previously attended parties hosted by students of this school. Blasey remembers another male at this party, PJ, who she described as a very nice person. At some point in the evening, Blasey went upstairs to use the restroom. When she got upstairs, she was pushed into a bedroom by

Examinee's Name: Blasey, Christine
Date: 08/10/2018

either Kavanaugh or his friend, Mark. The bedroom was located across from the bathroom. She was pushed onto a bed and Kavanagh got on top of her and attempted to take her clothes off. She stated she expected Kavanaugh was going to rape her. Blasey tried to yell for help and Kavanaugh put his hand over her mouth. Blasey thought if PJ heard her yelling he may come and help her. Blasey stated that when Kavanaugh put his hand over her mouth that this act was the most terrifying for her. She also stated that this act caused the most consequences for her later in life. Blasey stated that Kavanaugh and Mark were laughing a lot during this assault and seemed to be having a good time. Kavanaugh was having a hard time trying to remove Blasey's clothes because she was wearing a bathing suit underneath them. She stated Mark was laughing and coaxing Kavanaugh on. Blasey recalls making eye contact with Mark and thinking he may help her. Mark continued to encourage Kavanaugh. On a couple of occasions, Mark would come over and jump on the bed. The last time he did this, all three became separated and Blasey was able to get free and run to the bathroom. She stated she locked herself in the bathroom until she heard Kavanaugh and Mark go downstairs.

Following this interview, Blasey was given a polygraph examination consisting of the following relevant questions:

Series I

A. Is any part of your statement false? Answer: No
B. Did you make up any part of your statement? Answer: No

Four polygraph charts (which included an acquaintance or "stim" chart) were collected using a Dell Inspiron 15 notebook computer and Lafayette LX4000 software. This software obtained tracings representing thoracic and abdominal respiration, galvanic skin response, and cardiac activity. All of these physiological tracings were stored in the computer along with the time that the questions were asked as well as text of each question.

The format of the test was the two question Federal You Phase Zone Comparison Test (ZCT). As part of a 2011 meta-analysis study done by the American Polygraph Association (APA), the ZCT is one of the polygraph examinations considered valid based upon defined research protocol. As part of the validation process, the APA chose techniques that were reported in the Meta 22 Analytic Survey of Validated Techniques (2011) as having two, independent studies that describe the criterion validity and reliability. The ZCT includes relevant questions addressing the issues to be resolved by the examination, comparison questions to be used in analysis, symptomatic questions, and neutral or irrelevant questions. All questions were reviewed with Blasey prior to the test. The charts collected were subjected to a numerical evaluation that scored the relative strength of physiological reactions to relevant questions with those of the comparison questions. An analysis was conducted using a three (3) point scale (-1, 0, +1). If reactions were deemed to be greater at the relevant questions, then a negative score was assigned. If responses were deemed to be greater at the comparison questions, then a positive score was assigned. A decision of deceptive is rendered if any individual question score is -3 or less or the grand total of both questions is -4 or less. A decision of non-deceptive is rendered if the grand total of both questions is +4 or more with a +1 or more at each question.

Examinee's Name: Blasey, Christine
Date: 08/10/2018

Blasey's scores utilizing the three (3) point scale are +4 at Question A and +5 at Question B with a total score of +9. Based upon this analysis, it is the professional opinion of this examiner that Blasey's responses to the above relevant questions are **Not Indicative of Deception.**

A second analysis was conducted utilizing a scoring algorithm developed by Raymond Nelson, Mark Handler and Donald Krapohl (Objective Scoring System Version 3) which concluded " **No Significant Reactions- Probability these results were produced by a deceptive person is .002."** Truthful results, reported as "No Significant Reactions," occur when the observed p-value indicates a statistically significant difference between the observed numerical score and that expected from deceptive test subjects, using normative data obtained through bootstrap training with the confirmed single issue examinations from the development sample. **Truthful results can only occur when the probability of deception is less than .050.**

Deceptive results, in which an observed p-value indicates a statistically significant difference between the observed numerical score and that expected from truthful persons, and are reported as "Significant Reactions."

When the observed p-value fails to meet decision alpha thresholds for truthful or deceptive classification the test result will be reported as "Inconclusive." No opinion can be rendered regarding those results.

A third analysis was conducted utilizing a scoring algorithm developed by the Johns Hopkins University Applied Physics Laboratory (PolyScore Version 7.0) which concluded **"No Deception Indicated—Probability of Deception is Less Than .02."**

One summer
~~While in~~ high school in ~~the~~ 80's, I went to a small party in the Montgomery County area. There were 4 ~~people~~ boys and a couple of girls. At one point, I went up a small staircase to use the restroom. At that time, I was pushed ~~by two persons~~ into a bedroom and was locked in the room and pushed onto a bed. ~~My~~ Both ~~boys~~ men laid on top of me and tried to remove my clothes while groping me. He held me down and ~~put~~ put his hand on my mouth ~~so~~ to stop me ~~from~~ screaming for help. His friend Mark was also in the room and both were laughing. Mark jumped on top of us 2 or 3 times. I tried to get out from under unsuccessfully. Then Mark jumped ~~once~~ and he toppled over. I managed to run out of the room across to the bathroom and lock the door. Once ~~they~~ I heard them go downstairs, I ran out of the ~~house~~ and went home.

Christa Blasey August 7, 2018

For Immediate Release
September 21, 2018
Contact
Keith Rushing, [redacted], [redacted]

Earthjustice: We Stand With Dr. Christine Blasey Ford
Senate Judiciary Chairman Grassley Must Respect Victims, Honor Dr. Blasey Ford's Requests

Washington, D.C. – Abigail Dillen, incoming president at Earthjustice, offered the following statement regarding the nomination of Judge Brett Kavanaugh to the Supreme Court in light of recent allegations that Judge Kavanaugh violently sexually assaulted Dr. Christine Blasey Ford, a professor at Palo Alto University in California:

"No law firm takes public opposition to a judicial nominee – especially one for the highest court in America – lightly. We at Earthjustice are no exception.
When Judge Kavanaugh was nominated, we thoroughly examined his record. We read his opinions. We were guided by our powerful desire for an impartial Justice who would uphold the law for all people – especially those who have borne the brunt of air and water pollution, toxic waste, and other forms of environmental degradation in our country, and who will experience the effects of climate change most intensely.

And after we scrutinized Judge Kavanaugh's record, it was clear: Judge Brett Kavanaugh is a dangerous choice to serve on the Supreme Court.

We reached this conclusion based on what we could see. Yet, there is still so much unknown that the American public deserves to know. To this day, 90% of Judge Kavanaugh's records of service in the White House have been hidden from view by partisan lawyers and Trump Administration unfounded claims of 'privilege.' This entire nomination process has been an unprecedented sham and an insult to democracy. What are Senate Republicans afraid of?

Judge Kavanaugh's record was disqualifying on its own, but even to those who were willing to overlook it for the sake of tilting the scales of justice in favor of the wealthy and the powerful, the revelations of the last week should have ended the discussion.

This was an opportunity to not perpetuate the same culture Anita Hill was subjected to 27 years ago – one that belittles, mistreats, and attempts to silence women. As Anita Hill said herself earlier this week, 'A fair, neutral and well-thought-out course is the only way to approach' getting to the facts. It is clear now that Chairman Grassley and his supporters in this effort have no interest in allowing the American public to know the facts.

We see Dr. Christine Blasey Ford, and we stand with her. It is disgraceful that a man facing credible accusations of violent sexual assault stands at the doorstep of the United States Supreme Court.

It is disgraceful that Dr. Blasey Ford, a victim of an alleged sexual assault, would be subjected to a campaign of targeted harassment for daring to tell her story.

It is disgraceful that Chairman Grassley and his Republican colleagues are falling over each other to rush a sham hearing where they will, as men – let's not forget that all eleven Republicans on the Judiciary Committee are white men – smear and distort her story for partisan political benefit.

The Senate must reject this nomination and start over – now."

EVAWI
End Violence Against Women International

145 S Main | Colville, WA 99114
P- 509.684.9800 F- 509.684.9801
www.evawintl.org | info@evawintl.org

Start by Believing

EVAWI Statement on Sexual Assault Response and Investigation

As a professional training organization dedicated to improving sexual assault investigations, we know that the crime of sexual assault is complex and often misunderstood. Most sexual assault victims don't report the crime to law enforcement, and when they do, it is often weeks, months, or years later.

There are many reasons why survivors don't come forward, but primary among these is a fear of not being believed. Negative responses can have devastating consequences for victims, and they can decrease the chance of reaching out for further support or assistance. At EVAWI, we recognize that it takes extraordinary courage to come forward and report sexual assault under any circumstances.

We also recognize it is more difficult to investigate a report of sexual assault committed long ago. However, it is not impossible, and dedicated law enforcement professionals across the country do it every day. Particularly in cases of child sexual assault, investigators frequently corroborate reports of abuse that took place years ago, even without physical evidence or eyewitnesses to the crime. Other types of evidence and testimony can often be documented even decades after the original assault.

Yet the starting place for a sexual assault investigation is typically a victim interview. To get the best information from that interview, it is essential to follow standards of practice that are based on an understanding of trauma and the common dynamics of sexual assault victimization and perpetration. This includes creating a safe and nonjudgmental environment, establishing trust and rapport, and providing advocacy services or other support. It also requires a great deal of time and patience.

The most effective way to accomplish this is to Start by Believing. This doesn't mean investigators make a premature judgment, or reach a preordained conclusion. It simply means that investigators listen carefully to the victim's report, without communicating an attitude of doubt or blame. The next step is then to follow the evidence, by conducting a thorough, professional, and impartial investigation.

EVAWI offers a wealth of training resources for sexual assault investigators. But the most important step is the first one. When someone says they were sexually assaulted – whether in a report to law enforcement, or a disclosure to friends and family members – it is critical to Start by Believing.

#StartbyBelieving

Brett Kavanaugh Is Devoted to the Presidency

theatlantic.com/ideas/archive/2018/07/brett-kavanaugh-is-devoted-to-the-presidency/564754/

July 10, 2018

Not since Warren Harding in 1921 nominated former President William Howard Taft to be chief justice has the country been presented with a high court nominee so completely shaped by the needs and mores of the executive branch as Brett Kavanaugh, unveiled Monday night as President Donald Trump's nominee to replace Justice Anthony Kennedy.

Though Kavanaugh served as Kennedy's law clerk during the October 1993 term, the contrast between the two men could hardly be more complete. Kennedy's roots lay in his days of small-town private practice; he made his way to the bench from private practice, and, as a judge, he was conservative but independent. Kavanaugh has been the creature and servant of political power all his days. It would be the height of folly to expect that, having attained his lifetime's ambition of a seat on the Supreme Court, he will become anything else.

A product of the District and its affluent Maryland suburbs, Kavanaugh attended Georgetown Prep with another D.C. princeling, Neil Gorsuch. He went on to Yale College and Yale Law School. He and Gorsuch served together as law clerks for Kennedy; Kavanaugh worked for President George H.W. Bush's Solicitor General, Kenneth Starr, then, after Bush left office, worked with then-Independent Counsel Starr investigating the Clinton White House. In 2001, Kavanaugh went to the White House himself to serve George W. Bush, first in his legal counsel's office and then, for five years, as his staff secretary, ensuring a smooth flow of paper among the president and his aides. While in the White House, he married another Bush retainer, Ashley Estes, who had served for nearly a decade as Bush's personal secretary. Bush originally named Kavanaugh to the Court of Appeals for the District of Columbia Circuit in 2003, though Democratic opposition delayed his confirmation until 2006.

Much will be made of the nominee's deep religious faith and his many charitable works. He certainly appears to be a man of large intellect and sterling character. But this assiduous courtier's brilliant career has seldom been even momentarily exposed to the world beyond the Washington Beltway, in which most Americans live with the decisions made inside it. Indeed, Kavanaugh's strong Washington identity may have been the reason his name did not appear on candidate Trump's initial short list of court picks before the 2016 election; Kavanaugh surfaced as a possible court pick only long after the voters had picked Trump to "drain the swamp."

After Kennedy announced his departure, some in conservative circles expressed unease with the idea of a Justice Kavanaugh. They noted that Kavanaugh temporized during the Affordable Care Act litigation, arguing that the challenge was premature; he refused to adopt the harshest possible anti-abortion position during *Hargan v. Garza*, a case testing whether a teenaged woman held in immigration detention could leave lockup to have an abortion. (Kavanaugh

wrote that the woman was wrongly asserting "an immediate right to abortion on demand"—not that she had no right to choose abortion at all.) These quibbles are a textbook illustration of what Sigmund Freud once called "the narcissism of minor differences." There is no reason to believe that, on issues ranging from health care to consumer and labor rights to the Second Amendment, Kavanaugh's votes and opinions will be anything but reliably conservative—clothed at times, perhaps, in soothing rhetoric, but more consistent, and more conservative, than Kennedy's.

Kavanaugh seems most likely to make his mark are in two areas important to Washingtonians —executive authority and administrative law. As befits an executive creature, Kavanaugh's decisions incline toward the "unitary executive" view of presidential power, which holds that Congress cannot set up federal agencies that are not under the direction and control of the president. In administrative law, he argues that federal judges should displace specialized agencies in setting regulatory policy. Under a current doctrine called *Chevron,* agencies interpret the statutes under which they operate. When those interpretations are challenged in court, federal judges ask whether the statute is "ambiguous"—capable of two or more readings. If so, the judges must ask whether the agency's interpretation is "reasonable"; if so, the courts "defer" to the agency's reading.

Kavanaugh rejects this approach; he argues that "judges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way." Instead, he wrote in *Harvard Law Review,* "courts should seek the best reading of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons." Yet from what I can tell, that "best reading" is no more determinate than is "ambiguity"; indeed, it sounds to me a lot like "the judge's view of best policy."

One could imagine, of course, that Kavanaugh's experience pursuing wrongdoing in the Clinton White House might incline him to a jaundiced view of presidents generally, thus offering a hope that, on the bench, he will be independent of the president who appointed him. But in a 2009 article in *Minnesota Law Review,* Kavanaugh, by then a life-tenured judge, announced that the independent-counsel investigation in which he served had been a mistake after all: "[T]he nation certainly would have been better off if President Clinton could have focused on Osama Bin Laden without being distracted by the Paula Jones sexual harassment case and its criminal-investigation offshoots." He suggested instead that Congress should, by statute, simply provide that a sitting president could neither be sued, indicted, tried, investigated or even questioned by prosecutors while in office. Problem solved.

No doubt that position was agreeable to Trump and those around him.

Garrett Epps is a contributing editor for *The Atlantic*. He teaches constitutional law and creative writing for law students at the University of Baltimore. His latest book is *American Justice 2014: Nine Clashing Visions on the Supreme Court*.

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

November 2, 2018

VIA ELECTRONIC TRANSMISSION

The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Christopher A. Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

Dear Attorney General Sessions and Director Wray:

I am once again writing regarding fabricated allegations the United States Senate Committee on the Judiciary recently received. As you know, the Senate Judiciary Committee processed the nomination of Judge Brett M. Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States, leading to his eventual confirmation on October 6, 2018. As part of that process, the Committee has investigated various allegations made against Judge Kavanaugh. The Committee's investigation has involved communicating with numerous individuals claiming to have relevant information. While many of those individuals have provided the Committee information in good faith, it unfortunately appears some have not. As explained below, I am writing to refer Ms. Judy Munro-Leighton for investigation of potential violations of 18 U.S.C. §§ 1001 (materially false statements) and 1505 (obstruction), for materially false statements she made to the Committee during the course of the Committee's investigation.

On September 25, 2018, staffers for Senator Harris, a Committee member, referred an undated handwritten letter to Committee investigators that her California office had received signed under the alias "Jane Doe" from Oceanside, California.[1] The letter contained highly graphic sexual-assault accusations against Judge Kavanaugh. The anonymous accuser alleged that Justice Kavanaugh and a friend had raped her "several times each" in the backseat of a car. In addition to being from an anonymous accuser, the letter listed no return address, failed to provide any timeframe, and failed to provide any location -- beyond an automobile -- in which these alleged incidents took place.

Regardless, Committee staff quickly began investigating the claims as part of the broader investigation, hindered by the limited information provided. On September 26, 2018, Committee staff questioned Judge Kavanaugh about these allegations in a transcribed interview conducted

[1] *See* Undated Letter from "Jane Doe" to Senator Harris, enclosed below.

under penalty of felony.[2] They read him the letter in full as part of the questioning.[3] In response to the anonymous allegations, Judge Kavanaugh unequivocally stated: "[T]he whole thing is ridiculous. Nothing ever -- anything like that, nothing . . . . [T]he whole thing is just a crock, farce, wrong, didn't happen, not anything close."[4] Later that day, September 26th, the Committee publicly released the transcript of that interview with Judge Kavanaugh, which included the full text of the Jane Doe letter.[5]

Then, on October 3, 2018, Committee staff received an email from a Ms. Judy Munro-Leighton with a subject line claiming: "I am Jane Doe from Oceanside CA -- Kavanaugh raped me."[6] Ms. Munro-Leighton wrote that she was "sharing with you the story of the night that Brett Kavanaugh and his friend sexually assaulted and raped me in his car" and referred to "the letter that I sent to Sen. Kamala Harris on Sept. 19 with details of this vicious assault." She continued: "I know that [']Jane Doe['] will get no media attention, but I am deathly afraid of revealing any information about myself or my family." She then included a typed version of the Jane Doe letter.

Committee investigators began investigating Ms. Munro-Leighton's allegations. Given her relatively unique name, Committee investigators were able to use open-source research to locate Ms. Munro-Leighton and determine that she: (1) is a left-wing activist; (2) is decades older than Judge Kavanaugh; and (3) lives in neither the Washington DC area nor California, but in Kentucky. In order to investigate her sexual-assault claims, Committee investigators first attempted to reach her by phone on October 3, 2018, but were unsuccessful. On October 29, Committee investigators again attempted contact, leaving a voicemail. In response, Ms. Munro-Leighton left Committee investigators a voicemail on November 1, 2018.

Eventually, on November 1, 2018, Committee investigators connected with Ms. Munro-Leighton by phone and spoke with her about the sexual-assault allegations against Judge Kavanaugh she had made to the Committee. Under questioning by Committee investigators, Ms. Munro-Leighton admitted, contrary to her prior claims, that she had not been sexually assaulted by Judge Kavanaugh and was not the author of the original "Jane Doe" letter. When directly asked by Committee investigators if she was, as she had claimed, the "Jane Doe" from Oceanside California who had sent the letter to Senator Harris, she admitted: "No, no, no. I did that as a way to grab attention. I am not Jane Doe . . . but I did read Jane Doe's letter. I read the transcript of the call to your Committee. . . . I saw it online. It was news."

She further confessed to Committee investigators that (1) she "just wanted to get attention"; (2) "it was a tactic"; and (3) "that was just a ploy." She told Committee investigators that she had called Congress multiple times during the Kavanaugh hearing process – including prior to the time Dr. Ford's allegations surfaced – to oppose his nomination. Regarding the false sexual-assault

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[2] Senate Judiciary Committee Interview with Judge Kavanaugh 5-10 (Sept, 26, 2018). Available at: https://www.judiciary.senate.gov/imo/media/doc/09.26.18%20BMK%20Interview%20Transcript%20(Redacted).pdf.

[3] *Id.*

[4] *Id.*

[5] https://www.judiciary.senate.gov/press/rep/releases/judiciary-committee-releases-transcripts-of-kavanaugh-interviews

[6] Email from Judy Munro-Leighton to Senate Judiciary Committee (Oct. 3, 2018), enclosed below.

allegation she made via her email to the Committee, she said: "I was angry, and I sent it out." When asked by Committee investigators whether she had ever met Judge Kavanaugh, she said: "Oh Lord, no."

In short, during the Committee's time-sensitive investigation of allegations against Judge Kavanaugh, Ms. Munro-Leighton submitted a fabricated allegation, which diverted Committee resources. When questioned by Committee investigators she admitted it was false, a "ploy," and a "tactic." She was opposed to Judge Kavanaugh's confirmation.

As I have repeatedly stated, Committee investigations in support of the judicial nomination process are an essential part of the Committee's constitutional role. The Committee is grateful to citizens who come forward with relevant information in good faith, even if they are not one hundred percent sure about what they know. But when individuals intentionally mislead the Committee, they divert Committee resources during time-sensitive investigations and materially impede our work. Such acts are not only unfair; they are potentially illegal. It is illegal to make materially false, fictitious, or fraudulent statements to Congressional investigators. It is illegal to obstruct Committee investigations.

Accordingly, in light of the seriousness of these facts, and the threat these types of actions pose to the Committee's ability to perform its constitutional duties, I hope you will give this referral the utmost consideration. Thank you for your prompt attention to this matter. If you have any questions, please contact a professional investigative counsel in the Committee's Oversight and Investigations Unit at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
Committee on the Judiciary

Enclosures:
Undated Letter from "Jane Doe" to Senator Harris
Email from Judy Munro-Leighton to Senate Judiciary Committee (Oct. 3, 2018)

cc: The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary

DECENT

SAN DIEGO CA 920

19 SEP 2018 PM 5 L

USA

Kamala Harris,
Senate Judiciary Committee
600 B St. Suite 2240
San Diego CA 92101

DEAR SENATOR GRASSLEY, ET AL

THE CURRENT SITUATION REGARDING THE ACCUSATIONS MADE BY DR FORD AGAINST BRETT KAVANAUGH HAVE PROMPTED ME TO WRITE YOU TODAY.

I HAVE MOVED ON WITH MY LIFE SINCE HE FORCED HIMSELF ON ME AS WELL. THE TIMES WERE SO DIFFERENT AND I DIDN'T EXPECT TO BE TAKEN SERIOUSLY, EMBARRASS MY FAMILY BE BELIEVED AT ALL.

I WAS AT A PARTY WITH A FRIEND. I HAD BEEN DRINKING. SHE LEFT WITH ANOTHER BOY LEAVING ME TO FIND MY OWN WAY HOME. KAVANAUGH AND A FRIEND OFFERED ME A RIDE HOME. I DON'T KNOW THE OTHER BOYS NAME. I WAS IN HIS CAR TO GO HOME. HIS FRIEND WAS BEHIND ME IN THE BACK SEAT. KAVANAUGH KISSED ME FORCEFULLY I TOLD HIM I ONLY WANTED A RIDE HOME. KAVANAUGH CONTINUED TO GROPE ME OVER MY CLOTHES, FORCING HIS KISSES ON ME AND PUTTING HIS HAND UNDER MY SWEATER. "NO!" I YELLED AT HIM. THE BOY IN THE BACK SEAT REACHED AROUND PUTTING HIS HAND OVER MY MOUTH AND

AND Holding my arm to keep me in the car. I screamed into his hand.

Kavanaugh continued his forcing himself on me. He pulled up my sweater and bra exposing my breasts and reached into my panties inserting his fingers into my vagina

My screams were silenced by the boy in the back seat covering my mouth and groping me as well.

Kavanaugh slapped me and told me to be quiet and forced me to perform oral sex on him. He climaxed in my mouth.

They forced me into the backseat and took turns raping me several times each.

They dropped me off two blocks from my home. "No one will believe you if you tell. Be a good girl." He told me

Watching what has happened to Anita Hill and Dr Ford has me petrified to come forward in person or even provide my name. A group of white men powerful senators who won't believe me will come after me

Like Dr FORD. IM A TEACHER. I HAVE AN EDUCATION. A FAMILY. A CHILD A HOME.

I HAVE CREDIBILITY. JUST BECAUSE SOMETHING HAPPENS A LONG TIME AGO BECAUSE A RAPE VICTIM doesNT WANT TO PERSONALLY COME FORWARD does NOT MEAN SOMETHING CANT BE TRUE!

Jane Doe
OCEANSIDE CA

From: [redacted]
To: [redacted]
Cc: [redacted]
Subject: Fwd: I am Jane Doe from Oceanside CA -- Kavanaugh raped me
Date: Wednesday, October 03, 2018 7:27:42 AM

Begin forwarded message:

From: Judy Munro-Leighton <[redacted]>
Date: October 3, 2018 at 6:42:35 AM EDT
To: [redacted]
Subject: I am Jane Doe from Oceanside CA -- Kavanaugh raped me
Reply-To: [redacted]

To all Republican Senators, 10/3/18

My name is Jane Doe, from Oceanside CA. I am sharing with you the story of the night that Brett Kavanaugh and his friend sexually assaulted and raped me in his car. Here is the letter that I sent to Sen. Kamala Harris on Sept. 19 with details of this vicious assault. The Senate Judiciary Comm had a phone interview on Sept. 26 with Kavanaugh to ask him about my letter.

I refuse to allow Donald J. Trump to use me or my story as an ugly chant at one of his Republican rallies. I know that Jane Doe will get no media attention, but I am deathly afraid of revealing any information about myself or my family. I watched in horror as Trump vilified Dr. Blasey-Ford. I will not allow this abuse to be directed toward me.

> Dear, Senator Grassley, et al.
>
> The current situation regarding the accusations made by Dr. Ford against Brett Kavanaugh have prompted me to write you today. I have moved on with my life since he forced himself on me as well. The times were so different, and I didn't expect to be taken seriously, embarrass my family, be believed at all. I was at a party with a friend. I had been drinking. She left with another boy, leaving me to find my own way home. Kavanaugh and a friend offered me a ride home. I don't know the other boy's name. I was in his car to go home. His friend was behind me in the backseat. Kavanaugh kissed me forcefully.
>
> I told him I only wanted a ride home. Kavanaugh continued to grope me over my clothes, forcing his kisses on me and putting his hand under my sweater. 'No,' I yelled at him. The boy in the backseat reached around, putting his hand over my mouth and holding my arm

to keep me in the car. I screamed into his hand. Kavanaugh continued his forcing himself on me. He pulled up my sweater and bra exposing my breasts, and reached into my panties, inserting his fingers into my vagina. My screams were silenced by the boy in the backseat covering my mouth and groping me as well. Kavanaugh slapped me and told me to be quiet and forced me to perform oral sex on him. He climaxed in my mouth. They forced me to go into the backseat and took turns raping me several times each.

They dropped me off two blocks from my home. 'No one will believe if you tell. Be a good girl,' he told me. Watching what has happened to Anita Hill and Dr. Ford has me petrified to come forward in person or even provide my name. A group of white men, powerful senators who won't believe me, will come after me. Like Dr. Ford, I'm a teacher, I have an education, a family, a child, a home. I have credibility. Just because something happens a long time ago, because a rape victim doesn't want to personally come forward, does not mean something can't be true.

Jane Doe, Oceanside, California.

CHARLES E. GRASSLEY, IOWA, CHAIRMAN
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JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

October 26, 2018

VIA ELECTRONIC TRANSMISSION

The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Christopher A. Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

Dear Attorney General Sessions and Director Wray:

Yesterday, I wrote to you referring Mr. Michael Avenatti and Ms. Julie Swetnick for investigation of potential violations of 18 U.S.C. §§ 371, 1001, and 1505, for materially false statements they made to the Senate Judiciary Committee during the course of the Committee's investigation into allegations against Judge Brett M. Kavanaugh. I write today because of important additional information regarding Mr. Avenatti that has since come to the Committee's attention. In light of this new information, I am now referring Mr. Avenatti for investigation of additional potential violations of those same laws, stemming from a second declaration he submitted to the Committee that also appears to contain materially false statements. As explained below, according to NBC News, the purported declarant of that sworn statement has disavowed its key allegations and claimed that Mr. Avenatti "twisted [her] words."[1]

On October 2, 2018, Mr. Avenatti emailed Committee staff, stating:

> [A]ttached please find another declaration from another witness who supports a number of allegations of Ms. Swetnick. She knows both Ms. Swetnick and Dr. Ford. The identify [sic] of this witness will be released to the FBI once they contact me to arrange an interview as she does not want her name publicly disclosed at this time.[2]

The anonymous sworn statement attached to that email contained two key allegations against Judge Kavanaugh, ostensibly based on the "personal knowledge" of the declarant and made "under

[1] Kate Snow and Anna Schecter, *New Questions Raised About Avenatti Claims Regarding Kavanaugh*, NBC NEWS (Oct. 25, 2018), enclosed below and available at https://www.nbcnews.com/politics/justice-department/new-questions-raised-about-avenatti-claims-regarding-kavanaugh-n924596.
[2] Email exchange between the Chief Counsel for Nominations Mike Davis and Michael Avenatti on Oct. 2, 2018, enclosed below.

penalty of perjury."[3] According to the sworn statement, the declarant, whose name was redacted, claimed knowledge of Judge Kavanaugh being "overly aggressive and verbally abusive towards girls … includ[ing] inappropriate physical contact with girls of a sexual nature" while at house parties in the early 1980s.[4] The sworn statement also said:

> During the years 1981-82, I witnessed firsthand Brett Kavanaugh, together with others, "spike" the "punch" at house parties I attended with Quaaludes and/or grain alcohol. I understood this was being done for the purpose of making girls more likely to engage in sexual acts and less likely to say "No."[5]

In my previous referral, I noted the existence of this anonymous declaration and that Mr. Avenatti neither provided the identity of the declarant to the Committee nor made her available for an interview with Committee staff. I also noted that, as of then, it did not appear that any media outlet had been able to report any interview with the purported declarant or validate anything in the anonymous declaration.

However, after I sent you my referral, NBC News revealed yesterday evening that its reporters in fact had a series of contacts with the purported declarant between September 30, 2018, and October 5, 2018.[6] According to that report, the declarant denied the key allegations contained in the sworn statement, both before and after the statement was publicly released. Despite the fact the sworn statement Mr. Avenatti sent to the Committee stated she "witnessed firsthand" Judge Kavanaugh spiking punch, she expressly denied this. As noted in the report:

> [L]ess than 48 hours before Avenatti released her sworn statement on Twitter, the same woman told NBC News a different story. Referring to Kavanaugh spiking the punch, "I didn't ever think it was Brett," the woman said to reporters in a phone interview arranged by Avenatti on Sept. 30 after repeated requests to speak with other witnesses who might corroborate Swetnick's claims.[7]

According to the NBC News report, after Mr. Avenatti tweeted the sworn statement on October 2 with the name of the declarant redacted, "Avenatti confirmed to NBC News that it was the same woman interviewed by phone on Sept. 30."[8] The woman reportedly denied the allegation yet again after the release of the sworn statement:

> [R]eached by phone independently from Avenatti on Oct. 3, the woman said she only "skimmed" the declaration. After reviewing the statement, she wrote in a text on Oct. 4 to NBC News: "It is

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[3] Anonymous Sworn Statement dated Oct. 2, 2018, enclosed below.
[4] *Id.*
[5] *Id.*
[6] Kate Snow and Anna Schecter, *New Questions Raised About Avenatti Claims Regarding Kavanaugh*, NBC NEWS (Oct. 25, 2018)
[7] *Id.*
[8] *Id.*

> incorrect that I saw Brett spike the punch. I didn't see anyone spike the punch...**I was very clear with Michael Avenatti from day one.**"[9]

The declarant similarly disavowed the other allegation that Judge Kavanaugh was aggressive and abusive towards girls, once again both before and after the statement attributed to her was released. As reported by NBC News, "[w]hen asked in the [September 30] phone interview if she ever witnessed Kavanaugh act inappropriately towards girls, the woman replied 'no.'"[10] After the sworn statement was released, "[w]hen pressed about abusive behavior towards girls, she wrote in a text: 'I would not ever allow anyone to be abusive in my presence. Male or female.'"[11]

Despite the fact Mr. Avenatti had already confirmed to NBC News that the woman they spoke to on September 30 was the declarant:

> [W]hen questioned on Oct. 3 about the discrepancies between what she said in the phone interview and the serious allegations in the sworn declaration, Avenatti said he was "disgusted" with NBC News. At one point, in an apparent effort to thwart the reporting process, he added in the phone call, "How about this, on background, it's not the same woman. What are you going to do with that?"[12]

Mr. Avenatti then reportedly backtracked on this attempted tactic, instead claiming to NBC that he confirmed with her again that the allegations were true, and she must have been "confused" by the reporter's question.[13] The report says that five minutes later, the reporters received a "formally-worded text" from the woman's phone number backing Mr. Avenatti.[14]

> But when reached by phone minutes later, the woman again insisted that she never saw Kavanaugh spike punch or act inappropriately toward women. She said she's "been consistent in what [she's] told Michael." In a subsequent text on Oct. 5, she wrote, "I will definitely talk to you again and no longer Avenatti. I do not like that **he twisted my words**."[15]

Simply put, the sworn statement Mr. Avenatti provided the Committee on October 2 appears to be an outright fraud. According to NBC News, the purported declarant denied - both before and after the sworn statement was released - the key allegations Mr. Avenatti attributed to her. She stated she was clear and consistent "from day one" with Mr. Avenatti that those claims

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[9] *Id.* (emphasis added).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* (emphasis added).

were not true. And she said Mr. Avenatti "twisted [her] words." When reporters pressed him on these discrepancies, Mr. Avenatti attempted to deceive them in an apparent effort to thwart the truth coming out.

Accordingly, in light of the seriousness of these facts, and the threat these types of actions pose to the Committee's ability to perform its constitutional duties, I hope you will give this referral, as well as my prior one related to Mr. Avenatti, the utmost consideration. Thank you for your prompt attention to this matter. If you have any questions, please contact a professional investigative counsel in the Committee's Oversight and Investigations Unit at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
Committee on the Judiciary

Enclosures:

1. Email exchange between the Chief Counsel for Nominations Mike Davis and Michael Avenatti on Oct. 2, 2018
2. Anonymous Sworn Statement dated Oct. 2, 2018
3. Kate Snow and Anna Schecter, *New Questions Raised About Avenatti Claims Regarding Kavanaugh*, NBC NEWS (Oct. 25, 2018).

cc: The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary

[redacted]

From: Michael J. Avenatti [redacted]
Sent: Tuesday, October 02, 2018 4:39 PM
To: Davis, Mike (Judiciary-Rep)
Cc: Duck, Jennifer (Judiciary-Dem); Sawyer, Heather (Judiciary-Dem)
Subject: RE: Kavanaugh Nomination - Allegations of Julie Swetnick
Attachments: Declaration.pdf

Importance: High

Mr. Davis:

On repeated occasions, you have failed to respond to my correspondence relating to the nomination of Brett Kavanaugh and the ability of my client Ms. Swetnick to sit down with the FBI and share facts and witnesses regarding what she witnessed. This is entirely unprofessional and demonstrates a complete lack of good faith on your part and those that you report to. I once again ask that you immediately respond and take all steps to arrange an FBI interview.

Further, attached please find another declaration from another witness who supports a number of allegations of Ms. Swetnick. She knows both Ms. Swetnick and Dr. Ford. The identify of this witness will be released to the FBI once they contact me to arrange an interview as she does not want her name publicly disclosed at this time.

Time is of the essence. Please respond.

Michael

From: Michael J. Avenatti
Sent: Friday, September 28, 2018 2:13 PM
To: Davis, Mike (Judiciary-Rep)
Cc: Duck, Jennifer (Judiciary-Dem); Sawyer, Heather (Judiciary-Dem)
Subject: RE: Kavanaugh Nomination - Allegations of Julie Swetnick

Mr. Davis:

Please respond. Time is of the essence.

Regards,

Michael

From: Michael J. Avenatti
Sent: Friday, September 28, 2018 11:03 AM
To: Davis, Mike (Judiciary-Rep)
Cc: Duck, Jennifer (Judiciary-Dem); Sawyer, Heather (Judiciary-Dem)
Subject: RE: Kavanaugh Nomination - Allegations of Julie Swetnick

Mr. Davis:

We are STILL awaiting a response to my email. It has now been over 30 hours and you have failed to respond. We have heard nothing from the Committee.

In light of Senator Flake's comments moments ago, please let us know when we can meet with the FBI and provide the facts and evidence supporting my client's sworn declaration. Time is of the essence.

Regards,

Michael

From: Michael J. Avenatti
Sent: Thursday, September 27, 2018 3:05 PM
To: Davis, Mike (Judiciary-Rep)
Cc: Duck, Jennifer (Judiciary-Dem); Sawyer, Heather (Judiciary-Dem)
Subject: RE: Kavanaugh Nomination - Allegations of Julie Swetnick

Mr. Davis:

I sent the below e-mail nine (9) hours ago and have yet to receive any response. As you know, time is of the essence.

As stated below, my client Julie Swetnick is prepared to come to Washington, D.C. to testify under oath before the Committee. I also believe that at least one, if not two, other witness(es) are likewise prepared to come to Washington, D.C. to testify as to the accuracy of the statements in my client's declaration.

Please confirm that my client and the supporting witness(es) will be permitted to testify under oath before the Committee ASAP. Under no circumstances should a vote be taken on the nominee without first hearing from my client and the supporting witness(es).

Please get back to me as soon as possible.

Thank you.

Michael

From: Michael J. Avenatti
Sent: Thursday, September 27, 2018 5:58 AM
To: Davis, Mike (Judiciary-Rep)
Cc: Duck, Jennifer (Judiciary-Dem); Sawyer, Heather (Judiciary-Dem)
Subject: Kavanaugh Nomination - Allegations of Julie Swetnick

Mr. Davis:

As you know, I represent Ms. Julie Swetnick, a woman that has provided a detailed declaration under ***penalty of perjury*** relating to the claimed abhorrent conduct of Brett Kavanaugh, including sexual assault.

You and the Committee leadership first learned of these allegations on Sunday and yet have done basically nothing to investigate them. In fact, after I emailed you in detail on Monday morning, you failed to even respond for days. Simply put, you blew us off all day Monday and Tuesday. It was not until yesterday that you finally responded and you only did so then because the press started contacting you for comment.

Your conduct does not evidence any desire to get to the truth or to fulfill your duties to the American people (who pay your salary). To the contrary, you and the leadership seem intent on

confirming Brett Kavanaugh as quickly as possible so as to avoid any real investigation into the facts and circumstances surrounding the allegations made by my client and many other women. To be clear, my client Ms. Swetnick demands the following:

FBI Investigation. The Committee and Senator Grassley must immediately refer this matter to the FBI for a complete and fair investigation. My client is prepared to meet with the FBI today to disclose how she was victimized and what she observed. She is also prepared to disclose multiple additional cooraborating witnesses with knowledge of the conduct of Brett Kavanaugh and Mark Judge, as well as additional evidence.

In my experience, women that are fabricating stories do not offer to immediately meet with FBI agents to discuss their allegations. The FBI is used to investigate the many of the most serious allegations and crimes in America every day (i.e. 9/11 and the Oklahoma City bombing). *Why are you and Senator Grassley refusing to refer this matter to the FBI for investigation or request that they intervene?*

Sworn Testimony Before the Committee. Ms. Swetnick demands the opportunity to present sworn testimony before the Committee as to what she witnessed and how she was victimized. She is prepared to be questioned as to her allegations for as long as it takes to get to the truth. Please confirm that she will be allowed to testify and contact me so that we may agree on the logistics.

Polygraph Examination. My client is prepared to undergo a polygraph examination in further substantiation of her claims provided that Mr. Kavanaugh likewise agrees to undergo an examination. As you know, while the results of such an examination are generally not admissible in a court of law, they are routinely used in the federal government for the granting of security clearances and the like at the highest levels, including at our intelligence agencies. There is no reason why they cannot be used in this circumstance. Please confirm that both polygraph examinations will proceed.

Mark Judge. I am still awaiting an answer as to if the Committee has requested that Mark Judge appear to testify and if not, why not. As detailed in my client's sworn declaration, Mr. Judge has detailed knowledge of the conduct of Mr. Kavanaugh and witnessed it firsthand. This is likewise true as it relates to other allegations from other women. Thus, there is no excuse for the Committee refusing to make a demand that he testify. Indeed, seeing as Mr. Judge is one of Mr. Kavanaugh's closest friends from the time period at issue, one would think that Mr. Kavanaugh would want him to testify unless he is hiding something. Please confirm that Mr. Judge is being asked to provide sworn testimony.

Knowledge by the Committee. Press reports have stated that certain members of the Committee were aware of allegations similar to those set forth in my client's declaration well before Sunday. Is this accurate? If so, please provide the details of this knowledge and explain why it was not investigated sooner.

Please respond to the above as quickly as possible as time is of the essence. Once again, this process must be a search for the truth as opposed to a partisan attempt to ram a Supreme Court nominee through at all costs, including at the expense of women who claim to be victims of sexual assault.

Regards,

Michael

DECLARATION OF [redacted]

I, [redacted], declare as follows:

1. My name is [redacted] and I am a resident of South Florida. I fully understand the seriousness of the statements contained within this declaration. I have personal knowledge of the information stated herein and if called to testify to the same would and could do so.

2. I am a 1983 graduate of a high school in the Washington, D.C. area. I also hold a bachelor of arts degree and master of liberal arts degree. I have known Christine Blasey Ford and Julie Swetnick for decades and I believe they are both honest and truthful.

3. I was first introduced to Brett Kavanaugh and Mark Judge in 1980 at Beach Week in Ocean City, Maryland. Thereafter, I attended at least 20 house parties in the Washington, D.C. area where Brett and Mark were present during the years 1980-82. I knew them both well as we shared many mutual friends and often socialized with the same people.

4. The house parties I attended were a common occurrence in the area and usually occurred on the weekends during the school year. I know of many instances during these house parties where Brett and Mark would drink excessively and be overly aggressive and verbally abusive toward girls. This conduct included inappropriate physical contact with girls of a sexual nature. It also often included Brett drinking to a point where he was incoherent and vomiting, including well before he was 18 years old.

5. I have seen Brett Kavanaugh's recent interview on Fox News regarding his alleged "choir boy" existence during his high school years and lack of sexual activity. This claim is absolutely false and a lie based on what I observed firsthand. It is also laughable.

//

//

6. During the years 1981-82, I witnessed firsthand Brett Kavanaugh, together with others, "spike" the "punch" at house parties I attended with Quaaludes and/or grain alcohol. I understood this was being done for the purpose of making girls more likely to engage in sexual acts and less likely to say "No."

7. I am aware of other witnesses that can attest to the truthfulness of each of the statements above.

8. I am aware of other inappropriate conduct by Brett Kavanaugh but do not feel comfortable stating it at this time in this declaration. I am fully, willing, and able to speak with the FBI and tell them everything I know about Brett Kavanaugh and his misconduct if I am contacted.

I declare, under penalty of perjury and under the laws of the United States of America, that the foregoing is true and correct. I have executed this declaration on October 2, 2018.

[redacted]

nbcnews.com

New questions raised about Avenatti claims regarding Kavanaugh

Kate SnowKate Snow is a national correspondent for NBC News.

6-7 minutes

Breaking News Emails

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Oct. 25, 2018 / 6:53 PM EDT

By Kate Snow and Anna Schecter

When Sen. Chuck Grassley referred attorney Michael Avenatti and his client Julie Swetnick to the Justice Department for criminal investigation Thursday, he cited Swetnick's interview with NBC News as evidence the two were trying to mislead the Senate Judiciary Committee.

In the NBC News interview that aired on Oct. 1, Swetnick back-tracked on or contradicted parts of her sworn statement where she alleged she witnessed then-Supreme Court nominee Brett Kavanaugh "cause girls to become inebriated and disoriented so they could then be 'gang raped' in a side room or bedroom by a 'train' of boys."

NBC News also found other apparent inconsistencies in a second

sworn statement from another woman whose statement Avenatti provided to the Senate Judiciary Committee in a bid to bolster Swetnick's claims.

In the second statement, the unidentified woman said she witnessed Kavanaugh "spike" the punch at high school parties in order to sexually take advantage of girls. But less than 48 hours before Avenatti released her sworn statement on Twitter, the same woman told NBC News a different story.

Referring to Kavanaugh spiking the punch, "I didn't ever think it was Brett," the woman said to reporters in a phone interview arranged by Avenatti on Sept. 30 after repeated requests to speak with other witnesses who might corroborate Swetnick's claims. As soon as the call began, the woman said she never met Swetnick in high school and never saw her at parties and had only become friends with her when they were both in their 30s.

When asked in the phone interview if she ever witnessed Kavanaugh act inappropriately towards girls, the woman replied, "no." She did describe a culture of heavy drinking in high school that she took part in, and said Kavanaugh and his friend Mark Judge were part of that group.

In a statement Thursday about his referral of Swetnick and Avenatti for a criminal investigation, Grassley said, "When a well-meaning citizen comes forward with information relevant to the committee's work, I take it seriously....But in the heat of partisan moments, some do try to knowingly mislead the committee. That's unfair to my colleagues, the nominees and others providing information who are seeking the truth."

Avenatti responded in a statement to NBC News saying, "Senator

Grassley has just made a major mistake. Let the investigation into Kavanaugh and his lies begin."

Kavanaugh and Judge denied the allegations leveled by Swetnick and other women. Avenatti, asked about the inconsistencies within the second woman's account, said: "It is a sworn declaration that she read and signed and repeatedly stood behind."

Senate Judiciary Committee Chairman Chuck Grassley, R-Iowa, speaks to reporters as he leaves the chamber following a procedural vote to advance the confirmation of Supreme Court nominee Brett Kavanaugh, at the Capitol in Washington on Oct. 5, 2018.J. Scott Applewhite / AP

According to the second woman's declaration that Avenatti provided to the Senate Judiciary Committee, she said: "During the years 1981-82, I witnessed firsthand Brett Kavanaugh, together with others, 'spike' the 'punch' at house parties I attended with Quaaludes and/or grain alcohol. I understood this was being done

for the purpose of making girls more likely to engage in sexual acts and less likely to say 'No.'"

The statement also said that Kavanaugh was "overly aggressive and verbally abusive to girls. This conduct included inappropriate physical contact with girls of a sexual nature."

But reached by phone independently from Avenatti on Oct. 3, the woman said she only "skimmed" the declaration. After reviewing the statement, she wrote in a text on Oct. 4 to NBC News: "It is incorrect that I saw Brett spike the punch. I didn't see anyone spike the punch...I was very clear with Michael Avenatti from day one."

When pressed about abusive behavior towards girls, she wrote in a text: "I would not ever allow anyone to be abusive in my presence. Male or female."

Julie SwetnickMichael Avenatti / via AP

Shortly after tweeting out the woman's allegations on Oct. 2, Avenatti confirmed to NBC News that it was the same woman interviewed by phone on Sept. 30. But when questioned on Oct. 3 about the discrepancies between what she said in the phone interview and the serious allegations in the sworn declaration, Avenatti said he was "disgusted" with NBC News. At one point, in an apparent effort to thwart the reporting process, he added in the phone call, "How about this, on background, it's not the same woman. What are you going to do with that?"

After NBC News received text messages from the woman refuting some of the claims in the declaration, NBC reached out again to Avenatti, who defended the declaration.

"I have no idea what you are talking about," he said in a text. "I have a signed declaration that states otherwise together with multiple audio recordings where she stated exactly what is in the declaration. There were also multiple witnesses to our discussions."

He sent a follow-up message moments later: "I just confirmed with her yet again that everything in the declaration is true and correct," Avenatti said. "She must have been confused by your question."

Roughly five minutes later, the woman sent a formally-worded text backing Avenatti. "Please understand that everything in the declaration is true and you should not contact me anymore regarding this issue," the text read.

But when reached by phone minutes later, the woman again insisted that she never saw Kavanaugh spike punch or act inappropriately toward women. She said she's "been consistent in what she's told Michael."

In a subsequent text on Oct. 5, she wrote, "I will definitely talk to

you again and no longer Avenatti. I do not like that he twisted my words."

Anna Schecter

Anna Schecter is a producer for the investigations unit of NBC News.

Rich Schapiro contributed.

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

October 25, 2018

VIA ELECTRONIC TRANSMISSION

The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Christopher A. Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

Dear Attorney General Sessions and Director Wray:

As you know, the Senate Judiciary Committee recently processed the nomination of Judge Brett M. Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States, leading to his eventual confirmation on October 6, 2018. As part of that process, the Committee has investigated various allegations made against Judge Kavanaugh. The Committee's investigation has involved communicating with numerous individuals claiming to have relevant information. While many of those individuals have provided the Committee information in good faith, it unfortunately appears some have not. As explained below, I am writing to refer Mr. Michael Avenatti and Ms. Julie Swetnick for investigation of potential violations of 18 U.S.C. §§ 371, 1001, and 1505, for materially false statements they made to the Committee during the course of the Committee's investigation.

ALLEGATIONS BY MR. AVENATTI AND MS. SWETNICK

On September 23, 2018, Mr. Avenatti posted a message on social media claiming that he was "represent[ing] a woman with credible information regarding Judge Kavanaugh and Mark Judge."[1] Minutes later, Committee staff contacted Mr. Avenatti acknowledging his claim and asking that he "advise [them] of this information immediately so that Senate investigators may promptly begin an inquiry."[2] Mr. Avenatti responded, failing to disclose the identity of his client but representing to Committee staff:

> We are aware of significant evidence of multiple house parties in the Washington, D.C. area during the early 1980s during which Brett Kavanaugh, Mark Judge, and others would participate in the targeting of

[1] https://twitter.com/MichaelAvenatti/status/1044006928416825344.
[2] Email exchange between the Chief Counsel for Nominations Mike Davis and Michael Avenatti on Sept. 23, 2018, enclosed below.

> women with alcohol/drugs in order to allow a 'train' of men to subsequently gang rape them.[3]

Noting Mr. Avenatti's use of "we," Committee staff asked Mr. Avenatti if he did in fact have a client making these claims or was solely doing so himself.[4] He responded that he did have a client, but again did not identify her.[5] On September 24, 2018, Mr. Avenatti posted an additional message on social media "[w]arning ...[t]he GOP and others" to "be very careful in trying to suggest that she [Mr. Avenatti's unnamed client] is not credible."[6] Then, on September 26, 2018, Mr. Avenatti publicly revealed that his client was Ms. Julie Swetnick.[7] Ms. Swetnick is a former client of the law firm of Ms. Debra Katz, the attorney for Dr. Christine Blasey Ford.[8]

That same day, September 26, 2018, Mr. Avenatti submitted a sworn statement to the Committee purportedly written and signed by Ms. Swetnick, in which she accused Judge Kavanaugh of repeatedly drugging women and/or spiking their punch with alcohol in order to render them inebriated and disoriented so that groups of boys, including Judge Kavanaugh, could gang rape them.[9] Specifically, she alleged in her sworn statement that she met Brett Kavanaugh "in approximately 1980-1981," and that she "attended well over ten house parties in the Washington, D.C. area during the years 1981-1983," some of which she claimed Brett Kavanaugh also attended. "During the years 1981-82," Ms. Swetnick declared, "I became aware of efforts by Mark Judge, Brett Kavanaugh and others to 'spike' the 'punch' at house parties I attended with drugs and/or grain alcohol so as to cause girls to lose their inhibitions and their ability to say 'No.'" She said that at these parties, which "were a common occurrence in the area and occurred nearly every weekend during the school year," she witnessed Brett Kavanaugh participate in what she believed to be systematic sexual assaults of incapacitated women. "I ... witnessed efforts by Mark Judge, Brett Kavanaugh and others to cause girls to become inebriated so they could then be 'gang raped' in a side room or bedroom by a 'train' of numerous boys. I have a firm recollection of seeing boys lined up outside rooms at many of these parties waiting for their 'turn' with a girl inside the room," Ms. Swetnick declared, and "[t]hese boys included Mark Judge and Brett Kavanaugh."

Ms. Swetnick's sworn statement, which the Committee received on September 26, 2018, also mentioned for the first time the "Beach Week" parties in Ocean City, Maryland. Ms. Swetnick said that she was "told by other women this conduct also occurred during the Summer months in Ocean City, Maryland," and she "witnessed such conduct on one occasion in Ocean City, Maryland during 'Beach Week.'" However, Mr. Avenatti did not reference "Beach Week" in his September 23, 2018 email to the Committee. Mr. Avenatti's original email only alleged conduct at house parties in the Washington, D.C. area. Notably, Ms. Swetnick submitted her statement broadening the area of the alleged incidents from Washington, D.C.

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[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] https://twitter.com/MichaelAvenatti/status/1044233074609811456.
[7] https://twitter.com/MichaelAvenatti/status/1044960940884709378.
[8] Ariane de Vogue and Eli Watkins, *New Kavanaugh Accuser Has Tie to Firm of Christine Blasey Ford's Attorney*, CNN (Sept. 26, 2018). Available at: https://www.cnn.com/2018/09/26/politics/julie-swetnick-debra-katz-settlement/index html. Moreover, according to Dr. Ford's testimony, Ranking Member Feinstein's own staff facilitated Ms. Katz' representation of Dr. Ford. *See* Mikhael Smits, *Christine Blasey Ford: Feinstein Recommended Attorney Debra Katz to Me*, THE WASHINGTON FREE BEACON (Sept. 27, 2018). Available at: https://freebeacon.com/politics/ford-feinstein-recommended-attorney-debra-katz/.
[9] Swetnick Sworn Statement, dated Sept. 25, 2018 and received on Sept. 26, 2018, enclosed below.

to Ocean City, Maryland, only after the Committee publicly released Judge Kavanaugh's 1982 calendar - which included a notation for Beach Week during the week of June 6-12.[10]

DIVERSION OF COMMITTEE RESOURCES TO INVESTIGATE MR. AVENATTI'S AND MS. SWETNICK'S ALLEGATIONS

The sworn statement Mr. Avenatti submitted on behalf of Ms. Swetnick materially affected the Committee's investigation of allegations against Judge Kavanaugh. Within hours of the submission, all the Democrats on the Senate Judiciary Committee sent a letter to me stating:

> In light of shocking new allegations detailed by Julie Swetnick in a sworn affidavit, we write to request that the Committee vote on Brett Kavanaugh be immediately canceled and that you support the reopening of the FBI investigation to examine all of the allegations against Kavanaugh or withdrawal of his nomination.[11]

The Democrats' letter specifically referenced the fact that Ms. Swetnick's sworn statement was submitted to the Committee "[u]nder penalty of perjury, which would cause Ms. Swetnick to be subject to criminal prosecution" if her allegations are knowingly, willfully, and materially false.[12]

After receiving the allegations from Mr. Avenatti and Ms. Swetnick, Committee staff immediately began investigating the claims, diverting significant resources to the effort. This included questioning Judge Kavanaugh in a transcribed interview on September 25, 2018, about the allegations Mr. Avenatti made to the Committee via his September 23, 2018 email.[13] It also included questioning Judge Kavanaugh in another transcribed interview on September 26, 2018, about the specifics of Ms. Swetnick's allegations after the Committee received her statement.[14] Under penalty of felony, Judge Kavanaugh categorically denied the allegations and stated he did not know Ms. Swetnick. Committee staff also interviewed ten associates of Ms. Swetnick, working late nights and weekends to gather information to determine the veracity of Ms. Swetnick's claims and evaluate her credibility. Committee staff sought to interview Ms. Swetnick, but Mr. Avenatti refused.

MS. SWETNICK'S AND MR. AVENATTI'S SUBSEQUENT CONTRADICTIONS OF THEIR ALLEGATIONS

In short, Mr. Avenatti and Ms. Swetnick made grave allegations against Judge Kavanaugh, and the Committee diverted significant resources to investigate the claims. However, in light of Ms. Swetnick's and Mr. Avenatti's own statements to the media, information obtained from Committee interviews of her

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[10] Judge Kavanaugh's Summer 1982 Calendar, provided to Senate Judiciary Committee. Available at: https://www.judiciary.senate.gov/imo/media/doc/Kavanaugh%20Summer%201982%20Calendar%20Pages1.pdf.

[11] Letter from Judiciary Committee Democrats to Chairman Grassley (Sept. 26, 2018). Available at: https://www.feinstein.senate.gov/public/_cache/files/f/d/fd184cdb-c9fa-49bc-93b8-972f63557de6/6E8DC1425692A07770016AB11DB35F1A.2018.09.26-jud-d-ltr-to-ceg-re-swetnick-withdrawl-or-investigate.pdf

[12] *Id.*

[13] Senate Judiciary Committee Interview with Judge Kavanaugh 22-25 (Sept. 25, 2018). Available at: https://www.judiciary.senate.gov/imo/media/doc/09.25.18%20BMK%20Interview%20Transcript%20(Redacted)..pdf.

[14] Senate Judiciary Committee Interview with Judge Kavanaugh 5-10 (Sept, 26, 2018). Available at: https://www.judiciary.senate.gov/imo/media/doc/09.26.18%20BMK%20Interview%20Transcript%20(Redacted).pdf.

associates, and publicly reported information about her and Mr. Avenatti, it has become apparent that the statements Mr. Avenatti and Ms. Swetnick submitted to the Committee likely contained materially false claims.

On October 1, 2018, NBC News aired an interview of Ms. Swetnick by Ms. Kate Snow, in which Ms. Swetnick contradicted key claims she had made to the Committee via Mr. Avenatti.[15] When asked about the claim in her sworn statement that she was aware of Brett Kavanaugh spiking punch at parties with drugs and/or grain alcohol, Ms. Swetnick demurred, stating instead that "I saw [Kavanaugh] giving red Solo cups to quite a few girls" but that "I don't know what he did" as far as spiking punch. In this revised account to NBC, she merely claimed she "saw him by" punch containers. This materially contradicted her statement in her sworn statement that she was "aware of efforts by ... Brett Kavanaugh ... to 'spike' the 'punch' at house parties ... to cause girls to become inebriated and disoriented so they could then be 'gang raped.'"[16] Ms. Swetnick's sworn statement to the Committee claimed she had "personal knowledge of the information" stated in it. Yet, when CNN later questioned Mr. Avenatti about the clear contradictions between Ms. Swetnick's statements in her sworn declaration and those to NBC about Judge Kavanaugh spiking punch, he conceded: "One of her friends informed her of what she just put in the declaration or what was attested to in the declaration."[17]

When the NBC interview with Ms. Swetnick addressed claims in her sworn statement that she had "**a firm recollection** of seeing boys," including Brett Kavanaugh, "**lined up** outside rooms at many of these parties" to gang rape incapacitated women, Ms. Swetnick again contradicted her statement to the Committee. She denied both that there were lines of boys outside rooms and that she had any actual knowledge at the time of any gang rapes in those rooms by these boys.

Ms. Snow and Ms. Swetnick had the following exchange in which Ms. Swetnick contradicted her claim of seeing boys lined up outside rooms at these parties she supposedly attended:

> Ms. Swetnick: I would see boys standing outside of rooms, congregated together.... I would see them laughing, a lot of laughing.
> Ms. Snow: Standing in line outside a room?
> Ms. Swetnick: Not a line, but definitely huddled by doors.[18]

So, contradicting her sworn statement claim that she had "a firm recollection" of seeing boys lined up outside bedrooms at parties to systematically rape women, her revised account to NBC merely claimed that she saw groups of boys standing together and laughing in the general vicinity of doors at house parties.

Similarly, although Ms. Swetnick claimed in her sworn statement that, based on "personal knowledge," it was her "firm recollection" that these boys were lined up for the purpose of "waiting for

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[15] Kate Snow, *Kavanaugh Accuser Julie Swetnick Speaks Out on Sexual Abuse Allegations*, NBC News (Oct. 1, 2018). Available at https://www nbcnews.com/politics/supreme-court/kavanaugh-accuser-julie-swetnick-speaks-out-sexual-abuse-allegations-n915641.

[16] *See* Swetnick Sworn Statement.

[17] *See* Daniel Chaitin, *Michael Avenatti: One of Julie Swetnick's Friends Told Her Kavanaugh Was Spiking the Punch*, THE WASHINGTON EXAMINER (Oct. 1, 2018) (quoting CNN interview). Available at: https://www.washingtonexaminer.com/news/michael-avenatti-one-of-julie-swetnicks-friends-told-her-kavanaugh-was-spiking-the-punch; Cuomo Prime Time, *Cuomo Pushes Back on Credibility of Swetnick*, CNN (Oct. 1, 2018). Available at: https://www.cnn.com/videos/politics/2018/10/02/michael-avenatti-julie-swetnick-credibility-bts-cpt-vpx.cnn.

[18] Kate Snow, *Kavanaugh Accuser Julie Swetnick Speaks Out on Sexual Abuse Allegations*, NBC News (Oct. 1, 2018).

their 'turn' with a girl inside the room," *i.e.*, for their turn to rape a victim incapacitated by punch spiked with drugs or alcohol, she contradicted this as well in her NBC interview, instead admitting that she did not have any knowledge at the time that any such activity was actually happening, but only assumed as much after the fact, stating: "I didn't know what was occurring ... and I didn't understand what it could possibly be." Ms. Snow attempted to clarify, asking: "So you're suggesting that, **in hindsight**, you **think** he [Kavanaugh] was involved in this behavior [gang rapes]?" Ms. Swetnick responded: "I would say [pause] yes. It's just too coincidental."[19]

Ms. Swetnick also contradicted the timeline she provided in her sworn statement, in which she stated: "I attended well over ten house parties in the Washington D.C. area during the years 1981-83 where Mark Judge and Brett Kavanaugh were present." In the NBC interview, Ms. Swetnick stated that she was sexually assaulted at one of these house parties when she was 19 and stopped going to them afterwards. According to public records, Ms. Swetnick would have turned 20 toward the end of 1982. So, her claim that she attended these parties through 1983 is contradicted by her claim she stopped attending when she was 19.[20]

In sum, the sworn statement Mr. Avenatti submitted to the Committee on behalf of Ms. Swetnick claimed she had "personal knowledge" that Judge Kavanaugh spiked punch with drugs and alcohol at house parties in 1981-83 in order to cause girls to become incapacitated so that lines of boys would systematically sexually assault them. She later contradicted each of those claims in her interview with NBC.

Those contradictions did not go unnoticed. When NBC introduced her interview segment, Ms. Snow explicitly stated: "There are things that she told us on camera that differ from her written statement last week."[21] When later asked by an MSNBC anchor whether Ms. Swetnick has credibility issues, Ms. Snow stated: "I would say yes because there are – just to be clear there are things that she said to me that differ from her initial statement, which was a sworn statement last week, submitted to the Judiciary Committee."[22] A CNN host similarly noted the contradictions and quizzed Mr. Avenatti about them.[23] While differences between a media report and a statement to the Committee would not necessarily rise to the level of warranting a referral, when the source of the contradictory media reports is the declarant herself, as is the case here, it does.

LACK OF CREDIBLE EVIDENCE MS. SWETNICK EVER KNEW JUDGE KAVANAUGH

Not only did Ms. Swetnick materially contradict the allegations of sexual misconduct she and Mr. Avenatti made to the Committee about Judge Kavanaugh, there is simply no credible evidence that Ms. Swetnick ever even met or socialized with Judge Kavanaugh. On the contrary, there is substantial evidence they did not know each other. Ms. Swetnick was older and attended a different high school in a different town – one whose students were reportedly not known to regularly socialize with students from Judge Kavanaugh's high school. The only apparent commonality between Ms. Swetnick and Judge Kavanaugh is that they both lived in Montgomery County, Maryland in the early 1980s. That is not particularly

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[19] *Id.*

[20] In addition to contradicting her statement to the Judiciary Committee, Ms. Swetnick's NBC interview was also internally inconsistent and contradictory, such as her baffling explanations of how and when she decided to come forward with her allegation.

[21] Kate Snow, *Kavanaugh Accuser Julie Swetnick Speaks Out on Sexual Abuse Allegations*, NBC News (Oct. 1, 2018).

[22] MSNBC Live with Craig Melvin (Oct. 2, 2018).

[23] Cuomo Prime Time, *Cuomo Pushes Back on Credibility of Swetnick*, CNN (Oct. 1, 2018).

meaningful for determining whether they knew each other; according to information from the U.S. Census Bureau, Montgomery County had a population of over 600,000 in 1982.

In addition to denying her allegations, Judge Kavanaugh told the Committee under penalty of felony that he did not know Ms. Swetnick.[24] Mark Judge similarly denied the allegations and stated to the Committee, also under penalty of felony, "I do not know Julie Swetnick."[25] Michael Fegan, a friend of Judge Kavanaugh's in high school who "attended most of the same social events" as Judge Kavanaugh, stated the following to the Committee under penalty of felony:

> I have never heard of Ms. Swetnick. My understanding is that she graduated from Gaithersburg High School three years before we graduated from Georgetown Prep. During my high school years, I did not know any girls from Gaithersburg High School. We did not socialize with girls from Gaithersburg High School.[26]

Indeed, a letter to the Committee under penalty of felony signed by 64 "men and women who knew Brett Kavanaugh well in high school" called Ms. Swetnick's allegations "[n]onsense" and noted: "In the extensive amount of time we collectively spent with Brett, we do not recall having ever met someone named Julie Swetnick."[27]

For their part, it appears the media similarly could not find any evidence that Ms. Swetnick actually knew Judge Kavanaugh. As Ms. Snow from NBC News reported:

> We've been trying independently to reach out to anyone who remembers attending parties with Julie Swetnick and Brett Kavanaugh, and we've been asking her attorney for names. So far, we've not found anyone who remembers that.... We asked him [Mr. Avenatti], I asked him at that point can you provide us with any names of people who went to the parties with her. Just because we couldn't place her, NBC News has not since last week been able to place her in that time period at those house parties in that group of friends. There aren't other people coming forward as happens in many other stories we cover, who say 'yes I was there too.' ... We're just trying to do our reporting.... To date, as of today, we haven't been able to find anyone who says 'yes, I saw her in the same room with Brett Kavanaugh,' and of course Judge Kavanaugh says he was not in the same room with her, he doesn't even know who she is.[28]

Ms. Swetnick did eventually provide NBC News the names of four people she said attended these alleged parties with her, but according to NBC: "One of them said he does not recall a Julie Swetnick.

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[24] Senate Judiciary Committee Interview with Judge Kavanaugh 5-10 (Sept. 26, 2018). Available at: https://www.judiciary.senate.gov/imo/media/doc/09.26.18%20BMK%20Interview%20Transcript%20(Redacted).pdf.

[25] Letter from Mark Judge to Chairman Grassley and Ranking Member Feinstein (Sept. 28, 2018), enclosed below.

[26] Letter from Michael C. Fegan to Chairman Grassley (Oct. 1, 2018), enclosed below.

[27] Letter from Kavanaugh high school friends to Chairman Grassley and Ranking Member Feinstein (Sept. 26, 2018), enclosed below.

[28] Kate Snow, *Kavanaugh Accuser Julie Swetnick Speaks out on Sexual Abuse Allegations*, NBC News (Oct. 1, 2018).

Another of the friends she named is deceased. We've reached out to the other two, and haven't heard back."[29]

After the media hubbub about Ms. Swetnick's contradictory interview and the lack of any corroboration for her claims, Mr. Avenatti belatedly produced a vague and anonymous declaration he claimed supported her allegations.[30] Mr. Avenatti did not provide the identity of this supposed declarant to the Committee, nor did he make him or her available for an interview with Committee staff. It does not appear any media outlet has been able report any interview with the purported declarant or validate anything in the anonymous declaration. Indeed, it is unclear who actually wrote the anonymous declaration. Mr. Avenatti also apparently has a history of claiming to have anonymous clients who never materialize in any verifiable form.[31]

ISSUES WITH MS. SWETNICK'S CREDIBILITY

During the course of the Committee's investigation of allegations against Judge Kavanaugh, Committee investigators spoke with 45 individuals, obtained 25 written statements, and reviewed numerous other materials. This included speaking with ten associates of Ms. Swetnick who knew her at various times in her life ranging from junior high to the present day. In doing so, Committee investigators did not find any information to corroborate Ms. Swetnick's claims. On the contrary, they received substantial information calling into question her credibility. Based on this and public reports, it appears Ms. Swetnick has a history of making false legal claims and false accusations of sexual misconduct.

Through his attorney, Richard Vinneccy provided the Committee a signed statement regarding Ms. Swetnick.[32] According to his statement, Mr. Vinneccy was in a romantic relationship with Ms. Swetnick for seven years, and he said he submitted his statement to the Committee "to exercise [his] civic duty and attest to the credibility or lack thereof of Ms. Swetnick." Among other odd behavior by Ms. Swetnick that Mr. Vinneccy noted, he described how she "harassed and stalked" him after he ended their relationship. When he told her to stop calling because he had entered a relationship with a woman (who he later married) and that he and his new girlfriend were expecting a child, Mr. Vinneccy says Ms. Swetnick: 1) threatened to murder him, his girlfriend, and their unborn child; 2) threatened to falsely tell the police he had raped her; 3) threatened to have him deported; 4) stated she would not grant him a divorce; and 5) claimed she was pregnant with twins. As Mr. Vinneccy told the Committee, he and Ms. Swetnick were never married, so he found her reference to not granting him a divorce bizarre. Mr. Vinneccy is an American citizen, so he also found her threats of deportation bizarre. He also stated that he confirmed that Ms. Swetnick's claim of being pregnant with twins "was a complete fabrication and that there was no pregnancy."

Because he was afraid that she would harm him and his family, as she had threatened, Mr. Vinneccy filed a restraining order against her. He stated that a temporary injunction was granted, but he understood that for a permanent injunction to be issued in Florida, there would first need to be a hearing which Ms. Swetnick would attend. Fearing for his and his family's safety if Ms. Swetnick confronted him at the

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[29] *Id.*

[30] https://twitter.com/MichaelAvenatti/status/1047447758993547265. Mr. Avenatti emailed the same redacted declaration to the Committee on October 2, 2018.

[31] *See, e.g.*, Avery Anapol, *Avenatti Claims He Represents Three More Women That Were Paid Hush Money*, THE HILL (July 27, 2018). Available at: https://thehill.com/homenews/administration/399133-avenatti-claims-three-more-women-were-paid-hush-money-by-trump-cohen.

[32] Statement of Richard Vinneccy for Senate Judiciary Committee Investigation (Oct. 4, 2018).

hearing, he did not go through with the hearing. Instead, he moved to a new residence and changed his phone numbers to avoid further contact from Ms. Swetnick.

In addition to describing those actions by Ms. Swetnick, Mr. Vinneccy also stated that during their seven-year relationship, Ms. Swetnick was often financially unstable and was "always seeking financial gain from frivolous law suits." He also described other odd behavior relevant to her mental stability.[33] Mr. Vinneccy closed his letter by stating:

> Based on my history with Ms. Swetnick, I do not believe her allegations against Judge Kavanaugh and it is my opinion that she is perpetuating a fraud against him. Her motives may be for financial gain or notoriety but they are certainly not to expose the truth.[34]

Furthermore, in a defamation lawsuit filed against Ms. Swetnick by one of her former employers, Webtrends, the company reportedly indicated that Ms. Swetnick engaged in a pattern of lies and made multiple false accusations of sexual misconduct.[35] The company stated Ms. Swetnick lied in her employment application, falsely claiming she had earned an undergraduate degree from Johns Hopkins University, but the company subsequently learned the University had no record of her attendance.[36] The company also stated that Ms. Swetnick misrepresented the length of time she had worked for a previous employer, and took medical leave while simultaneously claiming unemployment benefits in the District of Columbia.[37] Webtrends stated that a few weeks after Ms. Swetnick started working for the company, its human resources department received a complaint that she had engaged in unwelcome and inappropriate sexual conduct towards two male coworkers at a business lunch.[38] The company stated that, in response to the complaint received against her, Ms. Swetnick falsely accused multiple male coworkers of sexually harassing her and threatened to sue the company.[39] The company later found that Ms. Swetnick had engaged in misconduct but found no evidence to support her sexual harassment claims.[40]

The Committee was also contacted by multiple employees of a different company where Ms. Swetnick previously worked, who stated it was their understanding that when Ms. Swetnick was confronted there about possible misconduct on her part, she responded by making a false sexual harassment or assault claim against that company as well, which it settled in order to avoid negative publicity. The employees

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[33] *Id.* Many other associates of Ms. Swetnick also described to the Committee issues with her mental health, substance abuse, and/or credibility issues, but requested confidential treatment from the Committee, which we are honoring. One former associate of Ms. Swetnick, Dennis Ketterer, did provide a signed public statement under penalty of felony in which he told the Committee that Ms. Swetnick's own father had told him "she had psychological and other problems." Statement by Dennis Ketterer to Senate Judiciary Committee (Oct. 2, 2018), enclosed below.

[34] Statement of Richard Vinneccy for Senate Judiciary Committee Investigation (Oct. 4, 2018), enclosed below.

[35] Mike Rogoway, *Julie Swetnick, a Brett Kavanaugh Accuser, Faced Misconduct Allegations at Portland Company*, THE OREGONIAN (Sept. 28, 2018) available at https://www.oregonlive.com/silicon-forest/index.ssf/2018/09/julie_swetnick_one_of_kavanaug html; Michael Kunzelman, Michael Biesecker, and Martha Medoza, *3rd Kavanaugh Accuser Has History of Legal Disputes*, THE ASSOCIATED PRESS (Sept. 30, 2018). Available at https://www.yahoo.com/news/3rd-kavanaugh-accuser-history-legal-disputes-100137653.html.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

requested confidentiality from the Committee regarding their names and the name of the company, which we are honoring.

Ms. Swetnick also reportedly made false claims in a personal injury lawsuit against the Washington Metropolitan Area Transit Authority.[41] According to the *Associated Press*, in the lawsuit Ms. Swetnick "claimed she lost more than $420,000 in earnings after she hurt her nose in a fall on a train."[42] Ms. Swetnick reportedly claimed she was a model and actor with numerous modeling commitments with companies at the time of the accident, but lost them because of her purported injuries.[43] To justify these claims, she reportedly named "Konam Studios" as one of the companies promising to employ her, and identified Nam Ko of "Kunam Studios" as a potential witness for her case.[44] But, reporters from the *AP* spoke with Mr. Ko and discovered the following:

> Ko, however, told AP on Friday that he was just a friend of Swetnick's and that he had never owned a company with a name spelled either way and had never agreed to pay her money for any work before she injured her nose. He said he first met Swetnick at a bar more than a year after her alleged accident. "I didn't have any money back then. I (was) broke as can be," Ko said. Ko said he has a hazy memory of Swetnick asking to use him as a "character reference" but doesn't recall hearing about her lawsuit. "I thought it was for a job application," he said.[45]

In short, it appears Ms. Swetnick has a substantial history of credibility issues. When viewed in light of the fact there is no credible evidence she ever knew Judge Kavanaugh, and the fact she has contradicted key aspects of her allegations against him, this lends credence to the likelihood that she made materially false statements to the Committee in violation of 18 U.S.C. § 1001. Those statements obstructed the Judiciary Committee's efforts to investigate allegations against Judge Kavanaugh and the processing of his nomination, potentially in violation of 18 U.S.C. § 1505. Given Mr. Avenatti's role in this with Ms. Swetnick, along with Mr. Avenatti's own substantial credibility issues (discussed next), there may have been a conspiracy to violate these laws, in potential violation of 18 U.S.C. § 371.

ISSUES WITH MR. AVENATTI'S CREDIBILITY

In addition to the credibility issues Committee investigators uncovered surrounding Ms. Swetnick, Mr. Avenatti has substantial credibility issues of his own. For example, Mr. Avenatti appears to have several issues stemming from his involvement with Global Baristas, a company he reportedly formed with actor Patrick Dempsey in 2012, which purchased the Tully's Coffee chain out of bankruptcy.[46] Mr.

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[41] *3rd Kavanaugh Accuser Has History of Legal Disputes*, THE ASSOCIATED PRESS (Sept. 30, 2018). Available at: https://www.yahoo.com/news/3rd-kavanaugh-accuser-history-legal-disputes-100137653 html.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *See* Kate Briquelet, *Michael Avenatti Lived the High Life While Owing Millions to IRS*, THE DAILY BEAST (Oct. 21, 2018). Available at: https://www.thedailybeast.com/michael-avenatti-lived-the-high-life-while-owing-millions-to-irs?ref=scroll.

Dempsey sued Mr. Avenatti in 2013, stating that Mr. Avenatti had lied to him about serious financial matters.[47] According to the *Seattle Times*:

> "My decision to become a member and manager of Global Baristas was based, in part, on Michael Avenatti's representation that he would provide both the capital to fund the entire Tully's acquisition and sufficient working capital to allow Global Baristas to operate the Tully's Coffee stores once the acquisition was completed," Dempsey said in the suit.
>
> Instead, he alleged, Avenatti used Global Baristas to borrow $2 million for working capital without telling him. The loan carries an "exorbitant" interest rate of 15 percent annually, the lawsuit says.[48]

Mr. Avenatti's company was also reportedly involved in additional litigation implicating his credibility, including one case in which a judge sanctioned his company for misconduct, "an acrimonious landlord-tenant dispute that led to court sanctions, fines and judgments against Avenatti's coffee firm, in part for failing to comply with court orders to produce evidence."[49]

Earlier this year, Mr. Avenatti was also reportedly under investigation by the State Bar of California as a result of a complaint regarding "what Mr. Avenatti has done in connection with Global Baristas," namely a claim that "he bought a company out of bankruptcy and then used it for a 'pump and dump' scheme to deprive federal and state taxing authorities out of millions of dollars."[50]

Mr. Dempsey's lawsuit against Mr. Avenatti was not the only time a business partner accused him of deception.[51] Jason Frank, a former partner at Mr. Avenatti's law firm Eagan Avenatti, "resigned in May 2016 after alleging that the firm didn't pay him millions of dollars that he was owed, misstated the firm's profits, and wouldn't provide copies of tax returns and other financial documents."[52] Mr. Frank filed for arbitration and "a three-judge panel found that Avenatti's former firm Eagan Avenatti 'acted with malice, fraud and oppression,'" by withholding relevant information from Mr. Frank.[53] On October 22, 2018, the

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[47] *See* Melissa Allison, *Dempsey Walks Away From Tully's After Suing Partner*, THE SEATTLE TIMES (Aug. 23, 2013). Available at: https://www.seattletimes.com/business/dempsey-walks-away-from-tullyrsquos-after-suing-partner/.

[48] *Id.*

[49] *See* Lewis Kamb, *California Bar Investigating Attorney Avenatti's Dealings Involving Tully's, Letter Says*, THE SEATTLE TIMES (May 18, 2018). Available at: https://www.seattletimes.com/seattle-news/california-state-bar-investigating-avenattis-tully-dealings-according-to-letter/.

[50] Avenatti Bar Complaint, available at https://www.documentcloud.org/documents/4433390-Avenatti-Bar-Complaint.html; *see* Lewis Kamb, *California Bar Investigating Attorney Avenatti's Dealings Involving Tully's, Letter Says*, THE SEATTLE TIMES (May 18, 2018); *see also* California State Bar Letter, available at https://www.documentcloud.org/documents/4469101-California-State-Bar-letter-to-Nold html; Kate Briquelet, *Michael Avenatti Lived the High Life While Owing Millions to IRS*, THE DAILY BEAST (Oct. 21, 2018).

[51] *See* Michael Balsamo, *Judge Orders Law Firm of Stormy Daniel's Lawyer to Pay $10M*, THE ASSOCIATED PRESS (May 22, 2018). Available at: https://www.apnews.com/f12a3b63b2964cf79f09315f8a1ad059; *see also* See Kate Briquelet, *Michael Avenatti Lived the High Life While Owing Millions to IRS*, THE DAILY BEAST (Oct. 21, 2018).

[52] Michael Balsamo, *Judge Orders Law Firm of Stormy Daniel's Lawyer to Pay $10M*, THE ASSOCIATED PRESS (May 22, 2018).

[53] Kate Briquelet, *Michael Avenatti Lived the High Life While Owing Millions to IRS*, THE DAILY BEAST (Oct. 21, 2018); *see* Michael Balsamo, *Judge Orders Law Firm of Stormy Daniel's Lawyer to Pay $10M*, THE ASSOCIATED PRESS (May 22, 2018).

California judge hearing the case on this issue ruled that Mr. Avenatti was personally liable and ordered him to pay $4.85 million in back pay to Mr. Frank.[54]

Moreover, Mr. Avenatti reportedly has credibility issues relating to the IRS. According to a report by the *Los Angeles Times*, "Eagan Avenatti, [Mr. Avenatti's] Newport Beach firm, has defaulted on millions of dollars in debt and fallen years behind in paying its payroll taxes.... The firm has also defaulted on more than $800,000 in federal payroll taxes, penalties and interest that Avenatti had promised that it would pay."[55] In response, federal prosecutors asked that the court hold Mr. Avenatti's firm in contempt, stating: "In this case, the Debtor and its responsible officer Michael Avenatti made misrepresentations to the detriment of the United States."[56] Instead, the parties reached an agreement that Mr. Avenatti's firm will be allowed to make monthly payments of $75,000 towards paying back the owed taxes.[57]

In divorce proceedings from his second wife, Lisa Storie-Avenatti, she also referenced potential dishonesty by Mr. Avenatti regarding his earnings.[58]

> Storie-Avenatti said in court papers that in November 2016, Avenatti told her he earned $3.7 million, but that she suspected his actual take-home was "substantially higher" based on his self-publicized verdicts, the couple's 2016 expenses and his "secreting from me of his tax returns and bank records."[59]

There seem to be numerous additional press reports that cast doubt on Mr. Avenatti's credibility. However, having reviewed several already, Committee investigators determined that delving into additional ones would be beating a dead horse.

Mr. Avenatti made allegations against Judge Kavanaugh in his email to Committee staff, and he submitted allegations to the Committee on behalf Ms. Swetnick. He reportedly told the *Associated Press* that he "fully vetted" Ms. Swetnick before taking her claims public,[60] and he told CNN: "When I – when we made the allegations, guess what, I had done significant due diligence in connection with this before we made the allegations."[61] However, given that he and Ms. Swetnick have contradicted key parts of the claims; that there is no credible evidence that Ms. Swetnick ever even knew Judge Kavanaugh and substantial evidence she did not; and the substantial credibility issues surrounding both Mr. Avenatti and Ms. Swetnick, I ask that the FBI investigate whether Mr. Avenatti criminally conspired with Ms. Swetnick to make materially false statements to the Committee and obstruct the Committee's investigation.

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[54] Amanda Lee Myers and Michael Malsamo, *Judge: Michael Avenatti Must Pay $4.85M in Ex-Lawyer Suit*, THE ASSOCIATED PRESS (Oct. 22, 2018). Available at: https://www.apnews.com/53f6f2f316844b14bdbe24a7b80dcc7c .
[55] Michael Finnegan, *Michael Avenatti Gets Judge to Bar Media from his Testimony on Newport Beach Law Firm's Bankruptcy*, THE LOS ANGELES TIMES (July 25, 2018). Available at http://www.latimes.com/politics/la-na-pol-avenatti-bankruptcy-20180725-story html.
[56] Kate Briquelet, *Michael Avenatti Lived the High Life While Owing Millions to IRS*, THE DAILY BEAST (Oct. 21, 2018).
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *3rd Kavanaugh Accuser Has History of Legal Disputes*, THE ASSOCIATED PRESS (Sept. 30, 2018). Available at: https://www.yahoo.com/news/3rd-kavanaugh-accuser-history-legal-disputes-100137653 html.
[61] Cuomo Prime Time, *Cuomo Pushes Back on Credibility of Swetnick*, CNN (Oct. 1, 2018). Available at: https://www.cnn.com/videos/politics/2018/10/02/michael-avenatti-julie-swetnick-credibility-bts-cpt-vpx.cnn.

CONCLUSION

Committee investigations in support of the judicial nomination process are an essential part of the Committee's constitutional role. The Committee is grateful to citizens who come forward with relevant information in good faith, even if they are not one hundred percent sure about what they know. But when individuals intentionally mislead the Committee, they divert Committee resources during time-sensitive investigations and materially impede our work. Such acts are not only unfair; they are potentially illegal. It is illegal to knowingly and willfully make materially false, fictitious, or fraudulent statements to Congressional investigators. It is illegal to obstruct Committee investigations. It is illegal to conspire to do either of those things. When charlatans make false claims to the Committee – claims that may earn them short-term media exposure and financial gain, but which hinder the Committee's ability to do its job – there should be consequences. These laws exist to ensure there are.

Accordingly, in light of the seriousness of these facts, and the threat these types of actions pose to the Committee's ability to perform its constitutional duties, I hope you will give this referral the utmost consideration. Thank you for your prompt attention to this matter. If you have any questions, please contact a professional investigative counsel in the Committee's Oversight and Investigations Unit at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
Committee on the Judiciary

Enclosures:

1. Email exchange between the Chief Counsel for Nominations Mike Davis and Michael Avenatti on Sept. 23, 2018
2. Swetnick Sworn Statement
3. Letter from Mark Judge to Chairman Grassley and Ranking Member Feinstein
4. Letter from Michael C. Fegan to Chairman Grassley
5. Letter from Kavanaugh High School Friends to Chairman Grassley and Ranking Member Feinstein
6. Statement of Richard Vinneccy for Senate Judiciary Committee Investigation
7. Statement by Dennis Ketterer to Senate Judiciary Committee

cc: The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary

From: Michael J. Avenatti
To: Davis, Mike (Judiciary-Rep)
Subject: Re: SCOTUS -- Avenatti claim of evidence
Date: Sunday, September 23, 2018 10:16:43 PM

Mike: I represent a client. And seeing as we are talking about an appointment to the SCOTUS, there is nothing wrong with this process being public.

What is the status of Mark Judge's testimony?

I look forward to receiving the answers to the questions.

Michael

Michael J. Avenatti, Esq.

The preceding email message (including any attachments) contains information that may be confidential, protected by the attorney-client or other applicable privileges, or constitutes non-public information. It is intended to be conveyed only to the designated recipient(s). If you are not an intended recipient of this message, please notify the sender by replying to this message and then delete it from your system. Use, dissemination, or reproduction of this message by unintended recipients is not authorized and may be unlawful.

On Sep 23, 2018, at 6:26 PM, Davis, Mike (Judiciary-Rep) <[redacted]> wrote:

> Mr. Avenatti,
>
> Thank you for reaching out to me. I noticed that you just publicly Tweeted our email conversation below.
>
> In your email below, you mentioned "we" several times. To clarify, are you representing a client? Or are you making these allegations yourself? On behalf of anyone else?
>
> I look forward to receiving your evidence.
>
> Thank you,
> Mike Davis
>
> Mike Davis, Chief Counsel for Nominations
> United States Senate Committee on the Judiciary
> Senator Chuck Grassley (R-IA), Chairman
> 224 Dirksen Senate Office Building
> Washington, DC 20510
> [redacted]

[redacted]

From: Michael J. Avenatti [redacted]
Sent: Sunday, September 23, 2018 9:07 PM
To: Davis, Mike (Judiciary-Rep) <[redacted]>
Subject: RE: SCOTUS -- Avenatti claim of evidence

Dear Mr. Davis:

Thank you for your email. We are aware of significant evidence of multiple house parties in the Washington, D.C. area during the early 1980s during which Brett Kavanaugh, Mark Judge and others would participate in the targeting of women with alcohol/drugs in order to allow a "train" of men to subsequently gang rape them. There are multiple witnesses that will corroborate these facts and each of them must be called to testify publicly. As a starting point, Senate investigators should pose the following questions to Judge Kavanaugh without delay and provide the answers to the American people:

1. Did you ever target one or more women for sex or rape at a house party? Did you ever assist Mark Judge or others in doing so?
2. Did you ever attend any house party during which a woman was gang raped or used for sex by multiple men?
3. Did you ever witness a line of men outside a bedroom at any house party where you understood a woman was in the bedroom being raped or taken advantage of?
4. Did you ever participate in any sexual conduct with a woman at a house party whom you understood to be intoxicated or under the influence of drugs?
5. Did you ever communicate with Mark Judge or anyone else about your participation in a "train" involving an intoxicated woman?
6. Did you ever object or attempt to prevent one or more men from participating in the rape, or taking advantage, of a woman at any house party?

Please note that we will provide additional evidence relating to the above conduct

both to the Committee and the American public in the coming days.

Regards,

Michael Avenatti

From: Davis, Mike (Judiciary-Rep) [redacted]
Sent: Sunday, September 23, 2018 4:42 PM
To: Michael J. Avenatti
Subject: SCOTUS -- Avenatti claim of evidence

Dear Mr. Avenatti,

According to your Tweet from 7:33 p.m. E.T. this evening, you claim to have information you consider credible regarding Judge Kavanaugh and Mark Judge. Please advise of this information immediately so that Senate investigators may promptly begin an inquiry.

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
[redacted]

DECLARATION OF JULIE SWETNICK

I, JULIE SWETNICK, declare as follows:

1. My name is Julie Swetnick and I am a resident of Washington, D.C. I fully understand the seriousness of the statements contained within this declaration. I have personal knowledge of the information stated herein and if called to testify to the same would and could do so.

2. I am a graduate of Gaithersburg High School in Gaithersburg, MD.

3. I presently hold the following active clearances associated with working within the federal government: Public Trust - U.S. Department of Treasury (DOT), U.S. Mint (USM), Internal Revenue Service (IRS).

4. I have also previously held the following inactive clearances: Secret - U.S. Department of State (DOS), U.S. Department of Justice (DOJ) and Public Trust - U.S. Department of Homeland Security (DHS), Customs and Border Protection (CBP).

5. My prior employment includes working with (a) Vietnam War Commemoration (VWC), Joint Services Providers (JSP), U.S. Department of Defense (DOD) in Arlington, Virginia; (b) U.S. Mint, U.S. Department of Treasury; (c) U.S. Internal Revenue Service (IRS), U.S. Department of Treasury; (d) Government Affairs and Communications Department, D.C. Department of General Services (DGS), Government of the District of Columbia (DC.Gov); (e) Customs and Border Protection (CBP), U.S. Department of Homeland Security; and (d) the U.S. Department of State (DOS). I was also one of the first 100 women in the world to achieve a Microsoft Certified Systems Engineering Certification (MCSE).

6. I first met Mark Judge and Brett Kavanaugh in approximately 1980-1981. I was introduced to them at a house party that I attended in the Washington, D.C. area. I observed Mark Judge and Brett Kavanaugh as extremely close friends during the early 1980s when I knew them and interacted with them. I would describe them as "joined at the hip" and I consistently saw them together in many social settings. There is no question in my mind that Mark Judge has significant information concerning the conduct

of Brett Kavanaugh during the 1980s, especially as it relates to his actions toward women.

7. Following that first introduction, I attended well over ten house parties in the Washington, D.C. area during the years 1981-1983 where Mark Judge and Brett Kavanaugh were present. These parties were a common occurrence in the area and occurred nearly every weekend during the school year. On numerous occasions at these parties, I witnessed Mark Judge and Brett Kavanaugh drink excessively and engage in highly inappropriate conduct, including being overly aggressive with girls and not taking "No" for an answer. This conduct included the fondling and grabbing of girls without their consent.

8. I observed Brett Kavanaugh drink excessively at many of these parties and engage in abusive and physically aggressive behavior toward girls, including pressing girls against him without their consent, "grinding" against girls, and attempting to remove or shift girls' clothing to expose private body parts. I likewise observed him be verbally abusive towards girls by making crude sexual comments to them that were designed to demean, humiliate and embarrass them. I often witnessed Brett Kavanaugh speak in a demeaning manner about girls in general as well as specific girls by name. I also witnessed Brett Kavanaugh behave as a "mean drunk" on many occasions at these parties.

9. I have been told by other women that this conduct also occurred during the Summer months in Ocean City, Maryland on numerous occasions. I also witnessed such conduct on one occasion in Ocean City, Maryland during "Beach Week."

10. I have reviewed Brett Kavanaugh's recent claim on Fox News regarding his alleged "innocence" during his high school years and lack of sexual activity. This claim is absolutely false and a lie. I witnessed Brett Kavanaugh consistently engage in excessive drinking and inappropriate contact of a sexual nature with women during the early 1980s.

11. During the years 1981-82, I became aware of efforts by Mark Judge, Brett Kavanaugh and others to "spike" the "punch" at house parties I attended with drugs and/or grain alcohol so as to cause girls to lose their inhibitions and their ability to say "No." This caused me to make an effort to purposely avoid the "punch" at these parties. I witnessed efforts by Mark Judge, Brett Kavanaugh and others to "target" particular girls so they could be taken advantage of; it was usually a girl that was especially vulnerable because she was alone at the party or shy.

12. I also witnessed efforts by Mark Judge, Brett Kavanaugh and others to cause girls to become inebriated and disoriented so they could then be "gang raped" in a side room or bedroom by a "train" of numerous boys. I have a firm recollection of seeing boys lined up outside rooms at many of these parties waiting for their "turn" with a girl inside the room. These boys included Mark Judge and Brett Kavanaugh.

13. In approximately 1982, I became the victim of one of these "gang" or "train" rapes where Mark Judge and Brett Kavanaugh were present. Shortly after the incident, I shared what had transpired with at least two other people. During the incident, I was incapacitated without my consent and unable to fight off the boys raping me. I believe I was drugged using Quaaludes or something similar placed in what I was drinking.

14. I am aware of other witnesses that can attest to the truthfulness of each of the statements above.

I declare, under penalty of perjury and under the laws of the United States of America, that the foregoing is true and correct. I have executed this declaration on September 25, 2018.

Julie Swetnick

COZEN O'CONNOR

September 28, 2018

VIA E-MAIL

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

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

Dear Chairman Grassley and Ranking Member Feinstein:

In response to the Committee's request for information, I, MARK JUDGE, declare:

1. The allegations in the Swetnick affidavit are so bizarre that, even while suffering from my addiction, I would remember actions so outlandish. I categorically deny them.

2. I do not know Julie Swetnick.

3. I do not recall attending parties during 1981-1983 when I fondled or grabbed women in an aggressive or unwanted manner.

4. I have never spiked punch to get anyone drunk or disoriented. Nor have I witnessed Brett Kavanaugh spike punch.

5. I have never engaged in gang rape of any woman, including Ms. Swetnick.

6. I will cooperate with any law enforcement agency that is assigned to confidentially investigate these allegations.

I am submitting this letter under penalty of felony.

Sincerely,

Mark Judge

October 1, 2018

Michael C. Fegan
[redacted]

Chairman Grassley
Senate Judiciary Committee
Room SD-224
Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley,

I am writing to you regarding the character of Judge Brett Kavanaugh. Brett and I attended Georgetown Prep High School together from 1979 to 1983. We were classmates, teammates and friends. I attended most of the same social events that Brett attended in high school, and many after high school as well. I also attended "Beach Week" with him in June 1982. I have never seen Brett out of control from drinking alcohol. I have never seen Brett out of control in any situation, whether it be in the classroom, on the football field, on the basketball court or in any social setting.

Regarding the allegation by Christine Blasey Ford, I never heard of such a gathering. We were a tight knit group, and I believe that if anything happened like Professor Ford described, I would have known about it. I never met Christine Blasey, and had never heard her name until mid-September 2018.

I cannot speak for the allegation from the Yale student, Deborah Ramirez, because I did not attend Yale. I can tell you that what Ms. Ramirez described would be completely out of character of the man I have known for almost 40 years.

As to the allegation made by Julie Swetnick, I have never heard of Ms. Swetnick. My understanding is that she graduated from Gaithersburg High School three years before we graduated from Georgetown Prep. During my high school years, I did not know any girls from Gaitherburg High School. We did not socialize with girls from Gaithersburg High School. We did not have any kind of punch drinks, hard liquor or drugs at our parties. I never witnessed any kind of sexual situation at any of our parties. If there was any kind of mis-treatment of girls at any of our parties, I assure you that my friends and I, including Brett Kavanaugh, would have put a stop to it immediately and would have reported it to the Montgomery County, MD Police Department.

I know that last week was tough on you, as it was for many people throughout our country, and I appreciate the way that you have conducted the confirmation hearings. I urge all senators to vote to confirm Judge Brett Kavanaugh. He is one of the most ethical and moral men I know, and has been for the almost 40 years that I have known him.

I appreciate your time in this matter and for your service to our country.

Sincerely,

Michael C. Fegan

September 26, 2018

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

We are men and women who knew Brett Kavanaugh well in high school. We have seen reports today that Julie Swetnick, who says she graduated from Gaithersburg High School, submitted a declaration to the Committee alleging that Brett participated in horrific conduct during high school, including targeting girls for gang rape. Nonsense. We never witnessed any behavior that even approaches what is described in this allegation. It is reprehensible.

In the extensive amount of time we collectively spent with Brett, we do not recall having ever met someone named Julie Swetnick. Nor did we ever observe Brett engaging in any conduct resembling that described in Ms. Swetnick's declaration.

Brett Kavanaugh is a good man. He has always treated women with respect and decency. He is a man of honor, integrity, and compassion. These shameful attacks must end. This process is a disgrace and is harming good people.

Russell Aaronson
Daniel Anastasi
Steve Barnes
Patrick Beranek
Michael Bidwill
Michael Boland
David Brigati
Missy Bigelow Carr
Sharon Crouch Clark
Steve Combs
Citsi Conway
Mark Daly
DeLancey Davis
Julie DeVol
Meg Williams Dietrick
Paula Duke Ebel
Michael Fegan
Maura Fitzgerald
Susan Fitzgerald
Jim Foley
Timothy Gaudette
James Gavin
William Geimer
Mary Beth Greene
Mary Ellen Greene
Daniel Hanley
Melissa Hennessy
Beccy Moran Jackson
Brian H. Johnston
Maura Kane
Kevin Kane
Thomas Kane
Amarie Kappaz
George M. Kappaz
Timothy Kirlin
Kelly Leonard
Maura M. Lindsay
John F. Loome, IV
Suzanne Matan
Meghan McCaleb

Scott McCaleb
Bernard McCarthy, Jr.
Michael R. McCarthy
Stephanie McGill
Stephanie McGrail
Byron J. Mitchell
Sean Murphy
Paul G. Murray
Douglas D. Olson
John F. Ostronic
Elizabeth (Betsy) Manfuso Pothier
Matthew Quinn
Mark A. Quinn
Mae Joyce Rhoten
Mark Richardson
L. Maurice Rowe, IV
Stephen Royston
Alice Kelley Scanlon
James Sullivan
Cynthia Urgo
Donald Urgo, Jr
Patrick T. Waters
Megan Williams
Jodi Yeager

Hansen
LAW FIRM

October 4th, 2018

STATEMENT OF RICHARD VINNECCY

For the Senate Judiciary Committee Investigation

I, Richard Vinneccy, do hereby swear and affirm that all of the statements made herein are true and accurate to the best of my knowledge.

First and foremost, I never wanted to come out publicly on this issue. However, numerous media outlets bombarded me with phone calls and questions when someone discovered the history of the restraining order I had sought against Ms. Swetnick in Miami, Florida. Unfamiliar in this arena, I mistakenly spoke to Politico, made a short two phrase statement to them which was then transmitted nationwide without my authority. Thereafter, I was thrown into the national spotlight and, consequently, I felt compelled to set the record straight against false accusations made by Ms. Swetnick's lawyer and, more importantly, to exercise my civic duty and attest to the credibility or lack thereof of Ms. Swetnick.

I was involved in a romantic relationship for 7 years with Julie Swetnick. For 2 out of those 7 years we lived together in Bethesda, Maryland. Thereafter, my work transferred me internationally to Panama and ultimately to Miami. Thus, due to geographics much of the relationship was long distance.

Despite the distance, we remained close and not once did Ms. Swetnick ever mention that she had been raped or sexually assaulted. Not once did Ms. Swetnick ever mention that she had attended any parties where she witnessed, train rapes, gang rapes, or other sordid sexual activity. Not once did she ever mention Brett Kavanaugh.

As to her mental stability, or lack thereof, throughout the relationship, I noticed odd behaviors exhibited by Ms. Swetnick. For the most part she was financially unstable and always seeking financial gain from frivolous law suits. She was abnormally possessive and jealous of me. She always wanted to be the center of attention and exaggerated everything in her life. When we would have disagreements she would try to provoke me to hit her. As to why she did that, I can only believe it was to instigate me to do something physically violent to her so that she could play the victim, contact the police and have me arrested. At times she threatened me not to mistreat her because she could do to me what she had done with her ex-boyfriend. While I do not know the entire story, I recall her telling me that her ex-boyfriend was in jail. Perhaps one of the most bizarre things about her was a closet that she kept in our Bethesda home. The closet was

4000 Ponce De Leon Blvd., Suite 470
Coral Gables, Fl. 33146
TEL. (305) 777-0474
mgh@thehansenlawfirm.com

"off limits" to me, however, one day I opened it and found three large boxes filled with years and years of receipts from grocery stores.

Looking back, I am not sure why I stayed in this relationship for so long. As a 60 year old wiser and more experienced man now, I can only blame inexperience, immaturity and whatever else it is that causes one to stay in an unhealthy relationship for too long. Ultimately, once I was transferred to Miami, I finally decided it would be best to end the relationship. I did and thereafter, Ms. Swetnick harassed and stalked me for almost 2 months via telephone and appeared at a trade show conference in Seattle that I was attending, unannounced and uninvited.

For obvious reasons this was difficult and uncomfortable for me, but even more so since I began a new relationship with the woman who would ultimately become my wife of 12 years and with whom I had two children. Finally, I told her to stop the calls, that I had moved on, that I had met someone and that we were expecting a baby.

Ms. Swetnick's reaction was scary, frightening and bizarre causing me to fear for my life and that of my new girlfriend and our unborn child. In a nutshell she: 1) told me that she was going to kill me, my girlfriend and our unborn child; 2) she was going to report me to the FBI and have me deported; 3) she was going to tell the police that I raped her in Seattle; 4) she was not going to grant me a divorce and; 5) that she was pregnant with twins.

- I have been a citizen of this country since the 80's so as far as deporting me, this did not make sense.
- I have never raped Ms. Swetnick.
- Ms. Swetnick and I were never married however in her opinion we were due to a Maryland statute, which she claimed, qualified us as a married couple since we co-habitated in that state for 2 years.
- I asked Ms. Swetnick for the medical records proving that she was pregnant with twins and after consulting with her "doctor", I confirmed the story was a complete fabrication and that there was no pregnancy.

I decided to file a restraining order in Miami, Florida because that is where I was residing and I was afraid she was going to come to Miami to do harm to my family and I as she had threatened. The temporary injunction was granted. (In Florida, the legal process to obtain a restraining order consists of a two phase process. First, one applies for a temporary injunction via a petition. A judge then reviews the petition and if that is granted, a temporary injunction is put in place until a hearing for a permanent injunction is held.)

Ultimately, I did not go through with the hearing on the permanent injunction for several reasons. First, not being a lawyer and never having done this before, I did not know that the final step to obtain the permanent injunction would entail confronting Ms. Swetnick personally in court at the hearing. When I found out about this, I thought it over with my girlfriend at the time

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Hansen
LAW FIRM

who was fearful for her own life, and together we determined not to perpetuate my connection with Ms. Swetnick or instigate her any further. I was not sure how Ms. Swetnick was going to retaliate if she was forced to fly down to Miami and confront me in court in front of a judge. So, instead we moved to a new residence and changed our telephone numbers in hopes that we would never have to see Ms. Swetnick again.

Thankfully, we never did see or hear from her again.

Based on my history with Ms. Swetnick, I do not believe her allegations against Judge Kavanaugh and it is my opinion that she is perpetuating a fraud against him. Her motives may be for financial gain or notoriety but they are certainly not to expose the truth.

Richard Vinneccy

Date: Oct 4, 2018

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October 2, 2018

My name is Dennis Ketterer.

I am a former weeknight meteorologist for Channel 7 (WJLA) in Washington, D.C., and won an EMMY in 1995.

I want to preface this by saying, I am neither proud of nor guiltless in the actions about to be mentioned in this letter. I hope my family, friends, and church members can forgive me.

I first met Julie Swetnick in 1993 at a Washington, D.C. bar near Wisconsin Circle. I was at a going-away party for channel 7 anchor Dale Solly. I left the party to go to the bar to buy a soda. I haven't drunk alcohol since my 18th birthday.

As I sat alone at the end of the bar, Julie approached me. She was alone, quite beautiful, well-dressed and no drink in hand. Consequently, my initial thought was that she might be a high end call girl because at the time I weighed 350lbs so what would someone like her want with me?

But, there was no conversation about exchanging sex for money so I decided to talk with her a few minutes. I had never been hit on in a bar before.

I didn't leave with her that night, although we talked about getting together. Over the next couple of weeks we met at what I believed and still believe was Julie's place. From the beginning Julie knew I was married and that I was having marital issues.

As we shared conversations, my lasting impression of Julie was that she was smart, fun and funny. But she was also an opportunist. I felt she only had interest in my 350lb self because I was on television and well known.

Although we were not emotionally involved there was physical contact. We never had sex despite the fact she was very sexually aggressive with me. I'm not implying I didn't like her advances, I just wasn't ready to make the jump. It came to a head so we talked about sex.

During a conversation about our sexual preferences, things got derailed when Julie told me that she liked to have sex with more than one guy at a time. In fact sometimes with several at one time. She wanted to know if that would be ok in our relationship.

I asked her if this was just a fantasy of hers. She responded that she first tried sex with multiple guys while in high school and still liked it from time-to-time. She brought it up because she wanted to know if I would be interested in that.

A.I.D.S. was a huge issue at the time. And I had children. Due to her having a directly stated penchant for group sex, I decided not to see her anymore. It put my head back on straight. That was the last conversation we had.

Julie never said anything about being sexually assaulted, raped, gang-raped or having sex against her will. She never mentioned Brett Kavanaugh in any capacity.

In 1996 I decided to run again for Congress in Maryland's 8th district as a Democrat. I thought Julie could help my primary campaign in some way because of her personality, great smile

and good looks. Also, in the course of our past conversations, she told me that she too was a Democrat.

Because I had lost Julie's number I called her father to get it. When I talked to him about possibly bringing her on to help with my campaign, he told me that she had psychological and other problems at the time. When I asked he would not go into detail and said that I wouldn't want her to work on my campaign. His response was rather abrupt. He hung up on me.

That was the end of my Julie saga...or so I thought.

On Wednesday, September 26th, I heard that Mr. Kavanaugh had a third accuser. When Julie's name was mentioned as the accuser, and due to the type of accusation, I was deeply troubled and felt a moral dilemma. Do I reach out and tell the truth of what I knew and risk family relationships, or remain silent.

The whole Kavanaugh confirmation process over the last few days brought out very deep issues within me. I know what it's like to be sexually assaulted and not be believed. I was 9 years old when it happened at the hands of my grandfather's best friend.

I also know what it's like to be accused of something significant that I didn't do and not be believed. Because of this and eternal considerations, the pressure on me built throughout the afternoon and early evening.

That evening was very difficult for me as I had to explain to my wife of three years what had happened 25 years ago, before we met and long before we were married. I explained my situation and she said she knew that if I didn't do the right thing, I couldn't live with myself.

Because of my less than perfect past, and having repented of this, I felt the need for spiritual guidance. I reached out to a church leader. We talked for a while. I explained that I felt horribly about this more-than-indiscretion. I knew if I came forward that in addition to me, it would affect my children, my grandchildren, my ex-wife, my wife, Julie, the Kavanaughs.

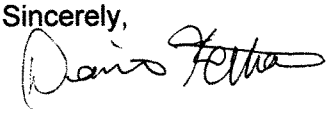
Finally, after much thought and frankly tears of remorse, I decided to be forth-coming with what I knew first-hand. I had to take the advice I'd always given my children. That is; Doing the right thing is almost never the easy thing, but it's always the right thing.

My heart felt very heavy because of the possible familial risks. But I knew I had to do the right thing. At my request, he put me in touch with another church leader we knew, who then reached out to Senator Hatch's Salt Lake office in my behalf.

As I watched part of the afternoon confirmation hearing the next day, and saw Mrs. Kavanaugh looking so sad I felt that she needed to know that in this instance, her husband was being mischaracterized.

My heart still feels heavy, for me as well as Julie and the Kavanaughs. That said, based on my direct experience with Julie, I do not believe her allegations against Mr. Kavanaugh.

Sincerely,



Dennis Ketterer

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

September 29, 2018

VIA ELECTRONIC TRANSMISSION

The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Christopher A. Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

Dear Attorney General Sessions and Director Wray:

As you know, the Senate Judiciary Committee recently processed the nomination of Judge Brett M. Kavanaugh to serve as an Associate Justice on the Supreme Court. As part of that process, the Committee has been investigating various allegations made against Judge Kavanaugh. The Committee's investigation has involved communicating with numerous individuals claiming to have relevant information. While many of those individuals have acted in good faith in providing the Committee information during the investigation, unfortunately it appears some have not. As explained below, I write today respectfully referring Mr. [redacted] for investigation of potential violations of 18 U.S.C. §§ 1001 and 1505, for materially false statements Mr. [redacted] made to the Committee as part of its investigation of allegations against Judge Kavanaugh.

According to Senator Whitehouse and his Committee staff, on the morning of September 24, 2018, Mr. [redacted] contacted the Senator's office to report an allegation of sexual misconduct by Judge Kavanaugh. Mr. [redacted] claimed that in August of 1985, Judge Kavanaugh sexually assaulted a close acquaintance of Mr. [redacted] on a boat in the harbor at Newport, Rhode Island. Committee staff took Mr. [redacted]'s allegation seriously, and asked Judge Kavanaugh numerous questions about it under penalty of felony during an interview on September 25, 2018. He categorically denied the allegation. On September 26, 2018, the Committee publicly released a redacted transcript of that interview, with Mr. [redacted]'s name redacted. Afterwards, at 7:51 pm that same evening, Mr. [redacted] "recanted" and apologized for his allegation via social media. I have enclosed the relevant materials documenting these facts.

Committee investigations in support of the judicial nomination process are an essential part of the Committee's constitutional role. The Committee is grateful to citizens who come forward with relevant information in good faith, even if they are not one hundred percent sure about what they know. But when individuals provide fabricated allegations to the Committee, diverting Committee resources

during time-sensitive investigations, it materially impedes our work. Such acts are not only unfair; they are potentially illegal. It is illegal to make materially false, fictitious, or fraudulent statements to Congressional investigators. It is illegal to obstruct Committee investigations.

Accordingly, in light of the seriousness of these facts, and the threat these types of actions pose to the Committee's ability to perform its constitutional duties, I hope you will give this referral the utmost consideration.

Thank you for your prompt attention to this matter. If you have any questions, please contact a professional staff investigator in the Committee's Oversight and Investigations Unit at (202) 224-5225.

Sincerely,

Chuck Grassley

Charles E. Grassley
Chairman
Committee on the Judiciary

Enclosures:
Letter from Senator Whitehouse to Chairman Grassley and Ranking Member Feinstein
Email from Senator Whitehouse' Staff
Transcript of Kavanaugh Interview
Tweet by Mr. [redacted]

cc: The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary

The Honorable Sheldon Whitehouse
Ranking Member
Subcommittee on Crime and Terrorism
Committee on the Judiciary

SHELDON WHITEHOUSE
RHODE ISLAND

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September 24, 2018

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

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
331 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

This morning, a constituent contacted my office to report another allegation of sexual misconduct by Judge Brett Kavanaugh, nominee to be Associate Justice of the Supreme Court of the United States. At the constituent's request, I provided the constituent with the contact information of a reporter who might investigate the allegation. I have also alerted the Federal Bureau of Investigation.

I look forward to hearing what further action you would like to take.

Sincerely,

Sheldon Whitehouse
United States Senator

PRINTED ON RECYCLED PAPER

From: [redacted] (Judiciary-Dem)
Sent: Monday, September 24, 2018 6:25 PM
To: [redacted] (Judiciary-Rep) [redacted] (Judiciary-Rep) [redacted] (Judiciary-Dem) [redacted] (Judiciary-Dem) [redacted]
Cc: [redacted] (Judiciary-Dem) [redacted]
Subject:

All—

Please find attached a letter from Senator Whitehouse to Chairman Grassley and Ranking Member Feinstein. I believe he handed your bosses hard copies at the vote. Below is a summary of the substance of the allegations referenced in the letter:

Our office received a call this morning from a Rhode Island constituent, [redacted], who made allegations regarding U.S. Supreme Court nominee Brett Kavanaugh. [redacted] reported that early on a Sunday morning in August of 1985, a close acquaintance of the constituent was sexually assaulted by two heavily inebriated men she referred to at the time as "Brett and Mark." The event took place on a 36' maroon and white boat in the harbor at Newport, Rhode Island, after the three had met at a local bar. According to [redacted], when he learned of the assault at approximately 5:00 a.m. that same morning, he and another individual went to the harbor, located the boat the victim had described, and physically confronted the two men, leaving them with significant injuries. [redacted] recently realized that one of the men was Brett Kavanaugh when he saw Kavanaugh's high school yearbook photo on television over the weekend. He promptly reported the incident to our office on Monday morning, September 24, 2018.

If your office wishes to pursue this matter, we can provide contact information for Mr. [redacted]. It is not clear that the victim is aware that Mr. [redacted] has brought these allegations forward or that she wishes to come forward herself.

Thanks,
[redacted]

[redacted]
Senator Sheldon Whitehouse
Subcommittee on Crime & Terrorism
Senate Committee on the Judiciary
[redacted]

SENATE JUDICIARY COMMITTEE

U.S. SENATE

WASHINGTON, D.C

INTERVIEW: [redacted]

TUESDAY, SEPTEMBER 25, 2018

The interview convened at 12:34 p.m.

[Telephone ringing.]

[redacted] Hello?

[redacted] Hi, this is [redacted] from the Senate Judiciary Committee.

[redacted] Oh, hi, [redacted] How are you?

[redacted] Great.

[redacted] This is [redacted] I'll put you on speaker with the judge. I'm with Alex Walsh, his counsel, and then the rest of us will head out of the room.

[redacted] Okay. Thank you.

[redacted] Can you hear us?

[redacted] Yes.

[redacted] [redacted]

[redacted] Yes. Can you hear us?

[redacted] Yes, it's a little quiet.

[redacted] Is this any better?

Judge Kavanaugh. I can hear you. This is Brett Kavanaugh. And Alex Walsh is here. It sounds like you're in kind of a wind tunnel, but --

[redacted] Okay. I'm not sure how to fix that.

[redacted] Why don't we try calling them back?

[redacted] We're happy to try one more time. We'll just dial the number one more time and see if it's a better connection.

Judge Kavanaugh. Okay. Great.

[Pause.]

[Telephone ringing.]

Judge Kavanaugh. Hello?

[redacted] Hi, it's [redacted] Is this any better?

Judge Kavanaugh. It sounds like it. Let me put you on speaker.

You there?

[redacted] Yes, how is it?

Judge Kavanaugh. We'll make do.

Female Speaker. Yeah, it's fine. We can hear you.

[redacted] All right. Well, we apologize. If there's any question you need us to repeat because you didn't hear it very well, please just let me know.

Okay. Well, again, thank you very much for jumping on the phone with us today.

I am here with several colleagues. I'll let them introduce themselves, and then we will get started.

[redacted] I'm [redacted] I'm [redacted] for Chairman Grassley.

[redacted] for Chairman Grassley.

[redacted] Hi, Judge. [redacted] with the minority. We've spoken in the past.

Judge Kavanaugh. Yes.

[redacted] Hi, Judge. We've also

spoken. I'm with the ranking member.

Judge Kavanaugh. Yeah, thanks, [redacted]

[redacted] Hi, Judge. It's [redacted] I'm a [redacted] for the ranking member.

Judge Kavanaugh. Okay. Thank you.

[redacted] Before we begin, I just want to make clear that the Democratic members have asked the FBI to investigate these allegations, and they believe that's necessary to a fair process and fairness more generally. The Democratic members do not believe that it's appropriate for staff to be discussing allegations with you that have not yet been investigated.

Also want to make clear that we just learned about the possibility of this phone call today at 11:15 a.m. and weren't advised that it would be happening at 12:30 p.m. until about 11:50 a.m. today. So it's likely that we will primarily be listening during this call.

And again, I just want to reiterate that the Democratic members do not believe that this is a fair or sufficient process, and this is not how the committee usually handles allegations of this sort.

[redacted] I would just say -- this is [redacted] I would just say that we can have these political discussions offline. Our job today is to gather evidence in the form of Judge Kavanaugh's testimony, and that's how we're going

to proceed. And we can have the political discussions offline.

[redacted] Judge, for your knowledge, this is being transcribed as well.

Okay. So we are here because we have received in various forms, but not through the normal BI process, various allegations. And when we receive allegations, we typically go to the nominee to get their take on it. So I'm going to run through some questions, and if anyone has follow-up or clarifications, feel free to jump in.

Judge Kavanaugh, by now we assume that you've heard about the New Yorker article published on Sunday. Have you reviewed the article?

Judge Kavanaugh. Yes.

[redacted] The article alleges that during your freshman year at Yale, you attended a -- and I quote -- "a drunken dormitory party at which you exposed yourself, thrust your penis in Deborah Ramirez's face, and caused her to touch it without her consent as she pushed you away."

Did that happen?

Judge Kavanaugh. That did not happen.

[redacted] Do you know Deborah Ramirez?

Judge Kavanaugh. I do.

[redacted] When did you meet her?

Judge Kavanaugh. I knew her in college.

[redacted] And when did you last talk to her?

Judge Kavanaugh. Many, many years ago.

[redacted] Would you say that was post college?

Judge Kavanaugh. I'm pretty sure we were at a wedding together. [redacted] and [redacted] wedding, which I believe was in 1997 in the Baltimore area. And I don't think I've seen her since then.

[redacted] Okay. Will you describe your relationship with her?

Judge Kavanaugh. I knew her. Friendly. Friendly, but not friends.

[redacted] Okay. So we're on the same page, I'm going to define "sexual or romantic behavior" as kissing, touching, or penetrating her genitals, anus, or breasts; touching or penetrating your -- her touching or penetrating your genitals or anus; seeing her genitals, anus, or breasts; or her seeing your genitals or anus.

With that definition in mind, did you have any sexual or romantic encounters with Deborah Ramirez?

Judge Kavanaugh. No.

[redacted] Are you aware of any reason Deborah Ramirez would lie about you?

[Pause.]

Judge Kavanaugh. I don't want to speculate.

[redacted] Okay. Ms. Ramirez says that she was

invited by a friend on the women's soccer team to a dorm room party that occurred at Lawrence Hall. And again, she says this occurred when you were both freshmen.

Did you attend any such party?

Judge Kavanaugh. I lived in Lawrence Hall freshman year in the basement, and I have no recollection at all of the party she's describing. And of course, I've said the incident, the specific incident didn't happen.

[redacted] So did you attend any such party with Ms. Ramirez?

Judge Kavanaugh. I -- I don't know all the parties in Lawrence Hall or get-togethers in Lawrence Hall that might have occurred. What I do know is this incident, this specific incident alleged did not happen, and I don't recall the general party that she's describing in particular.

[redacted] Okay.

Judge Kavanaugh. But people got together, of course, in the dorm rooms, if that's the question. So I don't want to imply that people weren't in the dorm rooms.

And the dorms had common rooms, just so you know. So there were not my -- not the room I lived in, but some of the other rooms in Lawrence Hall were six rooms off a common room in a what was called a suite. So in the common rooms, there would often be people just hanging out.

[redacted] Okay. Ms. Ramirez says at the party she identified, a small group of students decided to play a drinking game together at which students were sitting in a circle, and people would pick who drank. She says that she was chosen repeatedly to the point that she later was on the floor, foggy and slurring her words.

Did you attend any such party?

Judge Kavanaugh. I have no recollection of that.

[redacted] Ms. Ramirez says that at one point during the drinking game at the party she identified, a male student pointed a gag plastic penis in her direction.

Did you attend any party at which a male student pointed a gag plastic penis at Ms. Ramirez?

Judge Kavanaugh. I have no recollection of that.

[redacted] Ms. Ramirez says that after she was on the floor, foggy and slurring her words, a male student exposed herself -- himself to her. She says, "I remember a penis being in front of my face. I knew that's not what I wanted, even in that state of mind."

According to the article, she recalled remarking, "That's not a real penis," and the other students laughing at her confusion and taunting her, one encouraging her to kiss it. She said that she pushed that person away, touching it in the process.

Did you attend a party at which any of this happened,

whoever that student was?

Judge Kavanaugh. I know that -- I couldn't hear all of the question.

[redacted] Repeat it.

Judge Kavanaugh. I guess, I have no recollection of what you're describing generally, and of course, no -- did not -- the specific incident you're describing didn't happen. I never saw anything like that.

[redacted] Judge, we're going to repeat the question.

Judge Kavanaugh. Okay.

[redacted] Ms. Ramirez says that after Ms. Ramirez was on the floor, foggy and slurring her words, a male student exposed herself -- himself to her. She says, "I remember a penis being in front of my face. I knew that's not what I wanted, even in that state of mind."

According to the article, she recalled remarking, "That's not a real penis," and the other students laughing at her confusion and taunting her, one encouraging her to kiss it. She said that she pushed that person away, touching it in the process.

Did you hear all of that?

Judge Kavanaugh. Yes. And the question is?

[redacted] Did you attend a party at which any of this happened, whoever that student was?

Judge Kavanaugh. Never -- I never saw anything like

that.

[redacted] Ms. Ramirez says that after this event occurred, she remembers you standing to her right and laughing, pulling up your pants. According to her, you were laughing, and she can still see your face and your hips coming forward like when you pull up your pants.

She states that another student shouted about the event, "Somebody yelled down the hall, 'Brett Kavanaugh just put his penis in Debbie's face.' It was his full name. I don't think it was just 'Brett,' and I remember hearing and being mortified that this was out there."

Did this ever happen?

Judge Kavanaugh. That did not happen.

[redacted] The article reports that an anonymous classmate is 100 percent sure that he was told at the time that Kavanaugh was the student who exposed himself to Ramirez and that he independently recalled many of the same details offered by Ramirez, including the party's location. The article also suggests that some of your classmates have discussed this alleged event.

At any point, have you ever heard a rumor that you exposed yourself to Ms. Ramirez?

Judge Kavanaugh. No, and I would have, because it would have been the talk of campus.

[redacted] Okay. The article identifies Mr. James

Roche as your roommate. Is that his -- how do you pronounce his name?

Judge Kavanaugh. Roche. Jamie.

[redacted] Roche. Okay.

Judge Kavanaugh. Jamie is what he went by then.

[redacted] Okay. Generally speaking, he supports Ms. Ramirez's account of the story. When did you first meet Mr. Roche?

Judge Kavanaugh. Can you hold on one second?

[redacted] Yes.

[Pause.]

Judge Kavanaugh. Okay. I'm here.

[redacted] Great. When did you first meet Mr. Roche?

Judge Kavanaugh. I would have met him when we moved in to Lawrence Hall in September of 1983 when I was 18.

[redacted] And when did you last communicate with him?

Judge Kavanaugh. I saw him probably at our 25th reunion, which would have been 2000 and -- 2012. It might have been our 20th reunion, but I saw him briefly at one of those reunions.

[redacted] And will you describe your relationship with him?

Judge Kavanaugh. So there were three guys who lived,

in essence, in a room together -- Dave White, Jamie Roche, and myself. Jamie and Dave White hated each other. They got in fights, fist fights during the year. One time Dave White was away for the weekend. Jamie -- when he came back, Jamie had moved all Dave White's furniture, everything, like into some other area of Lawrence Hall in a hallway.

So he came back, and Dave White's room was entirely empty. They had a very contentious -- they had a contentious relationship, didn't like each other, at least as I recall it.

I got -- I was friends with Dave White more than Jamie. I tried to be civil. Jamie wasn't around a lot. I don't know, I think his parents lived nearby, and so he was elsewhere or with a girl, I don't know, a woman at Yale. [redacted] He didn't hang out with us very much, wasn't a great situation.

[redacted] Are you aware of any reason Mr. Roche would lie about you?

Judge Kavanaugh. I'm not going to speculate beyond -- I'm not going to speculate beyond what I've said. My understanding, of course, is that he does not corroborate the incident.

[redacted]

[redacted] What is your knowledge about the relationship between Mr. Roche and Ms. Ramirez while at Yale?

Judge Kavanaugh. I don't think I have much knowledge of that, or at least not much -- I don't have much recollection of that.

[redacted] Do you have any recollection about their relationship after their time at Yale?

Judge Kavanaugh. I don't.

[redacted] So Mr. Roche says, "Debbie and I became close friends shortly after we both arrived at Yale. She stood out as being exceptionally honest and gentle. I cannot imagine her making this up."

Do you have any other understanding about the nature

of their relationship, either then or now?

Judge Kavanaugh. I don't.

[redacted] According to the article, Mr. Roche never saw you engage in any sexual misconduct, but did recall you being frequently incoherently drunk.

Were you frequently incoherently drunk in college?

Judge Kavanaugh. No. Like -- like most people in college, I went to parties and had beers, but that's -- that's not an accurate description, in my view.

[redacted] Do you have any understanding of why Mr. Roche would characterize you as frequently incoherently drunk in college?

Judge Kavanaugh. I'm not going to speculate on what's going on right now. We're in the twilight zone.

[redacted] In a recent interview --

[redacted] Can I ask a question?

[redacted] Of course.

[redacted] Let me jump in here, Judge. Talk about your academic performance at Yale.

Judge Kavanaugh. Yeah. So two things I was doing the most at Yale College were studying and going to class and working very hard on my academics, doing well enough to get into Yale Law School, which was not obvious when I arrived in September of 1983. I worked my ass off.

And the second thing was basketball. Throughout the

freshman year when I lived there, I was playing basketball every day. I tried out for the varsity basketball team. As soon as we got there, literally the first day, the workouts started. Not -- not with coaches present because they weren't allowed by NCAA rules to be present, but the -- the play, the captain-led workouts started immediately. Butch Graves was the captain of the Yale basketball team. Chris Dudley was my classmate.

So we had basketball every day. Those were intense, really intense afternoons, early evenings of basketball. And then I played JV basketball that year, practice every day, lots of games, and then in the spring, basketball again for the same kind of captain-led workouts, which were every weekday, a lot of running, a lot of lifting.

So the two primary focuses of my life were academics and basketball. And of course, we all lived on Old Campus. So, of course, it was also social. I had friends. Louisa Garry, who testified at the hearing for me, who I met on the first day of Yale College, the other college women friends who have written, who joined that letter, talked about what I was like from the beginning in college.

So thank you for the question. Happy to answer any follow-up, but I was very focused on doing as well as I could in school, and I was very focused on trying to be the best basketball player I could be.

[redacted] So, in a recent interview, you denied ever getting blackout drunk. Would anything about your college drinking in any way impair your ability to remember whether you engaged in the conduct Ms. Ramirez identifies?

Judge Kavanaugh. No.

[redacted] All right. The article reports Mr. Roche as saying, "Is it believable that she was alone with a wolfy group of guys who thought it was funny to sexually torment a girl like Debbie? Yeah, definitely. Is it believable that Kavanaugh was one of them? Yes."

So did you ever, either alone or with other men, sexually torment any student at Yale?

Judge Kavanaugh. No.

[redacted] And do you -- do have any understanding of why your college roommate would make such an accusation?

Judge Kavanaugh. Well, I'm not going to speculate. I've described the contentious relationship in that room generally and his issues generally.

[redacted] And his issues you testified being [redacted]?

Judge Kavanaugh. That's my understanding.

[redacted] According to the New Yorker article, Ms. Ramirez continued to socialize with one of the male classmates who had egged Kavanaugh on during the party during college. She even invited the classmate to her

house for Thanksgiving one year after he told her that he had nowhere to go. She also attended his wedding years later as a guest of his wife, and she said that she posed for photographs with Kavanaugh, smiling.

You mentioned that you believed you were probably at a wedding with her. So have you interacted with Ms. Ramirez since you graduated college, including potentially that wedding or any other time?

Judge Kavanaugh. Yeah, so her best friend was Karen Yarasavage. Karen Yarasavage said she never heard about any such incident like this and that she would have heard about it. That's what she said, as I understand it, in the story -- or some story.

[redacted] would have been the person who had the wedding, marrying [redacted], who also lived -- who was also a student at Yale College at that time. And so, anyway, I would have been at [redacted] and -- I was at [redacted] and [redacted] wedding. And like I said, [redacted] said she never heard about any such thing as this incident.

[redacted] Did you interact with Ms. Ramirez at the wedding?

Judge Kavanaugh. I'm sure -- I'm sure I saw her because it wasn't a huge wedding. And at any wedding, you would see the people that you went to school with. But I don't have a specific recollection.

[redacted] Other than the wedding, have you had postgraduation interactions with Ms. Ramirez?

Judge Kavanaugh. Not that I'm remembering right now.

[redacted] The incident that she alleges in the article, was that discussed at the wedding?

Judge Kavanaugh. No, because it didn't happen. With me, or with anyone as far as I know, but not with me.

[redacted] All right. My last question on this subject is since you graduated from college, but before the New Yorker article publication on September 23rd, have you ever discussed or heard discussion about the incident matching the description given by Ms. Ramirez to the New Yorker?

Judge Kavanaugh. No.

[redacted] Judge, I want to get your general reaction to this New Yorker story, including the allegations made in this story.

Judge Kavanaugh. This didn't happen. I've never done anything like that. The story, as described -- back up. Karen Yarasavage, her best friend, says she never heard anything like this. If something like this had happened, it would have been the talk of campus.

The New York Times says as recently as last week, she was calling around to other classmates saying she wasn't sure I had done this. And you know, I think -- I think

we're -- this is an outrage for this kind of thin, uncorroborated, 35-year-old accusation to be leveled in this fashion at this time. I've been in the public eye for 24 years, since I started with the independent counsel in the fall of 1994, very public at various points in my life.

I've been through six background checks. I worked in the White House at the highest levels, senior staff, traveling with the President all over the world, seeing the most highly sensitive secrets of our Nation for years. I went through a difficult confirmation process for the D.C. Circuit that was public with two separate confirmation hearings in 2004 and 2006.

I've been a judge for 12 years in a very public way. I've been identified repeatedly as a potential Supreme Court nominee. Whether that was accurate or not, I've been publicly identified. My decisions have been publicly discussed.

I've been very much a presence at the Yale College reunions. I've been on multiple panels there. So I've been active in the class. The class newsletter has talked about me. The people in my class have been at those reunions and those events.

In all that time, not a word. And then 4 days, you know, when just right before a vote for the Supreme Court, after the nomination itself has been pending for months,

and I've been through the hearings and 65 Senate meetings and all the written questions, and then -- and then, after all these years, with all this time, and all these descriptions with no corroboration and with her best friend saying she never heard about it, you know, I'm -- I'm really just, you know, stunned. And outraged.

It's the twilight zone. I guess we're going to get to a few more of these twilight zone things, but --

[redacted] Well, actually, are you aware that the New York Times passed up on this story before the New Yorker ran the story?

Judge Kavanaugh. That's what I read in the New York Times.

[redacted] What's your reaction to that?

Judge Kavanaugh. They couldn't -- the New York Times couldn't corroborate this story and found that she was calling around to classmates trying to see if they remembered it. And I, at least -- and I, myself, heard about that, that she was doing that. And you know, that just strikes me as, you know, what is going on here? When someone is calling around to try to refresh other people, is that what's going on? What's going on with that?

That doesn't sound -- that doesn't sound good to me. It doesn't sound fair. It doesn't sound proper. It sounds like an orchestrated hit to take me out. That's what it

sounds like.

[redacted] The New Yorker story discussed how Ms. Ramirez had a lapse of memory related to this incident until she had several days of conversations with her attorney. Did you read that?

Judge Kavanaugh. I did. Six days of --

[redacted] What's your -- what's your reaction to that, Judge?

Judge Kavanaugh. I mean, what is that all about? What are we talking about here? This is serious stuff, and they're -- you know, they're calling around to other people either to refresh them, or I don't know what's going on in those conversations, but it takes 6 days to kind of dredge up something with a lawyer, as I understand it.

And in the context of a highly contentious Supreme Court nomination where people understandably, and that is understandably, feel strongly about the Supreme Court. I don't -- I don't want to say anything -- that's appropriate in America. It's appropriate in America for people to feel strongly about the Supreme Court.

It's not appropriate for people to be dredging up uncorroborated stories and trying to refresh other people's recollections and then stoke the media and create a feeding frenzy and destroy my family and destroy my reputation and take me down. This is not right. It's an outrage.

[redacted] Judge, your wife, Ashley, and you recently did an interview on Fox News with Martha MacCallum. Is that correct?

Judge Kavanaugh. That is correct.

[redacted] Everything that you said on that interview, do you -- do you affirm that today? Do you adopt that as your testimony today?

Judge Kavanaugh. Yes.

[redacted] And do you understand that what you tell a reporter is not subject to felony prosecution if you're lying? Do you understand that?

Judge Kavanaugh. Yes.

[redacted] Do you understand that what you tell congressional investigators is subject to felony prosecution for lying? Correct?

Judge Kavanaugh. Correct.

[redacted] So are you saying that you're -- again, with that in mind, are you adopting today that what you -- as your testimony what you told Martha MacCallum on Fox News?

Judge Kavanaugh. Yes.

[redacted] Hey, Judge. So we have a few more questions, as we've had a few more allegations. So I just want to start walking through those with you now.

Michael Avenatti has conveyed to the committee and the

press allegations about your alleged involvement in gang rape parties while in high school.

Have you had the opportunity to review those allegations?

Judge Kavanaugh. I've heard about them generally.

[redacted] Well --

Judge Kavanaugh. Happy to -- happy to answer questions.

[redacted] So tell us what you've heard about these allegations, Judge.

Judge Kavanaugh. Well, can you just give me an allegation? I think I saw generally described in an email the allegations. So if you can ask me --

[redacted] So the committee investigators -- Mr. Avenatti made allegations that he had secret evidence against you. Committee investigators reached out to him immediately via email and asked him for his allegations and his evidence. The allegations that he made are, to summarize, he alleged a drug- and alcohol-induced gang rape that you participated in.

Judge Kavanaugh. That is false. I've never participated in a gang rape. I've never participated in sexual activity with more than one woman present and me. I think -- yeah. Just making sure I accurately described that. In other words, I've never had a threesome or more

than a threesome.

[redacted] So, specifically, Mr. Avenatti said, "We are aware of significant evidence of multiple house parties in the Washington, D.C., area during the early 1980s during which Brett Kavanaugh, Mark Judge, and others would participate in the targeting of women with alcohol/drugs in order to allow a 'train of men' to subsequently gang rape them."

Were you involved in any way in such parties?

Judge Kavanaugh. No. And I've never heard of such a thing. It's an outrageous accusation. Ridiculous.

[redacted] Okay. So we have some more specific questions. These are -- these are Mr. --

Judge Kavanaugh. Good.

[redacted] Mr. Avenatti's questions. The first one, did you ever target one or more women for sex or rape at a house party?

Judge Kavanaugh. No.

[redacted] Did you ever assist Mark Judge or others in doing so?

Judge Kavanaugh. No.

[redacted] Did you ever attend any house party during which a woman was gang raped or used for sex by multiple men?

Judge Kavanaugh. No.

[redacted] Did you ever witness a line of men outside a bedroom at any house party where you understood a woman was in the bedroom being raped or taken advantage of?

Judge Kavanaugh. No.

[redacted] Did you ever participate in any sexual conduct with a woman at a house party with whom you understood to be intoxicated or under the influence of drugs?

Judge Kavanaugh. No.

[redacted] Did you ever communicate with Mark Judge or anyone else about your participation in a "train" involving an intoxicated woman?

Judge Kavanaugh. No.

[redacted] Did you ever object or attempt to prevent one or more men from participating in the rape or taking advantage of a woman at any house party?

Judge Kavanaugh. I never saw such a thing. So the premise, the question is off.

[redacted] Mr. Avenatti has also conveyed certain allegations about your yearbook and calendar. First, he says your yearbook and calendar refer to "FFFFFFFourth of July," that is "Fourth of July" with a total of seven Fs. For clarity, I'll just refer to that as the "FFFFFFFourth of July entry."

Does your yearbook contain the "FFFFFFFourth of July

entry" described by Mr. Avenatti?

Judge Kavanaugh. Can you -- sorry, you were breaking out. Can you just speak a little closer to the phone and speak up?

[redacted] Sure

[redacted] Reread the question, please.

[redacted] Right. Sorry. It's kind of a long one.

Mr. Avenatti says that your yearbook and calendar refer to "FFFFFFFourth of July," that is "Fourth of July" with a total of seven Fs. For clarity, I'll just refer to that as the "FFFFFFFourth of July entry."

Does your yearbook contain the "FFFFFFFourth of July entry" described by Mr. Avenatti?

Judge Kavanaugh. So "FFF," all that refers to is a friend of ours in the class, when he would say "fuck you," he would often say it with a wind-up like "fffuck you." And for reasons that are not clear to me today, at age 15 and 16, the whole group of guys thought that was a funny, inside thing, and it got shortened to the sound I just made was a number of Fs rolling together.

And that guy would sometimes get in fights, either on the football field or otherwise, where he would say "fuck you" and then, you know, be in a fight. And that was the reference.

[redacted] Okay. But what does ""FFFFFFFourth of July"

specifically refer to?

Judge Kavanaugh. That must refer to a specific incident where that guy -- hold on one second.

[Pause.]

Judge Kavanaugh. Best recollection would be that it's a specific party where he got in a fight.

[redacted] But you don't recall that party or that fight?

Judge Kavanaugh. I don't recall the specifics, no. I think it's referring to Rehoboth Beach.

[redacted] Okay. Mr. Avenatti says he has reason -- he has reason to believe that the "FFFFFFFourth of July entry" stands for "find them, French them, feel them, finger them, fuck them, and forget them."

Have you ever used such a reference?

Judge Kavanaugh. That's wrong. It refers to this one guy and his -- and a joke that everyone had about him and how he said "fuck you."

[redacted] Have you ever heard of such a reference as Mr. Avenatti described it being used?

Judge Kavanaugh. I have never heard that as a reference, and I know for a fact that that was not the reference with respect to the yearbook.

[redacted] Why did you include the "FFFFFFFourth of July entry" in your yearbook and your calendar?

Judge Kavanaugh. I can't remember. The yearbook is a lot of humor, a lot of farce, a little bit of serious where you list your activities. But it's a lot of humor and a lot of farce at a time when the editors of the yearbook were probably following a model -- model of -- hold on one second.

[Pause.]

Judge Kavanaugh. Yeah, the yearbook editors, I think, had a mindset of like "Caddyshack," "Fast Times at Ridgemont High," "Animal House," or something and made the yearbook into kind of a farce in that respect. And that's -- you know, that explains some of the yearbook.

[redacted] Judge, I just want to get some clarity on the first question that [redacted] asked you on this line of questioning. I just want to make sure that your answer is what we suspect it is.

So let me repeat the question, and then I'm going to ask you the first question again to get a clear answer.

Mr. Avenatti says he has reason to believe that the "FFFFFFFourth of July entry" stands for "find them, French them, feel them, finger them, fuck them, and forget them."

And here's the question. Have you ever used such a reference?

Judge Kavanaugh. No, never. Nor has anyone else, to my understanding. And I know for a fact that that is not

the reference in the yearbook or the reference related to the person in question talking about his use of it and how that became a joke among some of the classmates.

[redacted] Thank you, Judge, for the clarification on our part, and [redacted] will continue the questioning.

[redacted] So do you have any understanding of why Mr. Avenatti would interpret the "FFFFFFFourth of July entry" as he has?

Judge Kavanaugh. No. We all know about -- no, I'm not going to speculate further.

[redacted] Well, Judge, tell us about your general reaction to Mr. Avenatti and his allegations.

Judge Kavanaugh. I think it's absurd, outrageous, a joke, a farce, the twilight zone.

[redacted] Have you ever met Mr. Avenatti?

Judge Kavanaugh. No.

[redacted] We have not received any evidence from Mr. Avenatti, despite Senate investigators requesting his evidence for his allegations. We don't even know who his client is, or clients, he's apparently representing in this matter.

Are you aware of any client or clients of Mr. Avenatti related to this matter?

Judge Kavanaugh. I am not.

[redacted] Are you aware of any evidence that

Mr. Avenatti may have that he says that he's going to present to us at some indeterminate time in the near future?

Judge Kavanaugh. I am not.

[redacted] Okay. So we have a few more questions about some of these yearbook entries. Mr. Avenatti also says that your yearbook and calendar include the phrase "devil's triangle." For clarity, I'll refer to that as the "devil's triangle entry."

Does your yearbook contain the devil's triangle entry described by Mr. Avenatti?

Judge Kavanaugh. Hold on one second.

[Pause.]

Judge Kavanaugh. Yes. I should just clarify, too, you've referred to my calendars a couple of times. He has no -- he's never seen my calendars.

[redacted] You say "he," you mean Mr. Avenatti?

Judge Kavanaugh. Yes, Mr. Avenatti, of course, has never seen my calendars.

[redacted] And you say that -- you've referred to your calendars, are you -- you mean -- are you looking at your calendars today?

Judge Kavanaugh. No. I'm just saying your question, or at least the lead-up to the question, the last two questions referred to calendar and yearbook, and I'm just

pointing out that Mr. Avenatti has never seen my calendars. So we're talking about the yearbook entry.

On the yearbook entry, yes, there is a reference to devil's triangle.

[redacted] What does the devil's triangle entry refer to?

Judge Kavanaugh. It refers to a drinking game where there were three glasses in a triangle. Beer drinking.

[redacted] Mr. Avenatti says he has -- he has reason to believe the devil's triangle entry refers to a situation where two men engage in sex with one woman at the same time.

Have you ever used the term "devil's triangle" to refer to sexual behavior?

Judge Kavanaugh. No.

[redacted] Have you ever heard "devil's triangle" being used to refer to sexual behavior?

Judge Kavanaugh. No.

[redacted] Why did you include the devil's triangle entry in your yearbook?

Judge Kavanaugh. I don't know. We were 17.

[redacted] Do you have any understanding of why Mr. Avenatti would interpret the devil's triangle entry as he has?

Judge Kavanaugh. I think I'll refer back to my prior

answer about my reaction to his allegations.

[redacted] Thank you, Judge.

[redacted] This is [redacted] again. I'm going to jump to the next set of questions unless you have anything else to add on that past topic?

Judge Kavanaugh. That's fine by me. Thank you.

[redacted] Okay. Judge Kavanaugh, on September 22nd of this year, Senator Gardner received an anonymous letter, apparently sent from Denver, alleging that you engaged in certain conduct in 1998.

Have you had an opportunity to review that letter?

Judge Kavanaugh. I did look at that, I believe, yeah.

[redacted] Okay. I'm going to read -- read from it. The letter states, "I will remain anonymous, but I feel obligated to inform you of this 1998 incident involving Brett Kavanaugh." When you were the author of the Starr Report, the author's daughter from Boulder, Colorado, occasionally socialized with Brett Kavanaugh. She and a group of four, including Kavanaugh, met in a Washington, D.C., bar.

"Her friend was dating him, and they left the bar under the influence of alcohol. They were all shocked when Brett Kavanaugh shoved her friend up against the wall very aggressively and sexually. There were at least four witnesses, including my daughter. Her friend, still

traumatized, called my daughter yesterday, September 21, 2018, wondering what to do about it. They decided to remain anonymous."

Did the events described in the letter occur?

Judge Kavanaugh. No, and we're dealing with an anonymous letter about an anonymous person and an anonymous friend. It's ridiculous. Total twilight zone. And no, I've never done anything like that.

[redacted] Just a few more specific questions. At any point while you were involved in the Starr investigation, did you ever shove a woman up against a wall very aggressively or sexually as you left a bar?

Judge Kavanaugh. No.

[redacted] At any point while you were involved in the Starr investigation, did you ever behave violently toward a woman?

Judge Kavanaugh. No.

[redacted] All right. Just one moment, please.

[Pause.]

[redacted] When you were involved in the Starr investigation, do you recall ever socializing with a woman from Boulder, Colorado?

Judge Kavanaugh. No.

[redacted] While you were involved in the Starr investigation, do you recall ever dating a woman who would

fairly fit the description in the letter provided to Senator Gardner?

[redacted] The anonymous letter.

Judge Kavanaugh. What's the description?

[redacted] Just based on what I --

Judge Kavanaugh. Describe her appearance.

[redacted] No, it's -- all we have is what I read.

Judge Kavanaugh. Well, then I don't know what I'm responding to then.

[redacted] Judge, I want to give you the opportunity again to respond more generally to these series of allegations that are made against you either by Mr. Avenatti or anonymous sources or others. I just want to get your general reaction to this.

Judge Kavanaugh. I think this is -- this is crazy town. It's a smear campaign. I've been in the public eye for 24 years, really public at various points. Certainly 1998, when I was in the Starr investigation, that was a very public year. In the Bush White House, very public, especially in 2003 to 2006. Two notable confirmation hearings in '04 and '06. As a judge for 12 years. Named, whether correctly or not, a few times as a possible Supreme Court nominee, very public around those times.

You know, go through this whole process, and the FBI background, six FBI backgrounds, intense scrutiny, and then

for something like this and the Avenatti thing are just absurd and outrageous, coordinated perhaps. I don't know. Twilight zone. And I don't -- you know, it's just outrageous. It's trying to take me down, trying to take down my family.

It's bad -- it's doing damage to the Supreme Court. It's doing damage to the country. It's doing damage to this process. It's become a total feeding frenzy, you know? Every -- just unbelievable.

[redacted] The committee has received four separate allegations related to you and sexual misconduct. Is there a kernel of truth in any of these allegations?

Judge Kavanaugh. No. Are we going to talk Rhode Island?

[redacted] We are.

Judge Kavanaugh. Okay. Let's get that one out of the way, too.

[redacted] Okay, Judge.

Judge Kavanaugh. I don't mean to cut off questions about the other one.

[redacted] Oh, no, I think we were finished. Judge Kavanaugh, a Rhode Island man named [redacted] recently called Senator Whitehouse's office making allegations concerning a rape on a boat in August of 1985. Have you had the opportunity to review those allegations?

Judge Kavanaugh. Yes.

[redacted] So, for the record, the report from Senator Whitehouse states, "Senator Whitehouse received a call this morning from a Rhode Island constituent, [redacted], who made allegations regarding U.S. Supreme Court nominee Brett Kavanaugh. [redacted] reported that early on a Sunday morning in August of 1985, a close acquaintance of the constituent was sexually assaulted by two heavily inebriated men she referred to at the time as Brett and Mark.

"The event took place on a 36-foot maroon and white boat in the harbor at Newport, Rhode Island, after the three had met at a local bar. According to [redacted], when he learned of the assault at approximately 5:00 a.m. that same morning, he and another individual went to the harbor, located the boat the victim had described and physically confronted the two men, leaving them with significant injuries.

"[redacted] recently realized that one of the men was Brett Kavanaugh when he saw Kavanaugh's high school yearbook photo on television over the weekend. He promptly reported the incident to our office on Monday morning, September 24, 2018."

Judge, did this event happen?

Judge Kavanaugh. No. I was not in Newport, haven't

been on a boat in Newport. Not with Mark Judge on a boat, nor all those three things combined. This is just completely made up, or at least not me. I don't know what they're referring to.

[redacted] Did you ever sexually assault a woman or women in Rhode Island?

Judge Kavanaugh. No.

[redacted] Were you ever in a situation where two men injured you and someone named Mark?

Judge Kavanaugh. No.

[redacted] Do you have any knowledge of such a boat?

Judge Kavanaugh. No.

[redacted] Do you know [redacted]?

Judge Kavanaugh. No.

[redacted] [redacted] appears to have a Twitter account with the handle [redacted]. Among other things, the information identifies the account holder as a "hippie" from "[redacted], Rhode Island."

Are you aware that on June 27th of this year, the account tweeted, "A question, when will the United States military decided to do what they have vowed and remove the domestic threat to the Constitution that lives in the White House?"

Judge Kavanaugh. Can you repeat -- you broke out. So I just want to make sure I got it. I think I got it, but

can you repeat it?

[redacted] Sure. So [redacted] has a Twitter account with the handle [redacted]. Among other things, the information identifies the account holder as a "hippie" from "[redacted], Rhode Island."

Are you aware that on June 27 of this year, this account tweeted, "A question, when will the United States military decided to do what they have vowed and remove the domestic threat to the Constitution that lives in the White House?"

Judge Kavanaugh. I'm not aware of his Twitter account or what might be on his Twitter account, if that's the question.

[redacted] So you are not aware that on July 8th of this year, this account tweeted, "Dear Pentagon, please save my country from the parasite that occupies the White House. Our you waiting until Russians parachute in like in Red Dawn? Please help!"

Judge Kavanaugh. I'm not aware of that.

[redacted] So you are also not aware that on August 18 of this year, this account tweeted, "I am making for the military to do their constitutional duty --"

[redacted] I am asking.

[redacted] "I am asking" -- excuse me. "-- for the military to do their constitutional duty and protect us

from the domestic terrorist in the Oval Office. Please, please, please."

Judge Kavanaugh. I'm not aware of that.

[redacted] Having heard this information, do you know or remember, [redacted]?

Judge Kavanaugh. I don't.

[redacted] What are your general reactions to this allegation, Judge?

Judge Kavanaugh. It's just totally made up. Ridiculous.

[redacted] Okay. So, Judge Kavanaugh, we've asked you now about a number of very recently made allegations of sexual misconduct, and I want to make sure that we fully understand your testimony.

Again, you understand that falsely answering my questions -- our questions can carry criminal penalties. Correct?

Judge Kavanaugh. I understand that, yes.

[redacted] Committee investigators previously asked you about Dr. Ford's allegations. You categorically and unequivocally denied them.

Do you stand by that testimony?

Judge Kavanaugh. I do.

[redacted] Today, we've ask you about some other allegations that became public after Dr. Ford's allegations

became public. You have denied all of them.

Do you stand by that testimony?

Judge Kavanaugh. I do.

[redacted] Have you ever sexually assaulted anyone?

Judge Kavanaugh. I have not.

[redacted] Have you ever committed any kind of sexual misconduct?

Judge Kavanaugh. No.

[redacted] Are you looking forward to testifying at Thursday's hearing?

Judge Kavanaugh. I am looking forward to it. And to reiterate what I said last Monday, now 8 days ago, I wanted to testify last Tuesday so that I can clear my name, defend my integrity, defend a lifetime of good work that I have done and the record I've built as a judge for 12 years, worked in the White House for 5 1/2, working in public service, working for Justice Kennedy. I look forward to defending my name, defending my integrity.

And to reiterate also, listen to all the people who knew me best. The women I went to high school with who've spoken. You know, Julie and Suzanne and Meghan and Maura, and Maura, and I'll go on, who were my friends and are still my friends, and who knew me then and have known me since age 13 or 14. And the college friends like Louisa and Carolyn and Karen, and the people I -- the women I

worked with in the Bush White House who have repeatedly spoken on my behalf and signed a letter on my behalf and talked about how I've always treated women with dignity and respect throughout my life.

The law clerks that I've hired, and I've been the leading judge in the United States, Federal judge in the United States in my time on the bench in promoting women law clerks to Supreme Court clerkships and hired more women than men, and they've all spoken out in support of me and how I've been an advocate for women's equality throughout my life.

As a coach for the last 7 years of girls basketball teams, and training and encouraging and inspiring girls to do -- to have confidence and do better at basketball and prepare them for life and listen to their moms and dads.

And all this inspired by my mom, who taught me at a young age to break barriers and who, herself, was a trailblazer and overcame sexual harassment and barriers that were omnipresent at that time for women trying to break into the legal profession. And I watched her do that and learned from her and was inspired by her.

And one facet of my life that has been important to me in all aspects is I've always been friends with lots of people, and I'm blessed by my friends, and I've talked about that in my opening statement last time. And one of

the things that's been true throughout my life is how many women I've been friends with. Not talking about dating now, talking about friends.

From an early age, Julie Hurson DeVol on TV the other night talking about how I always helped her with her homework in high school. Suzanne Hohman Matan and Amy O'Neill and Kristin Blomquist Treacy and Maura Fitzgerald and Maura Molloy Kane and Meghan Molloy McCaleb, all friends from high school who were with me all the time and were my friends and are still my friends. And I can go on and on on the names and the people in college.

I've been -- I've been a supporter and promoter of women's equality, and then the women -- women I've dated have talked about that as well and how I treated them. And some of the women on those letters are people I went out with. Most of them, of course, are friends and never had that kind -- but they've all talked about how I treated them with dignity and respect throughout my life.

And you know, who would want to go through this? Who is ever going to want to go through this in the future? What is this doing to the Court when -- and the country and the process when these kind of -- this kind of process happens where an allegation is held for this long, an allegation during the process that was known. And then I have -- known during the process, I mean, by a Senator.

And then I go through the hearing and the prompt background check and the individuals meetings, and then it's sprung in the way it was sprung. And you know, just to go back to that, that's the summer of 1982. Well, I wasn't at such thing in the summer of 1982. And the people who were there say it didn't happen.

And since we last talked, the other -- the woman who was there says she doesn't know me and has never seen me, as far as she can remember, at a party. It's just -- it's a disgrace. It is a total -- what this process has become.

I'll end with that, unless you have further questions.

[redacted] Just one more.

[redacted] Two more. Go ahead.

[redacted] Two more. Excuse me. Do you object to the public release of the transcript of this interview?

Judge Kavanaugh. I do not object.

[redacted] And Judge, we had a transcribed interview with you on Monday, September 17, 2018. Correct?

Judge Kavanaugh. Yes.

[redacted] And in that interview, we discussed the then-allegations by Dr. Ford contained in the July 30, 2018, letter sent to Senator Feinstein's office. Correct?

Judge Kavanaugh. Correct.

[redacted] Do you -- for purposes of your testimony today, do you adopt your testimony from September 17th?

Judge Kavanaugh. Yes.

[redacted] And do you object to the public release of that testimony from September 17th?

Judge Kavanaugh. I do not object to that.

[redacted] So that was during -- that testimony was during a background investigation call with you between the ranking member's staff and the chairman's staff. Do you understand that?

Judge Kavanaugh. I thought it was just the chairman's staff, that call. Am I wrong about that?

[redacted] Excuse me. The chairman's staff. The ranking member's staff was invited, but did not participate. I stand corrected. But you understand that that's --

Judge Kavanaugh. Right. That --

[redacted] -- part of the BI process?

Judge Kavanaugh. That's correct.

[redacted] So I just want to make sure that this is crystal clear. You do not object to having that testimony, that transcript of that testimony attached, because you're adopting it for purposes of today's testimony, to your testimony today, and so we can publicly release both transcripts. Is that correct?

Judge Kavanaugh. That is correct.

[redacted] Do you have anything further to add,

Judge?

Judge Kavanaugh. Thank you all for your time.

[redacted] Thank you.

[Whereupon, at 1:36 p.m., the interview was concluded.]

[redacted]

[redacted]
Follow
Do everyone who is going crazy about what I had said I have recanted because I have made a mistake and apologize for such mistake
7:51 PM - 26 Sep 2018
140 Retweets 121 Likes
293
140
121

[redacted]

NOMINATION OF
THE HONORABLE BRETT M. KAVANAUGH
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES

- - -

[redacted]

- - -

Monday, September 17, 2018

- - -

United States Senate
Committee on the
Judiciary
Washington, D.C.

Corrected Transcript

The teleconference commenced at 6:04 p.m. and was reported from Room SD-181, Dirksen Senate Office Building, in Committee Confidential session

Participants:

Judge Brett Kavanaugh

Alex Walsh, on behalf of Judge Kavanaugh

[redacted], Senate Judiciary Committee Professional Staff Members.

[redacted]

[redacted]

PROCEEDINGS

[redacted]: Good evening. This is [redacted] from the Senate Judiciary Committee. Is this Judge Kavanaugh?

JUDGE KAVANAUGH: This is Brett Kavanaugh. I'm here with Alex Walsh, my counsel.

[redacted] Great. Well, thank you very much for getting on this call with us today. As you know, this is part of the Committee's background investigation into your nomination. Just so you know, this call is being transcribed.

I'll let the rest of my colleagues here introduce themselves.

[redacted]: [redacted] for Chairman Grassley.

[redacted]: [redacted] for Chairman Grassley.

[redacted]: [redacted]

[redacted] We also have a transcriber here as well.

JUDGE KAVANAUGH: Great.

[redacted] We'd also like to note for the record that the Ranking Member's staff were invited to this background investigation follow-up phone call and they have declined to join.

[redacted]

[redacted]

[redacted] Again, Judge, thank you for chatting with us today. We want you to be able to answer the questions we have in the most complete and truthful manner as possible. So if you have any questions during this process or if you don't understand any of our questions, just let us know.

If you don't know the answer to a question or don't remember, don't guess. Just give us your best recollection. It's okay to tell us if you learned information from somewhere else, if you indicate how you came to know that information.

If there's anything you don't remember, just give us the best of your knowledge. If you have names of folks that can provide further information, we'd take those.

For the benefit of everyone here, this interview is part of Judge Kavanaugh's background investigation and, unless we get a waiver to do so, its contents can't be shared with anyone whose name does not appear on the list of designated staff or representatives pursuant to this Committee's September 22, 2009, memorandum of understanding with the counsel of the President of the United States.

[redacted] Also, all Senators are entitled to a briefing of this interview if they request one.

JUDGE KAVANAUGH: Okay.

[redacted]

[redacted] Judge, before we get to the content of the questions here, I have a couple overview questions questions for you just on the process of what we're doing today. First, you should understand that, although this interview is not given to you when you're under oath, by law you're required to answer questions from Congress truthfully. Do you understand this?

JUDGE KAVANAUGH: I do.

[redacted] Section 18 -- Section 1001 of USC 18 makes it a crime to make any materially false, fictitious, or fraudulent statement or representation in the course of a Congressional investigation, and that statute applies to your statements in this interview. Do you understand that?

JUDGE KAVANAUGH: I do.

[redacted] I'm sorry; we didn't catch that.

JUDGE KAVANAUGH: I do.

[redacted] Witnesses who knowingly provide false statements could be subject to criminal prosecution and imprisonment for up to five years. Do you understand this?

JUDGE KAVANAUGH: I do.

[redacted] Is there any reason you'd be unable to provide truthful answers to today's questions?

JUDGE KAVANAUGH: No, there's no reason.

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[redacted]

[redacted] Great. Thank you, and I will get started with our questions.

Last week the Committee received additional information to your background investigation file. So our questions for you today are related to that information. The Committee received a letter from an anonymous source regarding alleged conduct by you from your time in high school. Although the names are redacted from the version the Committee received, since then we have come to understand the name of the person who wrote this letter is named Christine Ford. She made that public.

I understand that you have denied all conduct the letter alleges, but we'd still like to ask you some follow-up questions pertaining to the letter that we received. Again, I understand these questions may be uncomfortable to discuss, so we do appreciate you discussing them with us and your candor.

Again, like in the last call we did, none of these are meant to be accusatory. We're simply trying to gain information today.

First, have you read the letter and are you familiar with its contents?

JUDGE KAVANAUGH: I have.

[redacted] Are you familiar with the Washington Post article on this topic as well?

[redacted]

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[redacted]

(Pause.)

[redacted] Are you there?

JUDGE KAVANAUGH: I am.

[redacted] Sorry. Was that -- are you familiar with the Washington Post article on this topic?

JUDGE KAVANAUGH: Yes, I am.

[redacted] Great.

[redacted] We'd like to first ask you some questions about Christine Blasey Ford. I don't know if I'm saying that right. Do you know Dr. Ford?

JUDGE KAVANAUGH: We did not travel in the same circles in high school. I recognize the name.

[redacted] So do you recall meeting her or knowing her at all in high school?

JUDGE KAVANAUGH: Again, we didn't travel in the same circles, but I recall her name.

[redacted] So you don't recall meeting her?

JUDGE KAVANAUGH: I don't recall meeting her, that's correct.

[redacted] And you don't recall any interactions with her specifically?

JUDGE KAVANAUGH: That's correct.

[redacted] Do you know any members in her family?

JUDGE KAVANAUGH: I do not.

[redacted]

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[redacted]

[redacted] To the best of your knowledge, have you ever attended a party where Dr. Ford was also at the party?

JUDGE KAVANAUGH: I can't rule out that we were at the same party at some point where the circles, our social circles, would have overlapped.

[redacted] Do you ever remember having conversations with her at a party?

JUDGE KAVANAUGH: I do not.

[redacted] Do you ever recall having had any physical encounters with Dr. Ford?

JUDGE KAVANAUGH: I did not.

[redacted] All right. I'd like to go through just some of her allegations so we have your answers clearly on the record. Have you ever pushed Dr. Ford into a bedroom?

JUDGE KAVANAUGH: No, I have not.

[redacted] Have you ever locked Dr. Ford in a bedroom?

JUDGE KAVANAUGH: No, I have not.

[redacted] Have you ever pinned Dr. Ford on her back to a bed?

JUDGE KAVANAUGH: No, I have not.

[redacted] Have you ever groped Dr. Ford?

JUDGE KAVANAUGH: No, I have not.

[redacted]

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[redacted]

[redacted] Have you ever put your hand over Dr. Ford's mouth?

JUDGE KAVANAUGH: No, I have not.

[redacted] Have you ever tried to remove Dr. Ford's clothing?

JUDGE KAVANAUGH: No, I have not.

[redacted] Have you ever been in a room with Dr. Ford while a man named Mark Judge jumped on top of you.

JUDGE KAVANAUGH: No, I have not.

[redacted] More broadly, have you ever been in a bedroom with Dr. Ford?

JUDGE KAVANAUGH: No, I have not.

[redacted] Does anyone have any follow-up on that set of questions?

[redacted] I don't, no.

[redacted] I'd like to ask you a few questions about Mark Judge. Do you know him?

JUDGE KAVANAUGH: I do know him.

[redacted] Can you describe your relationship with him, both what it was like in the eighties and also what it's like today?

JUDGE KAVANAUGH: In high school, we were in a class of about a hundred, and we were friends; and kept

[redacted]

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[redacted]

in touch for a while after high school occasionally. But I have not been in touch with him in several years, putting aside potential group emails that members of my high school class might send out that would include both of us.

[redacted] So you first met Mr. Judge during high school, is that correct?

JUDGE KAVANAUGH: I believe in the fall of 1979. I might have met him in eighth grade when he was at Our Lady of Mercy, I believe, and I was at Mater Dei.

[redacted] And the last time you recall speaking to him was when?

JUDGE KAVANAUGH: I can't say for sure, but it's a while ago. I would probably think a couple of years.

[redacted] When you were in high school, how frequently -- or did you attend social events, or were you at the same social events together?

JUDGE KAVANAUGH: Yes.

[redacted] How frequently would you say that was?

JUDGE KAVANAUGH: We as a class or a group of friends would see each other a lot of weekends.

[redacted] In the past week, you have not spoken with him?

JUDGE KAVANAUGH: Correct, I have not spoken

[redacted]

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[redacted]

with him.

[redacted] Can you describe what the social events were, what they typically were, those weekends that you met Mr. Judge?

JUDGE KAVANAUGH: There often were parties on Saturday night during the school year, where one person would have a party where boys and girls would be, and it was fairly typical, at least for the high school culture of 1979 through 1983, I believe.

[redacted] Were there ever -- was there drinking at these parties?

JUDGE KAVANAUGH: Yes. The drinking age was 18 and that was not followed by the parents. The parents were generally present at these parties.

[redacted] They were?

JUDGE KAVANAUGH: Yes.

[redacted] Were there ever occasions where there were not parents present?

JUDGE KAVANAUGH: I'm sure there were.

[redacted] Did any of these parties include socializing with students at the Holton Arms School?

JUDGE KAVANAUGH: I believe so on occasion. But our school primarily socialized with girls from Stone Ridge, Holy Child, occasionally Visitation, Immaculata, sometimes Holy Cross. But, that said, I would imagine

[redacted]

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[redacted]

that there were Holton Arms girls there on occasion and I was friends with a couple.

[redacted] Do you recall their names?

JUDGE KAVANAUGH: Virginia Hume and Lisa Odyniec. Both of them -- Virginia's my class. Lisa Odyniec was a year above me. "Odyniec" is ODYNIEC.

[redacted] Do you recall how old the Holton Arms students were and how old you were at the time?

JUDGE KAVANAUGH: No. I'm not sure I fully understand the question.

[redacted] Sorry. When you socialized with students from the Holton Arms School, do you recall was it throughout high school or was it particular years?

JUDGE KAVANAUGH: I don't think I remember specifics on that in terms of tenth, eleventh, twelfth grade. I think ninth grade did not involve as much socializing as happened in tenth and eleventh.

[redacted] Okay. Did you ever have a sexual encounter with a Holton Arms student?

JUDGE KAVANAUGH: I do not believe so. But I'd like to think about that to make sure that I'm being fully accurate. But I do not believe so as I sit here right now.

[redacted] Thank you.

JUDGE KAVANAUGH: I know I -- I know I never had sexual intercourse.

[redacted]

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[redacted] I'd like to return -- the details are vague to us, but the letter indicates that an assault occurred in a suburban Maryland home at a gathering that included Dr. Ford and four others. Do you recall a party in a suburban Maryland home with her and four others?

JUDGE KAVANAUGH: No.

[redacted] Do you recall any parties in suburban Maryland homes that you were at? Was that a place that you went to parties?

JUDGE KAVANAUGH: Yes. I lived in suburban Maryland and many of my classmates and friends and many of the girls also lived in that same county.

[redacted] We have a couple questions about what your life looked like in the summer of 1982. Where were you living?

JUDGE KAVANAUGH: I lived in my parents' house at [redacted] Bethesda, Maryland.

[redacted] Were you dating anyone that summer?

JUDGE KAVANAUGH: I had been dating someone. That ended in early June. I had some dates over the summer with another friend and then started dating someone in September.

[redacted] Did you have a job that summer?

JUDGE KAVANAUGH: I had a lawn-cutting business

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[redacted]

that I -- it was just me, as I recall.

[redacted] Were you taking any classes?

JUDGE KAVANAUGH: No. I was -- no.

[redacted] Did you spend time at the Columbia Country Club?

JUDGE KAVANAUGH: It's possible that I was there one or two times. I did not belong, nor did my family belong, but friends, some friends of mine, belonged.

[redacted] Sorry. Judge, the question specifically, did you spend time at Columbia Country Club during the summer of 1982; I just want to clarify that it was once or twice during that time.

JUDGE KAVANAUGH: That's what I recall.

[redacted] Do you recall that summer attending a party at a home near the country club?

JUDGE KAVANAUGH: No.

[redacted] Give us one minute, please.

(Discussion off the record.)

[redacted] Thank you very much for holding. We appreciate it.

I have two fairly direct questions to you and then I think we have one more line of questioning, and then I believe we'll be done. Do you remember the party described by Dr. Ford?

JUDGE KAVANAUGH: No.

[redacted]

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[redacted]

[redacted] Did you attend the party described by Dr. Ford?

JUDGE KAVANAUGH: No.

[redacted] Did you ever attend any party were you were one of four boys at a party and a single teenage girl attended the party?

JUDGE KAVANAUGH: I have no recollection of that.

[redacted] Just a couple more questions. You stated earlier that you attended parties where alcohol was served, and sometimes parents were present at the parties, sometimes they weren't. Did you drink at these parties?

JUDGE KAVANAUGH: Yes.

[redacted] How much alcohol did you typically consume at a party?

JUDGE KAVANAUGH: I drank beer, and it would depend on the time of year, whether we were in football season, things like that.

[redacted] In the summer?

JUDGE KAVANAUGH: In the summer, I was doing sports all summer. So sometimes.

[redacted] Okay. And did you ever drink to excess, to the point that you would have blacked out?

JUDGE KAVANAUGH: No.

[redacted] Does anyone else have any questions?

[redacted]

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[redacted]

[redacted] One more minute, please.

(Discussion off the record.)

[redacted] Hey, Judge. This is [redacted]. I want to just hear from you more generally. You've heard these allegations made by Dr. Ford. You've read about them in the Washington Post. I just want to get your general reaction to these allegations.

JUDGE KAVANAUGH: Thank you. I did not do this. I did not do this to Ms. Ford or anyone. I want to be categorical and unequivocal that I did not commit sexual assault. That is not me. That was not me.

You have heard from friends I have from high school, 65 women, 220 or so total, men and women. That includes many friends who were girls, as well as people I dated, including dances over this period, all of whom attested to my respect for women and treating them as equals at the time.

You've heard throughout this process how I've treated women as equals and sought to promote women. You have a letter from women I went to college with. You have a letter from 84 women I worked with in the Bush White House.

You've heard often from my former clerks who are women. A majority of my clerks have been women. Almost all of them have gone on to clerk at the Supreme

[redacted]

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[redacted]

Court and I've served as mentors for them. You've heard about my coaching, the girls basketball, the people I've tried to influence in that through the coaching.

Sexual assault is horrible and traumatic. But I did not do this. Maybe something happened to Ms. Ford by someone else at some time in high school, but I know I did not do this.

I'm a sitting judge with a lifetime of public service and hard work. I've lived a good life. To clear my name, I want a hearing tomorrow.

[redacted] Judge, I just want to walk through the process through the Committee. As part of this nomination, we have had -- we have received your nomination. You have had, from what I understand, 65 meetings with United States Senators; is that correct?

JUDGE KAVANAUGH: That is correct.

[redacted] And that includes with Senator Dianne Feinstein, the Ranking Member of the Senate Judiciary Committee; is that correct?

JUDGE KAVANAUGH: That is correct.

[redacted] Do you recall the date of that meeting with Senator Feinstein?

JUDGE KAVANAUGH: I don't have the specific date with me.

[redacted] Senator Feinstein had a letter that was

[redacted]

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[redacted]

dated July 30, 2018, that she said that she received from Dr. Park. Senator Feinstein sat on this letter -- excuse me. Dr. Ford. I apologize. Dr. Ford.

Senator Feinstein sat on this letter for nearly six weeks and did not tell the Chairman or, apparently, any other member of the Senate Judiciary Committee. Do you understand that?

JUDGE KAVANAUGH: I have read that.

[redacted] During this time, we have had, along with your meeting with 65 Senators, including Senator Feinstein, we have also -- do you recall that Senator Feinstein's staff and Chairman Grassley's staff had two phone calls with you related to your FBI background investigation? Do you recall, it was -- excuse me. One phone call related to your FBI investigation; do you recall that phone call?

JUDGE KAVANAUGH: I do recall the phone call. There might have been two.

[redacted] Do you also -- I know that you're not going to forget this. Do you recall sitting through three days and 32 hours of a public hearing with the Senate judiciary Committee?

JUDGE KAVANAUGH: I do.

[redacted] Do you recall at any point during this process that this issue related to Dr. Ford, that Senator

[redacted]

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[redacted]

Feinstein had apparently since July 30th, according to the letter, do you recall this ever being raised at any point up to this point?

JUDGE KAVANAUGH: It was not raised.

[redacted] Was it raised in the closed session where confidential or sensitive matters can be raised in a private closed session at the end of your three days of testimony? Was it raised then?

JUDGE KAVANAUGH: It was not raised in the closed session.

[redacted] Do you recall if Senator Feinstein even came to that closed session?

JUDGE KAVANAUGH: Senator Feinstein was not present at the closed session.

[redacted] After your hearing, we have what are called questions for the record. Do you understand that -- they're "QFRs" for short in Senate parlance. Do you recall that you received nearly 1300 questions for the record that you had to respond to?

JUDGE KAVANAUGH: I do.

[redacted] Do you understand that this is more questions for the record submitted to one Supreme Court nominee, it's more than every other Supreme Court nominee before you combined?

JUDGE KAVANAUGH: I do understand that.

[redacted]

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[redacted] Was this issue -- was this allegation that Dr. Ford made, that Senator Feinstein had since July 30th, was this issue ever raised in any of these nearly 1300 questions for the record?

JUDGE KAVANAUGH: It was not raised.

[redacted] So here we are. We've already -- we were scheduled to have your vote out of the Committee to the Senate floor this Thursday. And for the first time, on Sunday we learned the identity of this accuser. Is that when you learned the identity of this accuser?

JUDGE KAVANAUGH: That is correct.

[redacted] What's your reaction to that?

JUDGE KAVANAUGH: I want a hearing tomorrow.

[redacted] Well, Judge, we understand that. We have rules in the Senate Judiciary Committee. We would love to have your hearing tomorrow, so you can come testify and tell the American people what you just told us. We have rules where we can't have your hearing for seven days.

So we have noticed a hearing for next Monday at 10:00 a.m., so you can come in and tell the American people what you've just told us. I hope that the American people get to hear from you.

JUDGE KAVANAUGH: I look forward to the hearing. I welcome the opportunity.

[redacted]

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[redacted]

[redacted] Great. Do you have anything else that you would like to add, Judge?

JUDGE KAVANAUGH: No, thank you.

[redacted] Thank you.

[redacted] Judge, we appreciate your candor in a very difficult and sensitive topic, and we thank you for talking with us today; and we will see you next week.

JUDGE KAVANAUGH: Thank you.

(Whereupon, at 6:34 p.m., the interview was concluded.)

[redacted]

SENATE JUDICIARY COMMITTEE

U.S. SENATE

WASHINGTON, D.C

INTERVIEW: [redacted]

WEDNESDAY, SEPTEMBER 26, 2018

The interview convened at 8:07 p.m.

[redacted] [redacted]

[Telephone number dialed.]

[redacted] Are we ready?

[redacted] Mm-hmm.

[Telephone ringing.]

Kavanaugh Staff. Judge Kavanaugh's chambers.

[redacted] Hi, this is [redacted] from the Senate Judiciary Committee. We are calling to speak with Judge Kavanaugh.

Kavanaugh Staff. Okay. I'll transfer you. One moment, please.

[redacted] Thank you.

[Brief pause.]

Judge Kavanaugh. Hello?

[redacted] Hi, Judge Kavanaugh. This is [redacted] [redacted] calling from the Senate Judiciary Committee. Apologies for the slight delay. I'm here with several colleagues, so I will let them introduce themselves before we get started.

[redacted] [redacted], [redacted] for Chairman Grassley.

[redacted] Hello, Judge. [redacted], [redacted] [redacted] for Chairman Grassley.

[redacted]. Hi, Judge. [redacted] again from Ranking Member Feinstein.

[redacted] Hi, Judge. [redacted], also with Ranking Member Feinstein. Before [redacted] right?

[redacted] Correct.

[redacted] Gets started with her questioning, I just want to make a brief statement. As we mentioned yesterday, we'd like to make clear that the Democratic members have asked the FBI to investigate these allegations. They believe an FBI investigation is necessary for fairness and a fair process. The Democratic members do not believe it's appropriate for staff to be discussing allegations with you that have not yet been investigated by the FBI.

In addition to Ms. Swetnick's sworn statement, the committee received today a letter from Roberta Kaplan. She is representing Elizabeth Rasor and affirms that Ms. Rasor's statements in The New Yorker article were truthful. Ms. Rasor has also expressed her desire for an FBI investigation, but is willing to testify. So, in addition to Ms. Swetnick's claims, there are more witnesses. And to be clear, these are not anonymous individuals, but women who have come forward, identified themselves, and confirmed their willingness to cooperate with an investigation of these matters.

The Democratic members strongly object to moving forward in this manner. At a minimum, we need to hear from all parties and gather all additional evidence. And,

again, we want to reiterate that the Democratic members do not believe that this is a fair or sufficient process, and this is not how the committee usually handles these kinds of allegations. Thank you.

[redacted] The chairman's position is is we can have these political arguments between the offices and not waste the witness' time with political arguments now. Our job right now is to try to find the facts and so we can move forward.

[redacted] All right. And just for a more full introduction, I'm [redacted] and I am one of the special counsel for the Senate Judiciary Committee.

Judge Kavanaugh, you've already done two of these --

Judge Kavanaugh. Can I just interrupt? I'm here with [redacted], my counsel.

[redacted] Thank you, Judge.

[redacted] Thank you. Judge Kavanaugh, you've already done two of these calls, so you're familiar with the process, but I'd like to say a few words before we begin. This call is part of the Senate Judiciary Committee's investigation of new allegations raised against you, the nominee for a vacancy on the Supreme Court. The committee is gathering evidence in the form of your testimony today. For your awareness, this conversation is being transcribed.

In speaking to the committee, you are speaking under penalty of felony. 18 U.S.C. 2001 applies.

[redacted] 1001.

[redacted] 1001, apologies. 1001 applies. We plan to discuss two allegations today. The first allegation comes from Ms. Julie Swetnick, a woman represented by Michael Avenatti. The second is from someone who goes by "Jane Doe." She submitted a letter to a senator's office last week. Judge Kavanaugh, you previously answered a few questions about Ms. Swetnick's allegations when her attorney, Mr. Avenatti, made some general statements on Twitter. Now that we have Ms. Swetnick's declaration, we would like to follow up with a few additional questions.

Judge Kavanaugh, Michael Avenatti has publicly posted allegations from Ms. Julie Swetnick. Do you know Ms. Swetnick?

Judge Kavanaugh. No, don't know her.

[redacted] Okay. Ms. Swetnick raises several specific allegations related to house parties that occurred in the Washington, D.C. area from 1981 to 1983. I'm going to ask you about some of her claims.

Ms. Swetnick claims that she observed you being overly aggressive with girls during these house parties. Did you ever become abusive or physically aggressive with women at house parties between 1981 and 1983?

Judge Kavanaugh. No, and she's lying. She was supposedly at Gaithersburg High School. I don't know. I don't know her. I don't know anyone like her. This is just total B.S.

[redacted] She also alleges that you fondled girls without consent between 1981 and 1983. Did you fondle girls without consent between 1981 and 1983?

Judge Kavanaugh. No, she's lying. I don't know her. I didn't -- we didn't hang out. I didn't know people from Gaithersburg High School, which is way out 270. This is a joke. She supposedly -- how old is she? She's supposed -- like class of '80? Give me a break. This whole thing is a farce.

[redacted] Okay. Moving on to some of her additional allegations. Did you grab girls without consent at parties between 1981 and 1983?

Judge Kavanaugh. No.

[redacted] Did you press girls against your body without their consent between 1981 and 1983?

Judge Kavanaugh. No.

[redacted] Did you attempt to shift a woman's clothing to expose her breasts or genitals without her consent at a party between 1981 and 1983?

Judge Kavanaugh. No.

[redacted] Did you attempt to remove a woman's

clothing to expose her breasts or genitals without her consent?

Judge Kavanaugh. No.

[redacted] Did you make statements designed to demean female partygoers between 1981 and 1983?

Judge Kavanaugh. No.

[redacted] Did you make statements designed to humiliate female partygoers between 1981 and 1983?

Judge Kavanaugh. No.

[redacted] Did you make statements designed to embarrass female partygoers from 1981 to 1983?

Judge Kavanaugh. No.

[redacted] Ms. Swetnick makes reference to Beach Week in her allegations. Did you engage in any abusive conduct toward women at Beach Week?

Judge Kavanaugh. No, and obviously she -- you know, it seems very likely that she saw my calendars, which I submitted last night. I mean, give me a break. But "no" is the answer to your question.

[redacted] Ms. Swetnick also makes allegations related to drugging women at these parties, so I'm going to ask you a few questions related to those allegations. At any time, did you attempt to add grain alcohol to punch at parties in an effort to take advantage of women?

Judge Kavanaugh. No.

[redacted] Did you attempt to add drugs, including Quaaludes, to punch at house parties in an effort to take advantage of women?

Judge Kavanaugh. No.

[redacted] Have you ever given Quaaludes to a woman?

Judge Kavanaugh. No.

[redacted] Did you ever take part in the gang rape of an inebriated woman?

Judge Kavanaugh. No. By the way, can I just ask that you make part of the record the letter that was sent today? I think it was by about 60 people or so, men and women who knew me in high school and said this is nonsense and this needs to stop for the good of the country. I'm paraphrasing that last part. But can you make sure that's part of the record of this proceeding? They put that together, like, an hour after seeing this nonsense today.

[redacted] Judge, have the Department of Justice submit it to the committee, and we will ensure that it is part of the record.

[redacted] We will make sure that happens.

[The information appears in the appendix.]

\ COMMITTEE INSERT

[redacted] All right, a few additional questions. Going back to these allegations of gang rape, did you ever line up outside a bedroom to await a turn raping an

inebriated woman?

Judge Kavanaugh. No.

[redacted] Did you observe men taking part in the gang rape of an inebriated woman?

Judge Kavanaugh. No.

[redacted] Did you ever observe men at a party lining up for the purpose of gang raping an inebriated woman?

Judge Kavanaugh. No.

[redacted] Did you ever know about gang rapes taking place at a high school party?

Judge Kavanaugh. No. I mean, in the whole country, that question is -- I've heard about allegations, you know, around the country, but not anything -- so I just want to be careful in her phrasing. Have I ever read about that occurring somewhere else is -- so just be careful in the question there. But "no" is the answer to anything I ever observed, saw, knew about with me or my friends.

[redacted] So, did you ever attend a party and hear about a gang rape taking place at that same party?

Judge Kavanaugh. No.

[redacted] All right, and those were the questions that I had related to Ms. Swetnick's allegations. I'll open it up to anyone else in the room if they had questions.

[redacted] Does the minority have any questions of

Judge Kavanaugh?

[redacted] No.

[redacted] Judge, I just want to get your general reaction to these allegations.

Judge Kavanaugh. I'm amazed in the United States that you can get the amount of attention for a totally bogus, B.S. charge that this received, just made up about me and friends of mine, too. And, you know, this is just a -- it's a disgrace. It's a circus. I don't know where this ends, but, you know, I always said I'm on the sunrise side of the mountain, optimistic, see the day that's coming. You know, this -- I fear for the future. That's it.

[redacted] Thank you, Judge. We're going to discuss one more allegation, and [redacted] will go through that.

Judge Kavanaugh. Can you hold on one second?

[redacted] Yes.

[Brief pause.]

Judge Kavanaugh. Okay. Okay.

[redacted] All right, moving on to the next allegation. Judge Kavanaugh, we received another anonymous allegation against you that we would like to address. These allegations regard behavior by you and an unnamed friend when you offered to give a woman, who is going by "Jane Doe," a ride home from a party. According to her allegations, you were driving, the woman was in the

passenger seat, and your male friend sat behind her. Have you ever given a woman a ride home from a party with a friend and committed any form of sexual assault, attempted rape, or rape against her?

Judge Kavanaugh. No.

[redacted] Have you ever kissed a woman against her will when driving her home from a party?

Judge Kavanaugh. No.

[redacted] Have you ever put your hand on --

Judge Kavanaugh. Well, can I just ask a question? I don't think I've even seen this letter.

[redacted] Yeah, this is [redacted] I don't believe we have seen this allegation or know the form in which it came.

[redacted] Do we have the letter?

Judge Kavanaugh. What is this thing?

[redacted] This -- Judge, this is an anonymous letter that came -- that went to Senator Cory Gardner's office.

[redacted] This one was Kamala Harris.

Judge Kavanaugh. This is the Colorado thing?

[redacted] I apologize. I'm confused. There are so many --

Judge Kavanaugh. Yeah.

[redacted] -- anonymous allegations flying around, I'm getting them mixed up. I apologize. This is an

anonymous letter that we received from San Diego -- San Diego, California. Senator Harris' office in San Diego, California received a letter, and Senator Harris -- Senator Harris received this letter and passed it along to the chairman and ranking member to do our due diligence.

Judge Kavanaugh. Is there -- is there a date, a place, anything?

[redacted] There is not, but we will -- we will read the letter to you in its full -- in its entirety. It is -- it is a --

Judge Kavanaugh. How long is it?

[redacted] It is a handwritten two-and-a-half page letter from an anonymous.

Judge Kavanaugh. I don't -- I don't need the whole thing. You can just ask the questions.

[redacted] Could you please send a copy of it to me, though?

[redacted] We will. I apologize. I thought that we sent you a copy ahead of time, and so, I apologize.

Judge Kavanaugh. Okay.

[redacted] It was -- it was a little bit fast moving.

[redacted] All right.

[redacted] [redacted] why don't you -- why don't we do this so we establish a record? Read the letter.

[redacted] Okay. "Dear, Senator Grassley, et al.

The current situation regarding the accusations made by Dr. Ford against Brett Kavanaugh have prompted me to write you today. I have moved on with my life since he forced himself on me as well. The times were so different, and I didn't expect to be taken seriously, embarrass my family, be believed at all.

I was at a party with a friend. I had been drinking. She left with another boy, leaving me to find my own way home. Kavanaugh and a friend offered me a ride home. I don't know the other boy's name. I was in his car to go home. His friend was behind me in the backseat. Kavanaugh kissed me forcefully. I told him I only wanted a ride home. Kavanaugh continued to grope me over my clothes, forcing his kisses on me and putting his hand under my sweater. 'No,' I yelled at him.

The boy in the backseat reached around, putting his hand over my mouth and holding my arm to keep me in the car. I screamed into his hand. Kavanaugh continued his forcing himself on me. He pulled up my sweater and bra exposing my breasts, and reached into my panties, inserting his fingers into my vagina. My screams were silenced by the boy in the backseat covering my mouth and groping me as well.

Kavanaugh slapped me and told me to be quiet and forced me to perform oral sex on him. He climaxed in my

mouth. They forced me to go into the backseat and took turns raping me several times each. They dropped me off two blocks from my home. 'No one will believe if you tell. Be a good girl,' he told me.

Watching what has happened to Anita Hill and Dr. Ford has me petrified to come forward in person or even provide my name. A group of white men, powerful senators who won't believe me, will come after me. Like Dr. Ford, I'm a teacher, I have an education, a family, a child, a home. I have credibility. Just because something happens a long time ago, because a rape victim doesn't want to personally come forward, does not mean something can't be true.

Jane Doe, Oceanside, California."

[redacted] And read the envelope for him that was sent to Senator Harris' office.

[redacted] The envelope has the word "urgent" across the top. It is addressed to Kamala Harris, Senate Judiciary Committee, 600 B Street, Suite 2240, San Diego, California, 92101. And it is postmarked from San Diego, California on September 19th, 2018.

[redacted] I just want to establish a couple things because Judge Kavanaugh has not seen this letter because of Chairman Grassley's staff mistakes, so I apologize again about that. Just to be clear, there -- [redacted] there is no date on this letter. Is that correct?

[redacted] That is correct.

[redacted] And there's no return address anywhere on this letter. Is that correct?

[redacted] That is correct.

[redacted] And there's no contact information on this letter anywhere. Is that correct?

[redacted] That is correct.

[redacted] And there's no date of the allegation. Is that correct?

[redacted] There is no date of the allegation.

[redacted] Okay. So, now you can proceed with your questions.

Judge Kavanaugh. Nothing -- the whole thing is ridiculous. Nothing ever -- anything like that, nothing. I mean, that's -- the whole thing is just a crock, farce, wrong, didn't happen, not anything close.

[redacted] Okay. I'm going to go through a few of the specific allegations just to have your responses. Have you ever kissed a woman against her will while driving her home from a party?

Judge Kavanaugh. No.

[redacted] Can you repeat that answer?

Judge Kavanaugh. No.

[redacted] Have you ever put a hand under a woman's sweater while your -- while your friend put his hand over

her mouth or held her arm?

Judge Kavanaugh. No.

[redacted] Have you ever put your hand under a woman's sweater after she told you she only wanted a ride home?

Judge Kavanaugh. No.

[redacted] Have you ever put a hand under a woman's sweater after she yelled "no?"

Judge Kavanaugh. No.

[redacted] Have you ever had a friend silence a woman while you were engaged in a physical encounter with her?

Judge Kavanaugh. No.

[redacted] Have you ever used fingers to penetrate a woman's vagina against her will?

Judge Kavanaugh. No.

[redacted] Have you ever slapped a woman and told her to be quiet while forcing her to perform oral sex on you?

Judge Kavanaugh. No.

[redacted] Have you and a friend ever taken turns raping a woman?

Judge Kavanaugh. No.

[redacted] Have you ever told a woman you assaulted "no one will believe if you tell, be a good girl?"

Judge Kavanaugh. No.

[redacted] Those are the questions that I have

related to that allegation. I'll open it to anyone else in the room.

[redacted] Does the minority have questions?

[redacted] We don't. We would just repeat the statement that we made at the start of the call.

[redacted] And I would repeat my response. Judge, do you have any further reaction to any of these allegations?

Judge Kavanaugh. I think I've covered it.

[redacted] And I just want to note for the record that separate from Dr. Ford's allegations, we now have these six allegations that have been made against Judge Kavanaugh very late in the proceedings. And this is after the FBI has conducted six full field background investigations going back 25 years to 1993. We've had -- we've had 60 -- Judge Kavanaugh has had 65 meetings with senators. He has had numerous staff investigator interviews with the chairman and ranking member staff. He has denied all of these allegations.

We have had 4 days of a public hearing with 32 hours of testimony from Judge Kavanaugh. We had a closed session where sensitive matters could've been raised. These issues were not raised then. We've had 1,300 written questions submitted to Judge Kavanaugh after his hearing. He has responded to those questions. This is more questions and answers than all prior Supreme Court nominees combined.

It is -- we have a hearing set up. Day 5 of this hearing is set up for tomorrow where we are going to hear from Dr. Ford and Judge Kavanaugh tomorrow at the hearing, and I just wanted to note where we are in the process. Do you have anything further to add, Judge?

Judge Kavanaugh. No, thank you.

[redacted] Thank you.

[redacted] Public release.

[redacted] One more question for you, Judge.

Judge Kavanaugh. Yes.

[redacted] This is -- this call is not part of the FBI background investigation because we received these allegations outside of the FBI background investigation. But we want to just find out from you, do you object to the public release of what you have said today on this phone call, including the public release of the transcript?

Judge Kavanaugh. I do not object.

[redacted] Thank you, Judge.

[redacted] Thank you so much for taking part in this call.

Judge Kavanaugh. Thank you.

[Judge Kavanaugh and [redacted] disconnected call.]

[redacted] All right, thank you, guys.

[redacted] I didn't say this on the call, but you can say that this is a political discussion that has to happen.

What I didn't appreciate was when you wasted 20 minutes of his time suggesting that my 2-minute statement was wasting his time. I really -- that's just -- that's --

[Whereupon, at 8:28 p.m., the interview was concluded.]

I Wrote Some of the Stolen Memos That Brett Kavanaugh Lied to the Senate About

slate.com/news-and-politics/2018/09/judge-brett-kavanaugh-should-be-impeached-for-lying-during-his-confirmation-hearings.html

September 7, 2018

Jurisprudence

He should be impeached, not elevated.

By Lisa Graves

Sept 07, 201811:43 AM

Much of Washington has spent the week focusing on whether Judge Brett Kavanaugh should be confirmed to the Supreme Court. After the revelations of his confirmation hearings, the better question is whether he should be impeached from the federal judiciary.

I do not raise that question lightly, but I am certain it must be raised.

Newly released emails show that while he was working to move through President George W. Bush's judicial nominees in the early 2000s, Kavanaugh received confidential memos, letters, and talking points of Democratic staffers stolen by GOP Senate aide Manuel Miranda. That includes research and talking points Miranda stole from the Senate server after I had written them for the Senate Judiciary Committee as the chief counsel for nominations for the minority.

Receiving those memos and letters alone is not an impeachable offense.

No, Kavanaugh should be removed because he was repeatedly asked under oath as part of his 2004 and 2006 confirmation hearings for his position on the U.S. Court of Appeals for the D.C. Circuit about whether he had received such information from Miranda, and each time he falsely denied it.

For example, in 2004, Sen. Orrin Hatch asked him directly if he received "any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee." Kavanaugh responded, unequivocally, "No."

In 2006, Sen. Ted Kennedy asked him if he had any regrets about how he treated documents he had received from Miranda that he later learned were stolen. Kavanaugh rejected the premise of the question, restating that he never even saw one of those documents.

Back then the senators did not have the emails that they have now, showing that Miranda sent Kavanaugh numerous documents containing what was plainly research by Democrats. Some of those emails went so far as to warn Kavanaugh not to distribute the Democratic talking

points he was being given. If these were documents shared from the Democratic side of the aisle as part of normal business, as Kavanaugh claimed to have believed in his most recent testimony, why would they be labeled "not [for] distribution"? And why would we share our precise strategy to fight controversial Republican nominations with the Republicans we were fighting?

Another email chain included the subject line "spying." It's hard to imagine a more definitive clue than that. Another said "Senator Leahy's staff has distributed a confidential letter to Dem Counsel" and then described for Kavanaugh that *precise* confidential information we had gathered about a nominee Kavanaugh was boosting. Again, it is illogical to think that we would have just given Miranda this "confidential" information for him to use against us. But this is precisely what Judge Kavanaugh suggested in his testimony on Wednesday. He is not that naïve.

In the hearing this week, Sen. Leahy also noted that the previously hidden emails showed that Miranda asked to meet Kavanaugh in person to give him "paper" files with "useful info to map out [Sens. Joe] Biden and [Dianne] Feinstein, and others." The promised information included "Biden-speak." Again, this would not have been a normal information exchange.

In response to Leahy's questions this week, Kavanaugh made the outlandish claim that it was typical for him to be told what Democrats planned to ask at these combative hearings over controversial nominees, and that this was in fact the "coin of the realm." As a Democrat who worked on those questions, I can say definitively that it was not typical at all. Kavanaugh knows this full well.

At the time, Kavanaugh was working with Miranda and outside groups to try to force these nominees through the Senate over Democratic objections, and it would have been suicide to give them our research, talking points, strategies, or confidential letters. The GOP senators, their staff, the White House, and outside groups were working intensively to undermine the work of Democratic senators to block the most extreme of President Bush's judicial nominees.

Kavanaugh's actions were dishonorable anddishonest.

The Leahy talking points given to Kavanaugh were from my in-depth research into why the Senate had compelling historical precedent for examining Miguel Estrada's Department of Justice records, which the White House counsel's office was refusing to surrender. Other confidential materials Miranda shared with Kavanaugh related to investigations Democrats were pursuing over how Judge Priscilla Owen had handled an abortion case involving parental consent and about the overlap between her funders and groups with business before the courts of Texas. We would never have provided that information—key to our strategy to try to block what we considered extremist judicial nominations—to Miranda or to the White House.

During his testimony, Kavanaugh conflated these adversarial proceedings with ones in which Democrats might have cooperated with the other side, like the Patriot Act and airline liability. But these weren't hearings on some bill where senators would share their concerns across the

aisle to try to get a bipartisan fix on problems in a piece of legislation. These were oppositional proceedings in committee and on the floor over controversial judicial nominees. Kavanaugh knew this just as intimately as I did—our sides fought over those nominations intensely.

It was also an area where Kavanaugh's judicial nominations alliance had taken a scorched-earth approach, attacking Democrats ruthlessly. The White House's closest allies went so far as to call Leahy and other Democrats on the committee "anti-Catholic," even running attack ads.

Perhaps Kavanaugh was so blinded by his quest to get the most controversial Bush nominees confirmed in 2003 that he did not have any concerns about the bounty of secret memos and letters he was receiving—the full extent of which is not known because so many documents are still secret.

But, surely, reasonable questions about what he had been party to would have been considered after the story of the theft exploded in the news, Miranda was forced to resign, and the U.S. Senate sergeant-at-arms began a bipartisan investigation into the files stolen from the Senate?

As of November 2003, when the sergeant-at-arms seized the Judiciary Committee's servers, Kavanaugh would have been on notice that any of the letters, talking points, or research described as being from Democrats that were provided to him by Miranda were suspect and probably stolen from the Senate's server.

But he did nothing. He did not come forward to the Senate to provide information about the confidential documents Miranda had given him, which were clearly from the Democrats.

Kavanaugh also apparently did nothing when the Senate referred the case to the U.S. attorney's office for criminal prosecution. (Miranda was never prosecuted.)

Eventually, though, Kavanaugh went *even further* to help cover up the details of the theft.

During the hearings on his nomination to the D.C. Circuit a few months after the Miranda news broke, Kavanaugh actively hid his own involvement, lying to the Senate Judiciary Committee by stating unequivocally that he not only knew nothing of the episode, but also never even received any stolen material.

Even if Kavanaugh could claim that he didn't have any hint *at the time he received the emails* that these documents were of suspect provenance—which I personally find implausible—there is no reasonable way for him to assert honestly that he had no idea what they were *after* the revelation of the theft. Any reasonable person would have realized they had been stolen, and certainly someone as smart as Kavanaugh would have too.

But he lied.

Under oath.

And he did so repeatedly.

Significantly, he did so even though a few years earlier he had helped spearhead the impeachment of President Bill Clinton for perjury in a private civil case. Back then Kavanaugh took lying under oath so seriously that he was determined to do everything he could to help remove a president from office.

Now we know that he procured his own confirmation to the federal bench by committing the same offense. And he did so not in a private case but in the midst of public hearings for a position of trust, for a lifetime appointment to the federal judiciary.

His actions were dishonorable and dishonest.

This week, as part of his efforts to be elevated to the highest court in the land, he has calmly continued to deceive, falsely claiming that it would have been perfectly normal for him to receive secret Democratic letters, talking points, and other materials. And if this absurd notion were somehow true, it would not even be consistent with what he testified to 12 and 14 years ago. Back then, he didn't state it would have been normal for him to receive secret Democratic strategy materials.

Instead, he explicitly and repeatedly went out of his way to say *he never had access to any such materials*. These objectively false statements were offered under oath to convince the committee of something that was untrue. It was clearly intentional, with Kavanaugh going so far as to correct Sen. Kennedy when the senator described the document situation accurately.

That's why—without even getting into other reasonable objections to his nomination—he should not be confirmed.

In fact, by his own standard, he should clearly be impeached.

Lisa Graves *is the co-founder of Documented, which investigates corporate influence on democracy. She is the former chief counsel for nominations for the ranking member of the Senate Judiciary Committee and was deputy assistant attorney general in the Department of Justice.*

Kavanaugh Deserves a Quick Hearing and a Favorable Vote

insidesources.com/kavanaugh-deserves-quick-hearing-favorable-vote/

August 6, 2018

Matthew Heiman

Chuck Grassley, chairman of the Senate Judiciary Committee, has pledged to hold open, fair, and thorough hearings to consider the nomination of Judge Brett Kavanaugh to the Supreme Court. Unfortunately, opponents of Judge Kavanaugh have taken this good faith approach as an opportunity to seek documents that have little connection to the judge's qualifications. As a result, Senator Grassley expects hearings to occur in September and a Senate vote in October.

The primary reason for the delay is the Senate Democrats' demands to see every piece of paper Judge Kavanaugh has ever touched while a federal employee, something he has been for 25 out of the last 28 years. It's a long paper trail. He has served as a federal judge on the D.C. Circuit Court of Appeals for the last 12 years. Before that, he served as a White House counsel and staff secretary to President George W. Bush. As the staff secretary, his job was to coordinate the flow of paper from government departments and agencies to the president's desk. For the most part, he was not the author of these documents, he was the person making sure they were seen and acted upon by the president. But, his opponents are anxious to get them – all one million pages.

Why look at documents that offer limited to no insight on Judge Kavanaugh's fitness to join the Supreme Court? Because his opponents are struggling to find a good reason to object to his fitness for the job. Look at his track record. He took undergraduate and law degrees from Yale. He clerked for prominent federal court judges, including retiring Justice Anthony Kennedy. He spent time at the Solicitor General's Office of the U.S. Department of Justice. He was an associate counsel for Ken Starr's Whitewater investigation. As mentioned, he was a White House counsel and has spent the last 12 years on the federal bench. His opinions have influenced decisions by the Supreme Court and federal courts around the country. His law clerks have gone on to clerk for Supreme Court justices. There are no question marks around his qualifications and no holes in his background.

Thus far, it appears there are two objections to Judge Kavanaugh. First, he takes a textualist approach when applying the Constitution and statutes to the cases that come before him. Second, he bought baseball tickets with a credit card. The first objection is wrong-headed. Taking the text of the law seriously is exactly what a good judge does. A judge should never substitute his or her views for the law as it is written in the Constitution or the statutes. To do otherwise upsets the careful balance of power that is distributed amongst the three branches of government. As we learned in civics class, Congress (not the courts) makes the law, the Executive executes the law, and the Courts apply the law. The second objection of having a fondness for baseball is silliness on stilts. Judge Kavanaugh's appreciation for America's pastime is further evidence of his fitness for the highest court.

There's an old saying among lawyers that goes like this: when the law is on your side, argue the law; when the facts are on your side, argue the facts; when neither is on your side, just argue. Judge Kavanaugh's opponents seem to be following the "just argue" approach, but there isn't much logic to it. Judge Kavanaugh is an outstanding judge who is held in high regard by his peers. He possesses impeccable credentials, and he has led a life of integrity in both the professional and personal spheres. Those are the factors Senators should consider in deciding whether to vote for or against Judge Kavanaugh. Justices Breyer, Ginsburg, Kagan, and Sotomayor received between 63 and 96 votes in favor of their nominations. Judge Kavanaugh deserves the same, strong bipartisan support. Tell your Senators to get on with it.

Matthew Heiman

Matthew Heiman is a Visiting Fellow at the National Security Institute at George Mason University's Antonin Scalia Law School. Previously, he was lawyer with the National Security Division of the Department of Justice and the Coalition Provisional Authority in Baghdad, Iraq.

Brett Kavanaugh: Siding with Conservative Amici Curiae 91% of the Time

Prepared by Paul M. Collins, Jr., Ph.D., Judicial Analytics LLC

An examination of District of Columbia Court of Appeals Judge Brett Kavanaugh's written opinions reveals that he aligned with conservative amici curiae ("friends of the court") 91% of the time. In these cases, Kavanaugh wrote opinions limiting collective bargaining rights, letting polluters pollute, blurring the line between the separation of church and state, protecting corporations from liability, and expanding the scope of the Second Amendment.

Methodology

- Kavanaugh wrote majority, concurring, concurring and dissenting, and dissenting opinions in 64 cases in which amicus curiae briefs were filed.
- A total of 184 amicus curiae briefs were filed in these cases.
- Kavanaugh's opinions and the amicus curiae briefs were coded according to their ideological direction based on a well-established methodology in the social scientific study of the law.[1]
- Kavanaugh supported amici curiae advocating for conservative positions 91% of the time, compared to 14.6% of the time for amici curiae advocating for liberal positions.
- Amici advocating for conservative positions include groups like the American Bankers Association, the U.S. Chamber of Commerce, the National Rifle Association, and the Washington Legal Foundation.

[1] Spaeth, Harold J., Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2018. *The Supreme Court Database.* http://scdb.wustl.edu/documentation.php?var=decisionDirection.

Brett Kavanaugh: Delivering for Right-Wing and Corporate Interests

Unleashing special interest money into elections

1. Citizens for Responsibility and Ethics in Washington v. Federal Election Commission (2018)
   - Shielded the FEC's considerations not to investigate dark money groups, making it easier for a partisan FEC to decline to investigate campaign violations.
2. Independence Institute v. FEC (2016)
   - Enabled dark money groups to evade donor disclosure requirements. Kavanaugh's opinion was later reversed by a three judge panel and the reversal was summarily upheld by the Supreme Court.
3. Bluman v. FEC (2011)
   - Suggested foreign nationals can run political "issue" advertisements.
4. Emily's list v. FEC (2009)
   - Allowed nonprofit front groups to raise and spend unlimited amounts of money in elections.

Protecting corporations from liability

1. PHH v. CFPB (2018, en banc, dissenting)
   - Declared the Consumer Financial Protection Bureau, charged with protecting consumers from fraud and abuse, unconstitutional.
2. Bais Yaakov of Spring Valley v. Federal Communications Commission (2017)
   - Struck down law that would have required businesses to include opt-out notices with solicited fax advertisements.
3. NLRB v. CNN America, Inc. (2017, dissenting).
   - Argued that an employer should be absolved of liability for firing union workers and discriminating against them when rehiring.
4. Ortiz-Diaz v. United States Department of Housing & Urban Development (2016, concurring).
   - Made it harder for federal employees to bring discrimination claims.
5. Sea World of Florida, LLC v. Thomas Perez (2014, dissenting)
   - Argued that employers in dangerous industries should not be subjected to workplace safety regulations.
6. Saleh v. Titan Corp. (2009)
   - Extended sovereign immunity to tort claims brought by international plaintiffs.
7. Jackson v. Gonzales (2007)
   - Denied employment discrimination claim by employee who alleged race discrimination.

Helping polluters pollute

1. Mexichem Fluor, Inc. v. Environmental Protection Agency (2017)
   - Undermined agency deference, stripping the EPA of its authority to properly implement the Clean Air Act and opening the door to unregulated corporate pollution.

2. Communities for a Better Environment v. EPA (2014)
   - Concluded that environmental groups did not have standing to challenge an EPA decision not to tighten carbon monoxide standards.
3. In re Aiken County (2013)
   - Granted permission to process a license application for permanent nuclear waste station, limiting agency discretion.
4. Friends of Blackwater v. Salazar (2012)
   - Upheld the Fish and Wildlife Service's delisting of the West Virginia Northern Flying Squirrel as an endangered species.
5. EME Homer City Generation, L.P. v. E.P.A. (2012)
   - Struck down EPA rule aimed at reducing air pollution, expanding judicial review over final rules promulgated by the EPA and undercutting the ability of the EPA to rely on the Clean Air Act to craft new rules.
6. Howmet Corp. v. E.P.A. (2010, dissenting)
   - Refused to approve an EPA fine against company that had improperly shipped corrosive chemicals.
7. American Bird Conservancy, Inc. v. FCC (2008, dissenting)
   - Dissented from a decision requiring the FCC to more completely review possible harm to migratory birds.
8. Sierra Club v. EPA (2008, dissenting)
   - Supported a rule that prevented authorities from supplementing inadequate federal monitoring requirements of sources of air pollution.
9. Association of Irritated Residents v. E.P.A. (2007)
   - Gave polluters a free pass by refusing to review agreements between EPA and animal feeding operations.

Striking down commonsense gun regulations

1. Heller v. District of Columbia (2011, dissenting)
   - Argued against Washington, D.C.'s common-sense gun laws banning semi-automatic weapons and registration requirements.

Keeping injured plaintiffs out of court

1. National Railroad Passenger Corporation (Amtrak) v. Fraternal Order of Police, Lodge 189 Labor Committee (2017)
   - Aggressively using judicial review to vacate an arbitration award that would have reinstated a terminated union member, undercutting workers' rights.
2. Meshal v. Higgenbotham (2015, concurring)
   - Limited access to civil remedies for victims of torture and abuse.
3. Odhiambo v. Republic of Kenya (2014)
   - Limited the ability to combat fraud by shrinking the types of claims that can be brought under the Foreign Sovereign Immunities Act.

4. Rollins v. Wackenhut Services, Inc (2012, concurring)
   - Argued that when a plaintiff's claim is categorically dismissed, the plaintiff should be barred from brining a subsequent or amended claim.
5. Miller v. Clinton (2012, dissenting)
   - Argued that the State Department should be able to fire employees solely based on age, denying victims of age discrimination federal civil rights protections.
6. Cohen v. United States (2011, dissenting)
   - Described class actions as a "jackpot" and expressed hostility to class actions.
7. Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. ex rel. Fed. Nat. Mortg. Ass'n v. Raines (2008)
   - Insulated a corporate board of directors from a shareholders' suit. The Supreme Court abrogated his holding in *Lightfoot v. Cendant Mortgage Corporation* (2017).

Expounding a nearly limitless vision of presidential immunity from the law.

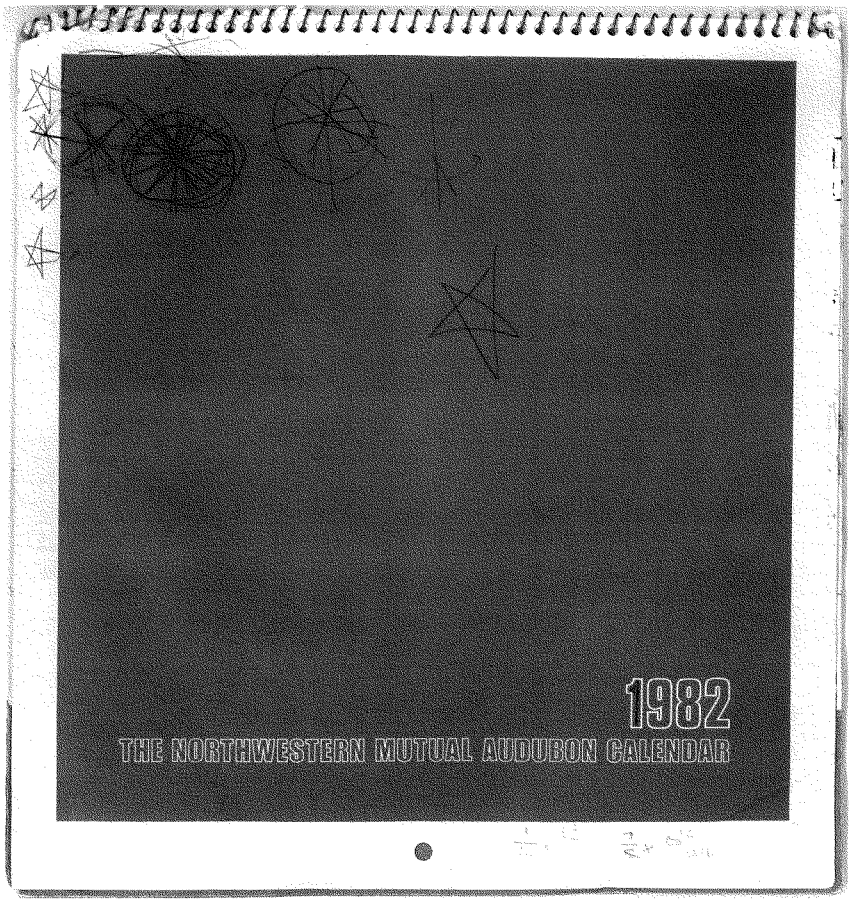
1. Free Enterprise Fund v. Public Company Accounting Oversight Board (2008, dissenting)
   - Argued that PCAOB's structure improperly limits Presidential power.
2. S.E.C. v. Federal Labor Relations Authority (2009, concurring)
   - Argued that the President or his designee, rather than the courts, should resolve legal or policy disputes between two Executive branch agencies.
   - Expounded the unitary executive theory that would limit the judiciary's role as a check on the president, noting that the "Constitution vests the 'executive Power' in one President"; that it "assigns the President the responsibility to 'take Care that the Laws be faithfully executed'"; that "Article II provides that a single President controls the Executive Branch, [so] legal or policy disputes between two Executive Branch agencies are typically resolved by the President or his designee—without judicial intervention."
3. 2016 American Enterprise Institute Speech[1]
   - Asked at a conservative event in 2016 to name a case that he believed should be overturned, Kavanaugh named *Morrison v. Olson*, a still-valid Supreme Court ruling upholding a 1978 law that creates a system for independent counsels to investigate and potentially prosecute government officials, including the president, for federal crimes. "It's been effectively overruled, but I would put the final nail in," Kavanaugh said at an event for the conservative think tank American Enterprise Institute.

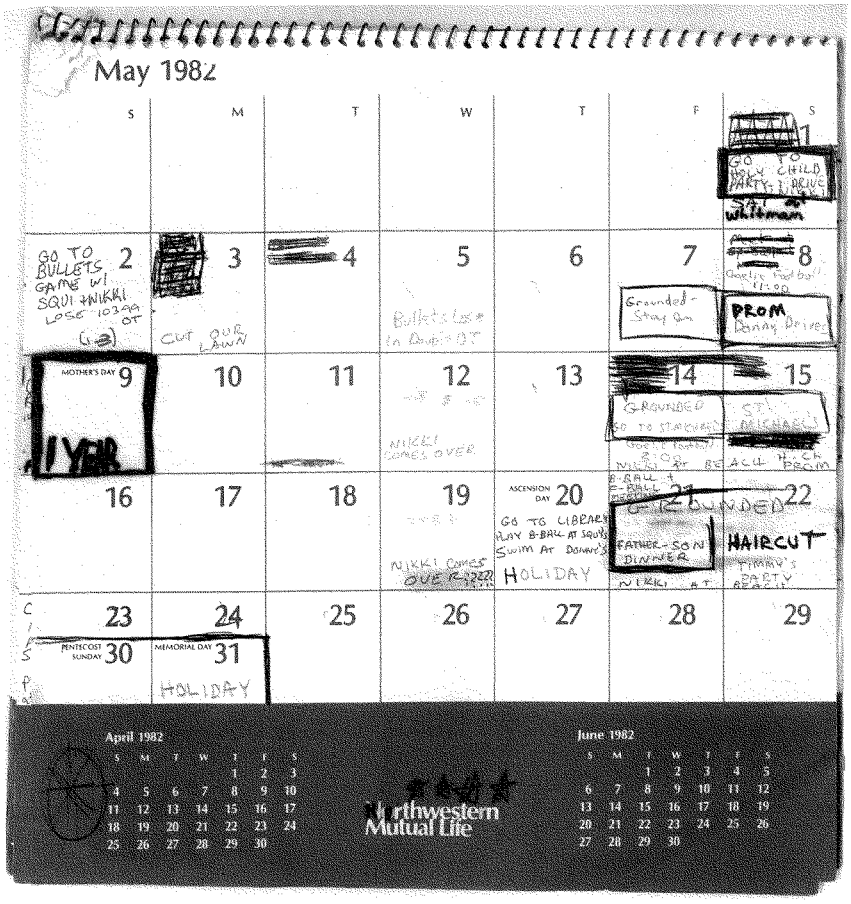
Gutting workers' rights

1. Arc Bridges, Inc. v. National Labor Relations Board (2017)
   - Held that yearly across-the-board wage increases were not a term or condition of employment.
2. National Railroad Passenger Corporation (Amtrak) v. Fraternal Order of Police, Lodge 189 Labor Committee (2017)
   - Overturned an arbitration ruling finding that an employee was wrongfully terminated.

[1] https://www.nbcnews.com/politics/donald-trump/trump-supreme-court-pick-kavanaugh-i-d-put-final-nail-n892421

3. Verizon New England Inc. v. National Labor Relations Board (2016)
   - Held that yearly across-the-board wage increases were not a term or condition of employment, undercutting the National Labor Relations Act and diminishing workers' protected speech rights.
4. Police and Fire Professionals of America v. Faye (2016, dissenting)
   - Dissented from ruling that a union had right to sue union official for breach of duty.
5. Sea World of Florida, LLC v. Thomas Perez (2014, dissenting)
   - Argued that employers in dangerous industries should not be subjected to workplace safety regulations.
6. Miller v. Clinton (2012, dissenting)
   - Argued that the State Department should be able to file employees solely based on age, denying victims of age discrimination federal civil rights protections.
7. Agri Processor Co. v. NLRB (2008, dissenting)
   - Dissented from decision ordering company to bargain with a union.
8. American Federation of Government Employees, AFL-CIO v. Gates (2007)
   - Granted temporary authority to abolish collective bargaining, effectively eliminating collective bargaining for hundreds of thousands of employees.


1982
THE NORTHWESTERN MUTUAL AUDUBON CALENDAR



May 1982

S	M	T	W	T	F	S
						1 GO TO CHILD PARTY + DRIVE Whitman
GO TO BULLETS GAME W/ SQUI + NIKKI LOSE 103-99 OT (43) 2	3 CUT OUR LAWN	4	5 Bullets Lose in Double OT	6	7 Grounded - Stay On	8 Charlie Football 11:00 PROM Donny Driver
MOTHER'S DAY 9 1 YEAR	10	11	12 NIKKI COMES OVER	13	14 GROUNDED GO TO STADIUM NIKKI	15 ST PATRICK'S BEACH PROM
16	17	18	19 NIKKI COMES OVER	ASCENSION DAY 20 GO TO LIBRARY PLAY B-BALL AT SQUI'S SWIM AT DONNY'S HOLIDAY	21 GROUNDED FATHER-SON DINNER NIKKI AT	22 HAIRCUT TIMMY'S PARTY BEACH
23	24	25	26	27	28	29
PENTECOST SUNDAY 30	MEMORIAL DAY 31 HOLIDAY					

April 1982

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Northwestern Mutual Life

June 1982

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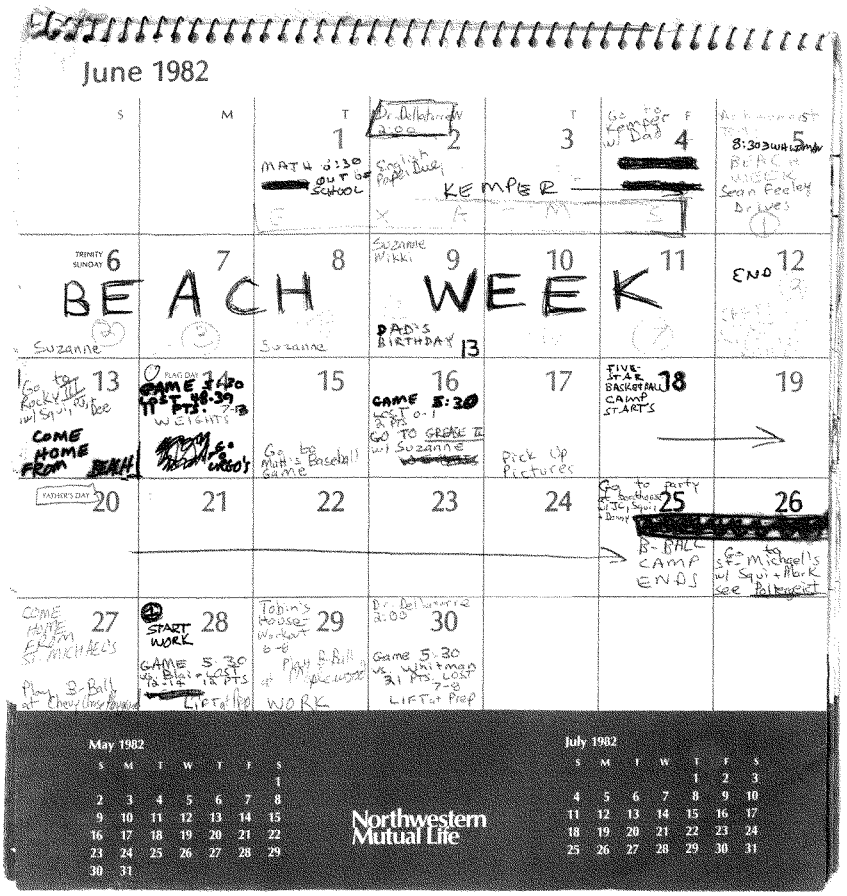
June 1982
S M T T F S
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MATH 8:30 OUT OF SCHOOL
KEMPER
Go for Kemper w/ Dad
8:30 3 WKS
BEACH WEEK
Sean Feeley Drives
TRINITY SUNDAY 6 7 8 9 10 11 12
BEACH WEEK
END
Suzanne
Suzanne
Suzanne Wikki
DAD'S BIRTHDAY 13
13 14 15 16 17 18 19
Go to Rocky III w/ Squi + Joe
COME HOME FROM BEACH
FLAG DAY
GAME 3:30 LOST 18-39 PTS. 7-13
WEIGHTS
Go to Matt's Baseball Game
GAME 5:30
LOST 0-1
2 PTS.
GO TO GRADE II w/ Suzanne
Pick Up Pictures
FIVE-YEAR BASKETBALL CAMP START'S
FATHER'S DAY 20 21 22 23 24 25 26
Go to party at Southeast w/ JC, Squi + Denny
B-BALL CAMP ENDS
Go to Michaels w/ Squi + Mark see Poltergeist
COME HOME FROM ST. MICHAEL'S
Play B-Ball at Chewning Park
27 28 29 30
START WORK
GAME 5:30 vs Blair 18-12 PTS
LIFT + Rec
Tobin's House Workout 6-8
Play B-Ball
WORK
Dr. Dellaverde 2:00
Game 5:30 vs Whitman 31 PTS. LOST 7-8
LIFT + Prep
May 1982
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Northwestern Mutual Life
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July 1982

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				Tobin's House – Workout 1 Go to Timmy's for Ski's w/ Judge, Tom, PJ, Bernie, Sgt.	w/ Sgt. for weekend 2	3
INDEPENDENCE DAY 4 Anne Dougherty's Party	Come Home from Beach w/ Danny 5	Game 6:45 vs. Tigers LOST 5-PTS. 6	Columbia 7 LIFT AT PREP	Congressional 8 Dr. Strawberry 1:30	Game 8:00 vs. Shaler 9 Go to St. Michael's for weekend	10 Richie Steinbrin's Party
11 Come Home from St. Mi's	12 LIFT	13	14 LIFT	Game 6:45 vs. High Point LOST 14 PTS 4-6 15	16 Go to St. Michael's for Weekend	17
18 Come back from St. Michael's	19 LIFT	Game 9:15 vs. WJ 20	Game 6:45 vs. Gonzaga 21 LIFT	Game 5:30 vs. Shaler St. Alban 22	23 Go to Connecticut for weekend w/ Grandma	24
25	26 INTERVIEW BROWN	27 INTERVIEW YALE	Dr. DeMarre 8:00 28 Go to Judge's	29	30 Go to Beach w/ Tom, Sgt.	31

June 1982

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Northwestern Mutual Life

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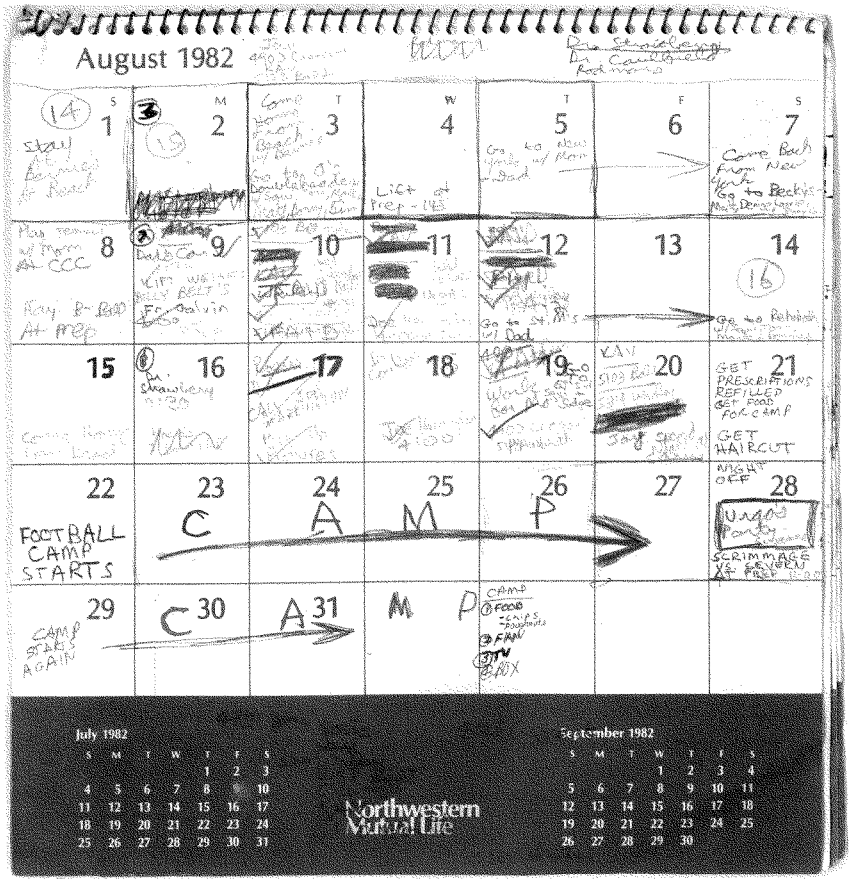

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Start Practice

Come Back from New York Go to Becky's

Lift at Prep - HS

Go to Dad

Go to Rehab

GET PRESCRIPTIONS REFILLED GET FOOD FOR CAMP GET HAIRCUT

FOOTBALL CAMP STARTS

C A M P

SCRIMMAGE VS. SEVERN

CAMP STARTS AGAIN

CAMP
1 FOOD
2 FAN
3 TV
4 MIX

July 1982

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Northwestern Mutual Life

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Judge Brett Kavanaugh is the right Supreme Court appointment at the right time

thehill.com/opinion/judiciary/401830-judge-brett-kavanaugh-is-the-right-supreme-court-appointment-at-the-right

Dr. Roger D. Klein, opinion contributor August 15, 2018

Americans today are deeply divided about many things. However, we should unite around the nomination of D.C. Circuit Judge Brett Kavanaugh, who is extraordinarily well-qualified to sit on the United States Supreme Court. Judge Kavanaugh's expertise in administrative and regulatory law makes him exactly the right appointment at the right time.

Judge Kavanaugh's legal pedigree includes a law degree from Yale, two prestigious federal appellate clerkships, a U.S. Supreme Court clerkship with Justice Anthony Kennedy, a prestigious Bristow Fellowship in the Solicitor General's Office, and a partnership in one of the Country's best known and most highly regarded law firms. Of critical significance, for the past twelve years Kavanaugh has served as a judge on the U.S. Court of Appeals for the D.C. Circuit.

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The D.C. Circuit Court directly reviews the decisions government agencies make, the actions they take, and the regulations they issue. It is for this reason that the court is of paramount importance to the efficient and effective operation of our government and large portions of the private economy.

Because of an unprecedented level of technological innovation, our times are among the most exciting and challenging in history. News stories abound with arcane terms like "artificial intelligence," "blockchain," "CRISPR/Cas9," "next generation sequencing," "cloning," "drones," and "autonomous vehicles."

Rapid progress in science and engineering has far-reaching impacts on our lives. In addition to having profound implications for our safety and privacy, it ultimately has enormous influence on our economic and social well-being.

In the legal world, powerful and disruptive new technologies are often associated with protection of and disputes about underlying intellectual property. However, the activities of regulatory agencies are probably more significant for the discovery, advancement, and ultimate commercialization of new knowledge than are mere considerations of ownership.

In theory, Congress creates the laws, the executive branch enforces the laws, and the judiciary interprets them. In practice things are not always this straightforward. There are spheres of life over which society demands some degree of public oversight, but that do not lend themselves to governance through passage of specific, highly particularized, and fixed laws.

It is widely believed that Congress has inadequate know-how, familiarity, and time to directly superintend the public aspects of leading-edge, high-tech improvements. A more technical, comprehensive, and flexible process is needed. We rely on administrative agencies to fill this void.

However, ceding congressional authority to unelected, specialized bureaucrats runs counter to our democratic ethos. It is also fraught with risks of establishing independent and unaccountable concentrations of power that are unconstrained by our system's usual checks and balances. Getting it right is a careful balancing act.

Helping society land at the proper spot on this continuum is one of the most impactful responsibilities of the Supreme Court. Allowing a government agency too little leeway can have disastrous effects on our health, safety and the economy. But giving an agency too much freedom presents similar risks, with repercussions that can be just as harmful.

The job of a judge in weighing these competing concerns is a difficult one. It must be accomplished with adherence to and respect for the law as Congress has propounded it. The judge must be dedicated to preservation of the rule of law. He or she must understand and be sensitive to the need to maintain and instill confidence in the legitimacy of our legal and governmental systems.

Judge Brett Kavanaugh is the person we should entrust with this solemn duty. We do not and cannot know what issues will come before the Supreme Court. Nor can we accurately predict how he will rule. What we can be sure of is that he will approach each with skilled and learned analysis, nuanced thought, and substantial wisdom.

Owing to Judge Kavanaugh's many published judicial opinions and his long career in public life, his nomination and confirmation process has been among the most open and transparent in history. He has clearly earned tremendous respect and affection from colleagues and others. Most telling is the support he has received from those who have disagreed with him.

It is this stellar record and Judge Kavanaugh's reputation as a genuinely decent person that make him the right Supreme Court appointment at the right time. Judge Kavanaugh should be quickly and unanimously confirmed.

Dr. Roger Klein M.D. J.D.m, is a molecular pathologist and attorney in Cleveland. He is a member of the Regulatory Transparency Project's FDA and Health Working Group. He is a former advisor to the FDA and HHS. Dr. Klein graduated from Yale Law School and completed his postgraduate medical training at Yale Medical School.

Can the Supreme Court confirmation process ever be repaired?

latimes.com/opinion/editorials/la-ed-trump-scotus-20180709-story.html

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Editorials
Opinion

By The Times Editorial Board

Jul 09, 2018 | 6:50 PM

With his nomination of Brett Kavanaugh to the Supreme Court, President Trump has chosen an experienced federal judge with a conservative record whose profile is less ideological than those of some other candidates he considered. Given the number of fire-breathing right-wing judges that Trump had to choose from, he could have done a whole lot worse.

Kavanaugh should be questioned closely by senators about his views of the Constitution, the role of precedent and, yes, what he thinks of Roe vs. Wade, the 1973 decision legalizing abortion. Yet no matter what Kavanaugh says at his confirmation hearings, he is likely to be opposed by most if not all Democrats, just as Justice Neil M. Gorsuch was last year when Trump nominated him to the seat that should have gone to Merrick Garland, former President Obama's nominee to succeed the late Antonin Scalia. Senate Republicans refused even to give Garland a hearing, keeping the Scalia seat open for more than a year in the hopes that it would be filled, as it was, by a Republican president.

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If anything, Democratic senators may resist Kavanaugh's nomination even more strenuously than they did Gorsuch's. After all, Gorsuch replaced another consistent conservative. Kavanaugh is being nominated to succeed Justice Anthony M. Kennedy, who, while he often joined with the court's conservatives, sided with liberal justices in reaffirming a woman's right to abortion and extending marriage to same-sex couples. If Kavanaugh is confirmed, he could cement a conservative majority on an array of other questions from campaign finance law to civil liberties.

These are the unhappy results of an increasingly bitter, increasingly partisan, increasingly dysfunctional judicial selection process.

To be clear, we have plenty of concerns about the appointment of a "reliably conservative" new justice. We share the Democrats' unease about this nomination and what it means for the court. We worry about the future of reproductive freedom, about the prospects for criminal justice reform and about the fulfillment of the 14th Amendment's promise of equal protection, to name just a few issues that hang in the balance. This page supported the Democrats who voted against Gorsuch to protest the outrageous obstruction of Garland.

Yet in the same editorial last year we reaffirmed our long-standing view that presidents generally should receive deference from the Senate so long as their nominees to the court are well-qualified and in the broad mainstream of legal thought. That was why we endorsed, for example, President George W. Bush's nomination of John G. Roberts Jr. to be chief justice even though he was likely to rule in ways we disagreed with much of the time.

The judicial system works best when judicial nominees are neither rigidly ideological nor biased along partisan lines — and when the Senate doesn't inject those factors into the process. Placing the emphasis on legal acumen, qualifications and judicial temperament helps promote a Supreme Court that can remain above politics even if individual justices bring different philosophies to the bench. Of course presidents will choose nominees with views similar to their own, but changes in the White House over time can help ensure that the court doesn't become overly identified with one party or ideology, or not for too long. The goal is to have more justices who act and are seen as disinterested interpreters of the Constitution rather than as "politicians in robes."

The agonizing question is whether it's possible to restore an arrangement in which nominations to the court are not occasions for scorched-earth partisan conflicts. We'd still like to think so, but even before the outrage of the Garland blockade, there were alarming signs in the Senate and on the court itself that the ideal of justice removed from politics was under siege.

For more than two decades, presidents of both parties have seen well-qualified, philosophically mainstream judicial nominees blocked or filibustered by senators of the opposite party. Nominations to the Supreme Court also have become more partisan.

In a speech in 2016, Roberts noted that while Scalia and Justice Ruth Bader Ginsburg were confirmed by near-unanimous votes, "you look at more recent colleagues, all extremely well-qualified for the court, and the votes were strictly on party lines for the last three. That does not make any sense."

As the Senate has divided on party lines in considering judicial nominations, the Supreme Court in politically sensitive cases has split between Democratic and Republic appointees, as it did in last month's decisions upholding Trump's travel ban and holding that public employees have a 1st Amendment right not to pay fees to unions that represent them in collective bargaining. In the past, philosophical differences on the court didn't neatly track party distinctions. For example, in Roe vs. Wade, both the majority and the minority were composed of justices appointed by presidents of both parties.

Whatever the outcome of Kavanaugh's nomination — and we'll reserve judgment until after the hearings — respect for the Supreme Court will suffer if confirmation of its members and the votes that they cast are seen as nothing more than exercises in partisan politics.

Opinion Newsletter

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EDITORIAL: Donald Trump nominates Brett Kavanaugh to the Supreme Court

reviewjournal.com/opinion/editorials/editorial-donald-trump-nominates-brett-kavanaugh-to-the-supreme-court/

July 11, 2018

President Donald Trump's nomination Monday evening of federal Judge Brett Kavanaugh to the U.S. Supreme Court was a bit of a snooze, given that the real pyrotechnics are too come. Democratic congressional leaders really didn't care who the White House selected; they were eager to oppose any GOP nominee regardless of qualifications and credentials.

Had Mr. Trump tapped Gandhi, Mother Teresa, Jesus Christ or Thomas Jefferson to replace the retiring Justice Anthony Kennedy, progressives would still be ululating that the court pick threatens to bring about the end of modern society as we know it. The reality is more mundane.

Judge Kavanaugh is eminently accomplished. A graduate of Yale Law, he clerked for Justice Kennedy before working in the George W. Bush White House. He was confirmed for the D.C. Circuit Court of Appeals in 2006 and has written more than 300 opinions during his 12 years on the bench.

Judge Kavanaugh is firmly in the judicial mainstream, although Democrats will no doubt try to twist him into a rabid, dangerous extremist. He is, in fact, a constitutionalist who believes that judges should follow the nation's founding document rather than reinterpret law to achieve desired ends. "As judges, we are not authorized to rewrite statutory text simply because we might think it should be updated," he wrote in a 2016 opinion.

Sadly, this is heresy among those on the left these days.

The nominee has an impressive paper trail when it comes to recognizing an individual's right to gun ownership. During his judicial tenure, he has consistently defended the First Amendment and has shown a willingness to recognize constitutional limits on the ever-expanding and oppressive administrative state. Judge Kavanaugh has also been a strong advocate for separation of powers protections.

As for the "A" word, The Wall Street Journal reports Judge Kavanaugh has authored "no opinion that would create a confirmation problem on abortion rights." But that line of attack has already been unleashed as a scare tactic by Democrats to raise cash and agitate the base; nevermind it remains highly unlikely there would be five votes to overturn Roe v. Wade — or Obergefell v. Hodges on gay marriage, for that matter — even if Judge Kavanaugh were confirmed.

Senate Majority Leader Mitch McConnell has done an admirable job shepherding the president's judicial nominees through a closely divided upper chamber and hopes to have a new justice on the court by October. Expect Democrats to use Judge Kavanaugh's extensive library of opinions to drag out the process until after the election. Republicans, though, have the procedural tools to blunt such a tactic.

Donald Trump won the 2016 election, in part thanks to Republicans and independents who worried what a Hillary Clinton presidency would mean for the Supreme Court. Mr. Trump's first selection to the tribunal, Neal Gorsuch, has so far delivered as a defender of the Constitution and Bill of Rights. Nobody can predict a justice's evolution on the bench, but Judge Kavanaugh appears cut from the same cloth, making him an excellent choice.

EDITORIAL: Senate approval of Kavanaugh makes sense -- even for Democrats

The Lowell Sun
Updated: 07/12/2018 07:12:23 AM EDT

The battle lines have been drawn. President Trump's selection of Brett Kavanaugh to fill the Supreme Court seat of retiring Justice Anthony Kennedy ensures a fierce Senate confirmation process, pitting the Democrat leadership who oppose all things Trump against Republicans who enjoy a razor-thin majority in that body.

Complicating factors include how Democratic senators facing tight re-election races in states that went for President Trump will vote, and the possible defections of maverick Republican Kentucky Sen. Rand Paul and moderate Maine Sen. Susan Collins.

There's also the declining health of Republican Sen. John McCain, whose absence during this debate would leave the GOP with just a 50-49 margin.

Three of those Democratic senators in tossup re-election races -- Joe Manchin of West Virginia, Joe Donnelly of Indiana and Heidi Heitkamp of North Dakota -- were the only senators from their party who voted for Trump's first nominee to the high court, Neil Gorsuch, who was confirmed 54-45.

But the stakes have been raised this time around. With Gorsuch, the Supreme Court maintained a 4-4 ideological split, with Kennedy being the swing vote. Now, Trump can put a conservative stamp on the court, and with liberal Justices Ruth Bader Ginsburg (85) and Stephen Breyer (80 next month) in retirement territory, the president will likely have the opportunity to take the high court even further to the right.

That's why Democrats will employ every confrontation ploy -- raising red herrings like the possible overturning of Roe v. Wade -- and stalling tactics if their ideological attack on Kavanaugh doesn't succeed to derail this high court nominee.

What Democrats cannot question is Brett Kavanaugh's credentials. Kavanaugh, 53, a graduate of Yale and Yale Law School, has served on the Court of Appeals for the District of Columbia Circuit since 2006. While on that court -- considered this nation's second most influential -- he's written hundreds of opinions that Democrats will

undoubtedly scrutinize, looking for damaging examples of his conservative judicial temperament.

Kavanaugh, who also served as a law clerk for retiring Justice Kennedy, is without question the most qualified of the president's other publicized candidates -- federal appeals judges Raymond Kethledge, Amy Coney Barrett and Thomas Hardiman.

Kavanaugh is considered an "originalist" for his adherence to interpret the Constitution as written. Such strict legal thinking has the drawn the ire of not only liberal activists, but also some conservative Republicans who question his commitment to social issues like abortion.

With the Senate's confirmation proceedings not expected to begin until September -- just two months before the mid-term congressional elections -- we can anticipate the Democrat chorus to rise in opposition to Trump's high-court pick.

It seems Democrats still haven't gotten over losing the White House. We'd like to remind them that if shoo-in Hillary Clinton had won, she'd be submitting her court-altering liberal candidate for Senate approval. It comes with the territory.

We'd also remind them that Supreme Court justices don't always follow the party line. Justice Kennedy, President Ronald Reagan's nominee, has sided with liberal majorities on numerous occasions, and Chief Justice John Roberts, President George W. Bush's pick, cast the deciding vote in favor of Obamacare. Reagan and Bush were both Republicans.

Brett Kavanaugh presents the most palatable option Democrats could have expected. After all the drama and histrionics, sensible Democrats should put politics aside and vote to make him the ninth member of the Supreme Court.

http://www.lowellsun.com/editorials/ci_32003335/senate-approval-kavanaugh-makes-sense-even-democrats#ixzz5LRcctILj

"Brett Kavanaugh's Radical View of Executive Power"
by Corey Brettschneider

Brett Kavanaugh's Radical View of Executive Power

politico.com/magazine/story/2018/09/04/kavanaugh-trump-mueller-executive-power-219634

In Tuesday's opening session of Supreme Court nominee Brett Kavanaugh's confirmation hearings, Democratic senators expressed concern about the nominee's views of presidential power. Chris Coons put it bluntly when he said President Donald Trump had nominated Kavanaugh with "an eye towards protecting himself." Mazie Hirono piled on, arguing that Trump's choice is not surprising given that the president is "committed to self-preservation every minute, every hour, every day."

These senators are right to be concerned. Kavanaugh seems to hold dangerous views about executive power, views that could undermine special counsel Robert Mueller's inquiry, ultimately shielding Trumpfrom a criminal investigation. Indeed, Kavanaugh's writing suggests that, as a justice, he might reject important Supreme Court case law and support the president's right to refuse to turn over evidence to Mueller's team. He might also hold that a president can refuse to answer questions in a criminal investigation. In other words, if Kavanaugh is appointed, Trump could have newly found constitutional privileges to undermine Mueller's investigation.

Senator Richard Blumenthal explained most clearly why the committee needs a deep dive into Kavanaugh's potentially dangerous views on executive power. He said these hearings are historic because the president is an "unindicted co-conspirator" in the Southern District of New York's investigation into potentially criminal campaign finance violations involving Trump attorney Michael Cohen. As Blumenthal put it, in the near future, the Supreme Court might face a question of whether to enforce a real system of "checks and balances" or defer to an "imperial presidency" unchecked by the rule of law.

In 1974, the Supreme Court faced the same question. In *United States v. Nixon*, the court required then President Richard Nixon to hand over tape recordings on which he discussed the break-in at the Watergate. Nixon refused, and his lawyers argued that the nature of his office gave him an "executive privilege" to do so, a right no other person in the United States enjoyed. They argued that the separation of powers and the unique role of the president made him not subject to a criminal subpoena of evidence.But in a unanimous opinion, the Supreme Court rejected that argument and ordered him to hand over the tapes—which turned out to be damning indeed. His resignation from office soon followed. Despite the sensitive nature of the president's work, the court made clear he was not above the law.

During his legal career, Kavanaugh has expressed two drastically different views on the *U.S. v. Nixon* decision and its implications for the scope of executive power. First, Kavanaugh seemed to support it. Working for Ken Starr's investigation of Bill Clinton, Kavanaugh concluded in a 1995 internal memo that the president could be required to testify while in office. Looking to Kavanaugh's own writings from that period shows why it's vital that the president be made

accountable. In the memo, Kavanaugh asked rhetorically, "Why should the president be different than anyone else for the purposes of responding to a grand jury subpoena?" At the time he wrote this memo, Kavanaugh seemed to believe that in the American legal system, prosecutors need to find the truth, regardless of how powerful the accused person is.

But this view of a constrained executive branch faded when Kavanaugh worked for President George W. Bush and later as a legal scholar. Far from being a defender of *U.S. v. Nixon*, during that period Kavanaugh suggested in remarks during a roundtable discussion about executive privilege first reported on by The Associated Press that the case was possibly "wrongly decided" when it held that a president can be subject to a criminal subpoena of information by a special prosecutor. He said, "*Nixon* took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official."

In other words, a president should not have to answer to employees, including lawyers in the special counsel's office.

A Supreme Court ruling based on this principle could severely hinder Mueller's investigation of Trump. By rendering unconstitutional any attempt by Mueller to compel Trump to turn over incriminating evidence, such a ruling would make it nearly impossible to amass the information needed for a case against him. If Kavanaugh believes Mueller cannot subpoena evidence from a president, it is also likely that he believes he cannot require him or her to testify, further imperiling the investigation. This effective immunity from criminal investigation is exactly what defenders of a limited presidency should be worried about.

If Kavanaugh really does hold this view of expansive executive power, the Senate should reject his nomination to the Supreme Court—an institution whose job it is to enforce the law impartially and keep the other branches of government in check. Holding the president accountable for wrongdoing has always been an essential constitutional principle. But it is especially salient today, with our current president facing multiple accusations of crimes and abuses of the office. Granting Trump immunity would convey to the American people that elected officials can abuse the public's trust without consequences.

The presidency is a unique job, and there's a pragmatic case for presidents keeping some sensitive information private. Yet when the Framers wrote the Constitution, setting up our system of laws, they made no special exceptions for the chief executive. As George Mason asked about the president at the Constitutional Convention, "Shall any man be above justice? Above all shall that man be above it, who can commit the most extensive injustice?"

In fact, the oath of office places special requirements on the president to serve the public and uphold the law. A president who wants to "preserve, protect and defend" constitutional principles must be willing to subject him or herself to investigation—just like all the other citizens he or she serves.

When the president won't do that willingly, the nation needs the judicial branch to step in as a check, just as the Framers intended. If Kavanaugh won't help the judicial branch play that role, he should not have a seat on the court.

The United States is at a historic moment. We have a president who is potentially guilty of a criminal act. His oath of office requires him to respect the rule of law and to defend the Constitution. Instead, he seems more interested in using the office and its potentially vast powers to escape accountability. We cannot allow a new justice to take his oath of judicial office as a means of helping the president to disregard his own oath of presidential office.

This article tagged under:

Marisa Maleck column: Kavanaugh has a proven track record, Democrats should take an honest look

richmond.com/opinion/their-opinion/guest-columnists/marisa-maleck-column-kavanaugh-has-a-proven-track-record-democrats/article_c7cb5790-b62c-5a0e-b027-53d0b564642f.html
By Marisa Maleck August 21, 2018

By Marisa Maleck

Judge Brett Kavanaugh is one of the most qualified individuals to ever be nominated to the Supreme Court. He should receive bipartisan support and be confirmed with ease. Unfortunately, Senate Minority Leader Charles Schumer is bent on obstructing this well-qualified nominee.

Judge Kavanaugh's stellar credentials are beyond dispute. He earned his law degree from Yale Law School. After graduating, Kavanaugh went on to clerk for Justice Anthony Kennedy at the Supreme Court, served in the White House Counsel's Office, and then as White House staff secretary.

Kavanaugh also brings more than 12 years' experience to the bench, having served as a judge on the D.C. Circuit Court since 2006, where he has authored over 300 judicial opinions. With impeccable legal credentials and a clear effective writing style, it's evident what a brilliant judge he truly is.

And he is a true "judge's judge." Kavanaugh is a thought-leader among his peers on appellate courts. The Supreme Court has endorsed his opinions more than a dozen times, including his dissents, which have thus become the law of the land. Supreme Court justices on every side of the political spectrum have hired his clerks.

Having spent the 25 of the past 28 years serving the American people, Kavanaugh has devoted his life to public service. He is active in the community. He coaches for the Catholic Young Organization, acts as a reader at his church, serves meals to needy families, tutors children at local elementary schools, and takes the young daughter of a widowed friend to her school's father-daughter dance. He exemplifies the type of character you would want in a judge.

Based on his exceptional qualifications and extensive experience, one might think Judge Kavanaugh would be confirmed with much bipartisan support. Unfortunately, that has not been the case.

According to Senator Schumer, Senate Democrats have made it their mission to oppose Kavanaugh with everything they have. Indeed, even before President Trump announced his nominee, some Democrats in the Senate came out with fierce opposition to the not-yet-named nominee, taking the hard stance that they would support no one that the president nominated.

This is a mistake. Sen. Charles Grassley — responsible for vetting the nominee as the

chairman of the Senate Judiciary Committee — has promised to lead the most transparent confirmation process in history. So far he is delivering.

Senators have ample time to meet with Judge Kavanaugh. There will be up to 1 million documents released, five times more than for any other past nominee for the Supreme Court. Each senator has access to these documents — and to Kavanaugh's 300 opinions, the true litmus test for any nominee.

Brett Kavanaugh has a proven track record and experience that make him the right choice to fill the current vacancy on the bench. Senators should access his legal track record and background instead of pursing a taxpayer funded fishing expedition.

If senators evaluate his judicial record and philosophy they will find a judge that is more than qualified to serve on the Supreme Court. It is time for Senate Democrats to take an honest look at Judge Kavanaugh.

THE NEW YORKER

The F.B.I. Probe Ignored Testimonies from Former Classmates of Kavanaugh

By Jane Mayer and Ronan Farrow October 3, 2018

Frustrated potential witnesses who have been unable to speak with the F.B.I. agents conducting the investigation into sexual-assault allegations against Donald Trump's Supreme Court nominee, Brett Kavanaugh, have been resorting to sending statements, unsolicited, to the Bureau and to senators, in hopes that they would be seen before the inquiry concluded. On Monday, President Trump said that the Bureau should be able to interview "anybody they want within reason," but the extent of the constraints placed on the investigating agents by the White House remained unclear. Late Wednesday night, Senate Majority Leader Mitch McConnell announced that the F.B.I. probe was over, and cleared the way for an important procedural vote on Kavanaugh's nomination to take place on Friday. NBC News reported that dozens of people who said that they had information about Kavanaugh had contacted F.B.I. field offices, but agents had not been permitted to talk to many of them. Several people interested in speaking to the F.B.I. expressed exasperation in interviews with *The New Yorker* at what they perceived to be a lack of interest in their accounts.

Deborah Ramirez, one of two women who have accused Kavanaugh of sexual abuse, said in an interview that she had been hopeful that her story would be investigated when two agents drove from Denver to Boulder, Colorado, last weekend to interview her at her lawyer's office. But Ramirez said that she was troubled by what she perceived as a lack of willingness on the part of the Bureau to take steps to substantiate her claims. "I am very alarmed: first, that I was denied an F.B.I. investigation for five days, and then, when one was granted, that it was given on a short timeline and that the people who were key to corroborating my story have not been contacted," Ramirez said. "I feel like I'm being silenced."

Ramirez, a classmate of Kavanaugh's at Yale, says that he exposed himself to her during a drunken dormitory party and thrust his penis in her face, which led to her touching it against her will. Kavanaugh has denied the allegation, along with that of Christine Blasey Ford, a professor from California who said that Kavanaugh sexually assaulted her at a party when they were teen-agers. Several former Yale students who claim to have information regarding the alleged incident with Ramirez or about Kavanaugh's behavior at Yale said that they had

not been contacted by the F.B.I. Kenneth G. Appold was a suitemate of Kavanaugh's at the time of the alleged incident. He had previously spoken to *The New Yorker* about Ramirez on condition of anonymity, but he said that he is now willing to be identified because he believes that the F.B.I. must thoroughly investigate her allegation. Appold, who is the James Hastings Nichols Professor of Reformation History at Princeton Theological Seminary, said that he first heard about the alleged incident involving Kavanaugh and Ramirez either the night it occurred or a day or two later. Appold said that he was "one-hundred-per-cent certain" that he was told that Kavanaugh was the male student who exposed himself to Ramirez. He said that he never discussed the allegation with Ramirez, whom he said he barely knew in college. But he recalled details—which, he said, an eyewitness described to him at the time—that match Ramirez's memory of what happened. "I can corroborate Debbie's account," he said in an interview. "I believe her because it matches the same story I heard thirty-five years ago, although the two of us have never talked."

Appold, who won two Fulbright Fellowships, and earned his Ph.D. in religious studies from Yale in 1994, also recalled telling his graduate-school roommate about the incident in 1989 or 1990. That roommate, Michael Wetstone, who is now an architect, confirmed Appold's account and said, "It stood out in our minds because it was a shocking story of transgression." Appold said that he initially asked to remain anonymous because he hoped to make contact first with the classmate who, to the best of his recollection, told him about the party and was an eyewitness to the incident. He said that he had not been able to get any response from that person, despite multiple attempts to do so. *The New Yorker* reached the classmate, but he said that he had no memory of the incident.

Appold reached out to the Bureau last weekend but did not hear back. Frustrated, he submitted a statement through an F.B.I. Web portal. During his first year at Yale, Appold lived in the basement of Lawrance Hall, one of the university's freshman dormitories. He was in the same suite of bedrooms as Kavanaugh, sharing a common room. Appold said of Kavanaugh, "We didn't hang out together, but there was no animosity between us either." He said he believes that "there were two sides to Brett." Those who have described the judge as studious and somewhat reserved or shy are correct, he said. He added, "That was true part of the time, but so are the other things that have been said about him. He drank a lot, and when he was drinking he could be aggressive, and belligerent. He wasn't beating people up, but there was an edge and an obnoxiousness that I could see at the hearings. When I saw clips"—of Kavanaugh's Senate testimony—"I remembered it immediately.

Appold said that he learned about the alleged incident with Ramirez during the winter of the 1983-84 school year. He recalled being told that, during a party in a first-floor common room in Lawrance Hall, Kavanaugh went over to

Ramirez, who had been participating in a drinking game, "and opened his pants, and pulled out his penis, and tried to put it in her face." But she waved him away. Appold recalled hearing that Ramirez said something like "It's not a real penis." He said that the remark made no sense to him at the time, and he understood it only after reading Ramirez's allegation in *The New Yorker* and learning that people had been playing pranks with a fake plastic penis at the party.

In an interview with *The New Yorker* last month, Ramirez said, "I remember a penis being in front of my face," and that "I knew that's not what I wanted, even in that state of mind." She recalled remarking, "That's not a real penis," and that other students were laughing at her confusion and taunting her; one encouraged her to "kiss it."

Appold recalled being "shocked" when he was told of Kavanaugh's alleged behavior. "The person who saw it was taken aback by what he had seen," too, he said. Appold added, "It was a disturbing thing. I think everyone recognized that a line had been crossed here."

Looking back, Appold said, "The thing I ask myself is, why didn't anybody do anything about it? Why didn't anybody report it?" But, he added, "The times were different then. Today, I'm an educator, and if something like this happened, I'd know exactly where to go to the Title IX people. But back then there was no place to report these uncomfortable things—we tried to forget about them." Kavanaugh has argued that, if he had behaved as Ramirez described, the whole campus would have talked about it, but Appold said that, to the contrary, "It was more like, 'Don't talk about it.' "

Appold said that he did not initially oppose Kavanaugh's nomination for the Supreme Court. Since he had not witnessed the alleged misconduct himself, Appold said, he had not been sure whether to regard it as an assault, in legal terms, or as something less serious, although he saw it as "morally wrong, either way." After seeing Kavanaugh's blanket denials of Ford and Ramirez's allegations, and his assertions of his rectitude during his high-school and college years, Appold said, "I had concerns that there was a good chance he wasn't telling the truth." He was certain, he said, that "what he said about drinking was not accurate."

Beth Wilkinson, Kavanaugh's attorney, said, "There is no new information here. The Judge stands by his denial." The F.B.I. declined to comment on its investigation.

Ramirez said that the F.B.I. agents she spoke to interviewed her in a comprehensive and sensitive manner. Several of their questions appeared to mirror Republican speculation that the allegations against Kavanaugh were

coördinated by Democrats or were otherwise politically motivated. (Ramirez said that neither was true.) "They asked me if I'd ever been in touch with Dr. Christine Ford," Ramirez recalled, "and if I knew how reporters got my name." She told the agents that she has never had contact with Ford and began receiving calls from reporters unbidden. Ramirez said that her main concern, after her F.B.I. interview, was that the agents who interviewed her might not be the same ones talking to people who could corroborate her account—she felt that continuity was important. But she had not anticipated that people she believed had relevant information wouldn't even be interviewed. "Being told that these people haven't even been contacted," Ramirez said, "it's very troubling to me."

In addition to Appold, several other former Yale classmates said that they had reached out to the F.B.I. about Kavanaugh but had not received a response. Stephen Kantrowitz, a former Yale classmate, said in a text message that, "No one who lived in Lawrance Hall (so far as I know) has been contacted by the FBI What a charade."

Two high-school acquaintances of Kavanaugh's have also submitted sworn declarations to senators and to the F.B.I. A classmate of Kavanaugh's at Georgetown Preparatory School, who asked to remain anonymous because of the intensity of the partisan fight over Kavanaugh's nomination, submitted a signed declaration to the F.B.I. after visiting the F.B.I. field office nearest his home, where he was told they didn't do "in-person interviews." He said that he was hoping to hear something back, but hadn't yet. In his statement, which his attorney also sent to several members of the Senate Judiciary Committee on Tuesday, he described Kavanaugh as part of a clique of high-school athletes, most of whom were on the football team, who "routinely picked on" less physically fit or popular students. He said that he never witnessed Kavanaugh physically attacking another student, but he recalled him doing "nothing to stop the physical and verbal abuse." Instead, he said, Kavanaugh "stood by and laughed at the victims." Both Ford and Ramirez have said they remembered Kavanaugh laughing during their ordeals. "It was so wrenching for me when I heard Dr. Ford mention how they were laughing," the Georgetown Prep classmate said, in a phone interview. "That really, really struck a chord. I can hear him laughing when someone was picked on right now."

In his statement, the classmate also said that he recalled, "on multiple occasions, BrettKavanaugh counting on his fingers, how many kegs they had over the weekend." The amount that he heard Kavanaugh describe, he said in the statement, "seemed to be an extreme amount of beer drinking for someone to consume at any age, let alone someone in high school." He said that he also recalled Kavanaugh participating in general conversations "where the football players were bragging about their sexual conquests over the prior weekend."

His statement also challenges Kavanaugh's assertion in last week's hearing that he never denigrated a female student named Renate Schroeder, whose married name is Renate Dolphin, and who attended Georgetown's sister school, Stone Ridge School of the Sacred Heart, in Bethesda, Maryland.

Kavanaugh and thirteen other Georgetown Prep boys described themselves in their high-school yearbook as "Renate Alumnius," which other classmates have told the *Times*was a crude sexual boast. During his Senate hearing, Kavanaugh said that the reference was an endearment, saying, "she was a great friend of ours. We—a bunch of us went to dances with her. She hung out with us as a group." He said that a "media circus that has been generated by this, though, and reported that it referred to sex. It did not."

But the classmate who submitted the statement said that he heard Kavanaugh "talk about Renate many times," and that "the impression I formed at the time from listening to these conversations where Brett Kavanaugh was present was that Renate was the girl that everyone passed around for sex." The classmate said that "Brett Kavanaugh had made up a rhyme using the REE NATE pronunciation of Renate's name" and sang it in the hallways on the way to class. He recalled the rhyme going, "REE NATE, REE NATE, if you want a date, can't get one until late, and you wanna get laid, you can make it with REE NATE." He said that, while he might not be remembering the rhyme word-for-word, "the substance is 100 percent accurate." He added, "I thought that this was sickening at the time I heard it, and it left an indelible mark in my memory."

Reached for comment, Dolphin noted that she had asked for her name to be removed from a statement signed by female supporters of Kavanaugh's nomination. "If this report is true, I am profoundly hurt," she said, of the account in the affidavit. "I did nothing to deserve this. There is nothing affectionate or respectful in bragging about making sexual conquests that never happened. I am not a political person, but my reputation matters to me and to my family. I would not have signed the letter if I had known about the yearbook references and this affidavit. It is heartbreaking if these guys who acted like my friends in high school were saying these nasty, false things about me behind my back."

Angela Walker, who was in Dolphin's class at Stone Ridge, also submitted a declaration to the F.B.I. Though she did not mention Dolphin in the declaration, Walker voiced support for her in a phone interview. "It's really horrifying what they did to her," Walker said, "it's a terrible betrayal." She noted, too, that the depiction of Dolphin reported in the classmate's statement "is not the Renate that I knew—it's not possible." Walker's declaration described attending a large house party with Georgetown Prep boys, where, she wrote, "A friend from Prep warned me not to go upstairs, where the bedrooms were, cautioning me that it could be dangerous."

Official Statement from Mormon Women for Ethical Government with Regard to the Brett Kavanaugh Confirmation Proceedings

Given the seriousness of the allegations levied against Judge Kavanaugh, we call upon the members of the Senate Judiciary Committee to immediately suspend the confirmation proceedings until a thorough independent investigation can be conducted.

We very specifically urge the four members of the committee who share our faith as members of The Church of Jesus Christ of Latter-day Saints--Senator Hatch, Senator Lee, Senator Flake, and Senator Crapo--to ensure that these charges be taken seriously and that every attempt be made to ascertain the truth of the situation. Our mutual faith teaches that any sexual abuse or assault in any context is contemptible and worthy of the most severe condemnation.

If these accusations are proved false, an investigation will prevent harm to the court's legitimacy. If they are true, then Judge Kavanaugh must not be confirmed.

As we have stated previously, sexual assault must not be normalized or condoned in any way or by anyone, especially those charged with political leadership. We boldly condemn any attempts to justify such inexcusable and reprehensible behavior and demand that our elected leaders set a morally sound example.

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Mormon Women for Ethical Government (MWEG) is a nonpartisan group of over 6,000 women dedicated to the ideals of decency, honor, accountability, transparency, and justice in governing. MWEG is not formally affiliated with the Church of Jesus Christ of Latter-day Saints. We do, however, fully sustain the leaders and doctrines of the Church.

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THE NAACP IS EXTREMELY OPPOSED

TO THE CONFIRMATION OF JUDGE BRETT KAVANAUGH TO SERVE AS AN

ASSOCIATE JUSTICE ON THE U.S. SUPREME COURT

TESTIMONY BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY

SEPTEMBER 4, 2018

Dear Chairman Grassley and Ranking Member Feinstein, good afternoon. My name is Derrick Johnson and I am the President and CEO of the National Association for the Advancement of Colored People, the NAACP. Thank you for allowing me to submit to you the concerns and objections of the NAACP in respect to this nomination.

Founded more than 108 years ago, in February of 1909, the NAACP is our nation's oldest, largest, and most widely-recognized grassroots-based civil rights organization. We currently have more than 2,200 membership units across the nation, with members in every one of the 50 states as well as units on overseas military bases. Along with our community based adult units, we also have youth and college units in hundreds of communities and schools across the country as well as units in prisons.

On behalf of the NAACP, our nation's oldest, largest and most widely-recognized grassroots based civil rights organization, I strongly urge you to oppose the confirmation of Brett Kavanaugh to be Associate Justice on the Supreme Court of the United States.

I. INTRODUCTION

The U.S. Supreme Court has always been crucial to the progress of African Americans. Our rights to fully participate in democracy and in every facet of social and economic life, on an equal basis, lie in the balance. Each term, the Court can decide important cases regarding voting rights, equal educational opportunity, workers' rights, fair housing, women's rights, access to health care, immigration, consumer rights, and the criminal justice system.

The NAACP has fought for fair and independent justices on the Supreme Court since its very beginning. In 1930, the NAACP opposed President Herbert Hoover's nomination of Judge John Parker to the Supreme Court because he believed that African Americans had no role in our democracy. NAACP members around the country urged their Senators to oppose Parker and we testified before the Senate against him. His nomination was rejected by a vote of 39 to 41. The NAACP has stood guard over the Supreme Court ever since and has participated in every important Supreme Court confirmation battle to protect civil rights and equal justice.

The stakes for nominating a replacement for Justice Anthony Kennedy could not be higher than any moment in our history. Justice Kennedy played a pivotal role on the Supreme Court for thirty years. Although Justice Kennedy was a reliably conservative justice, he occasionally cast votes to protect civil rights. He voted to uphold race-conscious action in college admissions to promote diversity. He wrote the opinion allowing housing discrimination to be challenged using the disparate impact method. He made a difference in criminal justice cases. He provided a

critical fifth vote in cases securing equal treatment for the LGBTQ community. Without him, the courthouse door could close on justice for a generation.

Immediately after Justice Kennedy's retirement, the NAACP joined several civil rights organizations in demanding that the vote to confirm Justice Kennedy's successor be delayed until a new Senate is seated. We stated: "This is an extraordinary time in American history, which calls for extraordinary measures. The Senate is divided by a single vote. The need for a strong system of checks and balances has seldom been greater. During this time of escalating crises, citizens must have the opportunity to decide who will advise and consent to the nominee of a deeply divisive Chief Executive."

On July 9, Donald Trump nominated Brett Kavanaugh to the Supreme Court. The NAACP is very familiar with Brett Kavanaugh because we opposed his nomination to the D.C. Circuit Court of Appeals 12 years ago. His terrible record as an appellate court judge has proven us correct. He has been a consistent voice for the wealthy and powerful and has ruled against civil rights, workers' rights, consumer rights, and women's rights. We consider him to be a dangerous ideologue, whose extreme views would solidify a far right majority on the Supreme Court and remake the Court in President Trump's own image.

II. CORRUPT PROCESS

Every circumstance surrounding the Kavanaugh nomination reveals a process infected with corruption and tainted with illegitimacy. First, Brett Kavanaugh was hand-picked from Donald Trump's short-list of Supreme Court candidates developed by radical right groups with litmus tests on issues such as choice and civil rights. The contamination of the selection process by extremist forces undermines the public's trust and confidence in the Supreme Court itself.

Next, the Senate's consideration of Judge Kavanaugh constitutes an unprecedented abdication of its constitutional obligation to meaningfully review and evaluate the fitness of the nominee. The Senate Judiciary Committee proceeded with its sham hearing although the White House has refused to produce millions of records from Kavanaugh's work at the highest levels of the George W. Bush Administration when he was at the center of political and policy decisions, including civil rights, torture, and warrantless wiretapping. Kavanaugh has acknowledged that this period shaped his views of the executive branch and influenced his perspective as a judge. Holding a hearing on the nominee without complete and comprehensive disclosure of his records strikes a devastating blow to the integrity of the confirmation process.

Throughout this process, the NAACP has objected to considering the nomination of Brett Kavanaugh at all. There is simply too much at stake to allow this dangerous nomination to move forward when the presidency itself is under investigation and the American people have not yet elected the Senate that must rigorously review this pivotal nomination. The impropriety in advancing the nomination was all the more evident when Donald Trump was identified as an unindicted co-conspirator in Michael Cohen's guilty plea on August 21. The Senate owes it to the nation to wait until these legal proceedings play out before even considering whether to confirm a Supreme Court nominee selected by a President linked to federal crimes. This is especially true with a nominee like Brett Kavanaugh who believes that the President is immune from federal investigation.

Finally, recently disclosed records provide strong evidence that Brett Kavanaugh lied under oath on a range of issues during his confirmation hearing to be a judge on the D.C. Circuit Court. The false statements concern his denials that he assisted in the nomination of Charles Pickering to the Fifth Circuit, as a lawyer in the Bush White House. The NAACP led the fight against Pickering, who had segregationist roots and had reduced the sentence of a man convicted of burning a cross

in front of an interracial couple's home; the Judiciary Committee rejected his nomination in 2002. At his own confirmation hearing to the D.C. Circuit, Kavanaugh distanced himself from the controversial Pickering, telling the Judiciary Committee that Pickering "was not one of the judicial nominees that [he] was primarily handling." But records released now prove his misrepresentations. Judge Kavanaugh also misled the Judiciary Committee about his involvement in William Pryor's nomination to the Eleventh Circuit. Kavanaugh had testified that he "was not involved in handling his nomination," yet newly released documents show Kavanaugh recommended Pryor for the judgeship, interviewed him, and shepherded the nomination through the Senate. Judge Kavanaugh also denied knowing of, or receiving, emails stolen by a Republican Senate aide from Democratic staff on the Judiciary Committee during the battles over George W. Bush's judicial nominees. Again, recently disclosed records between Kavanaugh and the aide raise serious doubts about his denials. The NAACP believes that Judge Kavanaugh's dishonesty is disqualifying and we have called for the Senate to investigate the false statements. A lifetime appointment to the Supreme Court is simply too important to sweep aside glaring revelations about Judge Kavanaugh's truthfulness before the very body charged by the Constitution to evaluate his fitness to serve.

III. BACKGROUND

Brett Kavanaugh is a 53-year-old white male who was born in Washington D.C. and raised in its wealthy suburbs. He has led an exceedingly privileged life. He attended only private schools, including Georgetown Preparatory School where Trump Supreme Court appointee Neil Gorsuch was a classmate. He received his B.A. from Yale University in 1987 and his J.D. from Yale Law School in 1990. Kavanaugh has none of the hard-scrabble or working class experience that could produce an appreciation for others struggling to make better lives for themselves and their families in the face of strong social and economic headwinds. He simply does not understand the experiences of average people, and his opinions consistently reflect that.

Brett Kavanaugh has a deeply partisan background. He worked for Independent Counsel Kenneth Starr during his wide-ranging investigation into President Clinton and Hilary Clinton. He co-authored the infamous Starr Report which made the case for impeaching President Clinton, wrote the articles of impeachment against Clinton, and investigated the tragic suicide of Vince Foster. During the George W. Bush Administration, he served in the White House Counsel's office for two years and then as a top advisor to President Bush for three years, where he wielded tremendous influence on controversial issues involving civil rights and civil liberties.

When George W. Bush nominated Brett Kavanaugh to the D.C. Circuit in 2003, the NAACP opposed his nomination because he "was responsible for overseeing efforts to pack our nation's courts with extreme right-wing judicial nominees." Indeed, Kavanaugh helped to select judges who are hostile to civil rights, including Charles Pickering, William Pryor, Terrence Boyle, and Dennis Shedd. His controversial nomination stalled for three years. The Senate eventually confirmed Kavanaugh in 2006, in a 57-36 vote.

IV. RECORD OF HOSTILITY TO COMMUNITIES OF COLOR

Judge Kavanaugh's tenure as a judge was exactly as the NAACP predicted when it opposed him. The D.C. Circuit currently has 11 judges, with seven appointed by Democratic presidents and four appointed by Republicans. Kavanaugh staked out radical positions to the far right of his colleagues, even Republican appointees. He consistently voted to uphold the interests of the wealthy and powerful and ruled against the rights of average Americans. He has the highest number of dissents per year of any judge on the D.C. Circuit.

A. HOSTILE TO AFFIRMATIVE ACTION

Judge Kavanaugh shows every sign of deviating from Justice Anthony Kennedy's support under some circumstances for race-conscious measures in college admissions to promote racial diversity. He assisted the Bush Administration in asking the Supreme Court to strike down the University of Michigan's admissions policies which used race as one factor, writing: "The Michigan program is unconstitutional because race-neutral programs should be employed, where possible..." The Supreme Court rejected that position, ruling that the admissions process was narrowly tailored and therefore constitutional. As a private lawyer, Kavanaugh co-authored a brief with failed Supreme Court nominee Robert Bork on behalf of the Center for Equal Opportunity, a group vehemently opposed to affirmative action. He argued that Hawaii violated the Constitution by permitting only Native Americans to vote in elections for the Office of Hawaiian Affairs. He wrote that "the intent, meaning, history, and policy of the Equal Protection Clause all suggest that the Constitution does not allow governmental racial classifications." In an op-ed, Kavanaugh called the Hawaii restrictions a "racial spoils system" urging the Court to "adhere to the fundamental constitutional principle most clearly articulated by Justice Antonin Scalia: In the eyes of government, we are just one race here. It is American." Kavanaugh further stated, "This case is one more step along the way in what I see as an inevitable conclusion within the next 10 or 20 years when the Court says we are all one race in the eyes of government."

B. THREAT TO FAIR HOUSING

One of retiring Justice Anthony Kennedy's signature civil rights opinions upheld the "disparate impact" method for proving housing discrimination. This method—which allows facially neutral practices to constitute discrimination if they disproportionately impact communities of color—is a longstanding tool for proving discrimination of any kind. But Kavanaugh needlessly and harshly questioned the disparate impact doctrine at a time when the Supreme Court had not yet settled that the Fair Housing Act allows this type of claim. Greater New Orleans Fair Housing Ctr. v. HUD. Civil rights organizations sued HUD under the Fair Housing Act for its policy of reimbursing homeowners after Katrina for the pre-storm value of the property or rebuilding costs, whichever was lower; they claimed that African Americans whose home values were lower than those in white areas, were disproportionately impacted. Kavanaugh joined an opinion rejecting the disparate impact claim but also launching a broad-based attack on the doctrine itself. It speculated about whether plaintiffs could ever "identify a sound benchmark" for assessing disproportionate impact in these circumstances and whether white homeowners might have disparate impact claims under a different formula. The concurring opinion called this a "strange turn" and correctly noted that it seemed to lack any purpose "other than to posit hurdles for future disparate impact claims" and was "unnecessary" to resolve the case.

C. RESTRICTED POLITICAL PARTICIPATION TO WEALTHY & POWERFUL

Brett Kavanaugh poses a severe threat to our democracy based on his record of voting rights and campaign finance issues, which signals willingness to further restrict communities of color from the political process and to limit exercise of the franchise to the wealthy and powerful.

With Judge Kavanaugh, voting rights can undoubtedly be further eroded. Five years ago, in Shelby County v. Holder, the Supreme Court gutted the heart of the Voting Rights Act by dismantling the requirement that jurisdictions with a history of discrimination preclear voting changes. State legislatures and municipalities quickly enacted measures to suppress the vote. But voting rights jurisprudence can get even worse. Just this past term, the Court upheld the most heinous voter purge law in the nation, transforming voting rights into a "use it or lose it" proposition, and then upheld racially gerrymandered districts in Texas. A future Court could decide that the Voting Rights Act does not cover challenges to redistricting or that its other provisions are unconstitutional or subject to death by a thousand cuts.

Judge Kavanaugh wrote the unanimous three-judge court opinion upholding South Carolina's photo ID law in a challenge under the Voting Rights Act. South Carolina v Holder. The Justice Department had rejected the law under Section 5 of the Voting Rights Act on the basis that it would disenfranchise tens of thousands of voters of color. After South Carolina modified the law, Kavanaugh upheld it. Significantly, Kavanaugh refused to join a concurrence that stated "one cannot doubt the vital function that Section 5 of the Voting Rights Act has played here." Section 5 is the heart of the Voting Rights Act that was completely disabled by the Supreme Court only one year later in Shelby County v. Holder. And, although South Carolina offered no evidence whatsoever of voter fraud, Judge Kavanaugh wrote: "We conclude that South Carolina's goals of preventing voter fraud and increasing electoral confidence are legitimate: those interests cannot be deemed pretextual merely because of an absence of recorded incidents of in-person voter fraud in South Carolina." Judge Kavanaugh dissented in an earlier discovery ruling rejecting South Carolina's effort to invoke attorney-client privilege to shield material prepared by state senate staff attorneys when the voter ID law was drafted. He wanted to allow South Carolina to keep information private from the Justice Department and civil rights organizations which intervened.

Judge Kavanaugh's record in election law cases indicates he would move more aggressively than Justice Kennedy in lifting restrictions on money in politics. He wrote the opinion striking down Federal Election Commission regulations to restrict spending by outside organizations, helping to fuel the creation of super PACs. Emily's List v. FEC. Although the case could have been decided on administrative law grounds, Judge Kavanaugh issued a sweeping constitutional ruling, invoking a sharp rebuke by the extremely conservative Judge Janice Rogers Brown for disregarding precedent that instructs courts to avoid constitutional questions unless necessary and adding: "The court, however, is not content just answering a gratuitous constitutional question. Its holding is broader than even the plaintiff requests." In another ruling, Judge Kavanaugh sought to revive a challenge to federal "electioneering communications" disclosure provisions in the McCain-Feingold Act although they had been twice upheld by the Supreme Court. Independence Institute v. FEC. For more on Kavanaugh's "unsettling record on democracy," see this report by Demos and the Campaign Legal Center.

D. NARROW VIEW OF FAIR EMPLOYMENT LAWS

In several cases in which the D.C. Circuit upheld the rights of employees under anti-discrimination laws, Judge Kavanaugh dissented and argued that the federal laws had no application and were not even necessary to protect against discrimination in the workplace.

In Rattigan v. Holder, Judge Kavanaugh wanted to ban Title VII's application to employees in all national security situations, despite precedent banning application only to denials or revocations of security clearances. A black FBI employee accused officials of retaliation for reporting unfounded security concerns which prompted an investigation into his security clearance eligibility. The D.C. Circuit ruled that the claim could proceed if it challenged the reporting of the employee and not the decision to investigate, rejecting the federal government's request for "sweeping immunity from Title VII liability." The Court reasoned: "Were we to declare all reporting-based claims nonjusticiable, federal employees could no longer seek redress for the harm caused when a coworker fabricates security concerns in retaliation for statutorily protected activity, and Congress's purpose in enacting Title VII would be frustrated." Judge Kavanaugh dissented, saying that the majority opinion suffered from a "basic flaw" "by insisting that some agency security clearance decisions are judicially reviewable." Kavanaugh believed that reliance on civil rights laws was unnecessary since sanctions such as agency discipline might deter such behavior.

Judge Kavanaugh argued that an African-American woman fired from her position working as Capitol Hill staff could not pursue claims of race discrimination and retaliation under the Congressional Accountability Act, which extends the protections of fair employment statutes to legislative branch employees. Howard v. Office of the Chief Administrative Officer of the U.S. House of Representatives. Judge Kavanaugh would have held these claims were barred by the Constitution's Speech or Debate Clause, a position which would have foreclosed federal lawsuits by workers throughout the federal legislative branch including those pursuing sexual harassment claims in the #MeToo era. In this situation, Kavanaugh believed that administrative complaint procedures were an acceptable substitute for discrimination victims deprived of federal court claims. The majority, however, held that the employee's claims could in fact proceed under the Congressional Accountability Act because they were not precluded or limited by the evidentiary, testimonial or non-disclosures privileges that emanate from the Speech or Debate Clause.

Judge Kavanaugh tried to exclude federal employees from laws prohibiting age discrimination in Miller v. Clinton. The D.C. Circuit held that the State Department violated such laws by imposing a mandatory retirement age and firing an employee when he reached 65. It rejected the Department's attempt to exempt from coverage citizens employed abroad. But Kavanaugh dissented, favoring the exemption. This prompted the majority to note—without disagreement by Kavanaugh—that this position would free the Department from "any statutory bar against terminating [an employee] on account of his disability or race or religion or sex." Kavanaugh argued that the Constitution was sufficient to protect against discrimination on the basis of race, sex and religion but conceded that they would be entitled to limited remedies without the protection of federal anti-discrimination laws.

E. ELIMINATED FEDERAL AGENCY PROTECTIONS

One of Donald Trump's top priorities is to reduce or eliminate the power of federal agencies to adopt protections for communities of color, workers, consumers, and the environment. Former Trump aide Steve Bannon vowed to fight daily for the "deconstruction of the administrative state." White House Counsel Donald McGahn told the Federalist Society that "the ever-growing, unaccountable administrative state is a direct threat to individual liberty." Judge Kavanaugh's appointment plays a large role in fulfilling Trump's promise to his base. Judge Kavanaugh shows a deep skepticism of deference to administrative agencies. He has taken a harsh stance against the "Chevron doctrine," a longstanding legal principle that courts should defer to federal agency interpretations of laws where the law is ambiguous and the agency's position is reasonable. He has stated: "The Chevron doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes." Immediately after nominating Brett Kavanaugh, the White House boasted to business groups that Judge Kavanaugh "has overruled federal agency action 75 times."

F. OPPOSED AGENCY TO PROTECT CONSUMERS

In one of his most egregious rulings against agency protections, Judge Kavanaugh ruled that the entire Consumer Financial Protection Bureau was unconstitutional. PHH Corp. v. Consumer Fin. Prot. Bureau. This is the independent agency created by the Dodd-Frank Wall Street Reform and Consumer Protection Act in the wake of the 2008 financial crisis to protect consumers from abusive practices and lending discrimination by financial institutions. Judge Kavanaugh concluded it was unconstitutional for the agency to be headed by single director who could be removed by the President only for "inefficiency, neglect of duty or malfeasance in office." He claimed that independent agencies constitute "a headless fourth branch of the U.S. government." He stated: "Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the

constitutional system of separation of powers and checks and balances." The *en banc* D.C. Circuit upheld the agency's constitutionality and said that Judge Kavanaugh's argument "flies in the face" of Supreme Court precedent and "defies the historical practice."

G. RULED AGAINST ENVIRONMENTAL JUSTICE

In numerous instances, Judge Kavanaugh undermined the authority of the Environmental Protection Agency to fulfill its mission to protect the environment, with significant consequences on communities of color. He ruled that the EPA overstepped its authority by adopting the Cross-State Air Pollution Rule, called the "good neighbor rule." EME Homer City Generation, L.P v. EPA. This is a clean air safeguard which protects downwind states from harmful air pollution emitting from distant power plants, which are often located in communities of color, and then crossing state borders. The Supreme Court reversed his decision. Judge Kavanaugh also strongly dissented from the D.C. Circuit's decision not to rehear a ruling upholding the EPA's finding that carbon dioxide was a pollutant and its emissions could be regulated. Coalition for Responsible Regulation, Inc. v. EPA. Judge Kavanaugh wrote: "[T]he ultimate clincher in this case is one simple point: EPA chose an admittedly absurd reading over a perfectly natural reading of the relevant statutory text. An agency cannot do that." Judge Kavanaugh dissented when the D.C. Circuit upheld the EPA's first emission standards for mercury and other hazardous pollutants from coal and oil-fired plants. White Stallion Energy Center v. EPA. In another dissent, Kavanaugh would have reversed an EPA penalty against a company that shipped a corrosive chemical that caused "significant risks to public health." Howmet Corp. v. EPA.

H. RULED AGAINST WORKERS' RIGHTS

Donald Trump has already installed Justice Neil Gorsuch on the Supreme Court, who quickly voted to overturn 40 years of precedent on collective bargaining law. The labor law record of Trump's second nominee to the Court, Brett Kavanaugh, reveals deep hostility to the rights of workers and threatens to undermine workplace protections even further.

In an extremely consequential opinion, Judge Kavanaugh challenged the ability of federal agencies to protect employees from harm in the workplace. SeaWorld of Florida, LLC v. Perez. When a SeaWorld trainer drowned after an attack by a killer whale, the D.C. Circuit upheld a Labor Department fine on SeaWorld for failing to keep the trainer from "recognized hazards" under workplace safety laws. But Judge Kavanaugh blasted the sanction and asked: "When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves." As commentators noted, Judge Kavanaugh's view has "real world consequences for federal safeguards covering workers, consumers and the environment."

Judge Kavanaugh dissented from a D.C. Circuit ruling that ordered a company to bargain with a union, on the grounds that certain employees were ineligible to vote as undocumented immigrants. Agri Processor Co. v. NLRB. The majority opinion harshly criticized Judge Kavanaugh's "misreading" of both the plain language of the National Labor Relations Act (NLRA) and Supreme Court precedent which held that undocumented immigrants are covered by the NLRA. The majority stated "There is absolutely no evidence that ... Congress intended to repeal the NLRA to the extent its definition of 'employee' includes undocumented aliens."

Judge Kavanaugh wrote the majority opinion which allowed the Defense Department to proceed with what the Washington Post called "some of the most dramatic workplace changes planned for civil service employees in 30 years" and would "curb union rights at Defense and overhaul how the Department's civil employees are paid, promoted and disciplined." AFGE v. Gates. The district court had blocked the Pentagon from implementing a substantial portion of the regulations on the basis they would "entirely eviscerate collective bargaining." But Kavanaugh

reversed the decision. A partial dissent argued that Kavanaugh's opinion would allow the Secretary of Defense to "abolish collective bargaining altogether—a position with which even the Secretary disagrees."

I. PRO-GOVERNMENT BIAS IN FOURTH AMENDMENT CASES

A significant portion of the Supreme Court's docket each year is comprised of criminal justice cases, including those addressing racism in the criminal justice system. Kavanaugh's record on and off the bench reveals a strong pro-government bias in criminal and other cases involving the Fourth Amendment. Indeed, Kavanaugh authored 12 dissents in criminal justice cases, ruling for the government in 10.

In a recent speech, Judge Kavanaugh called former Chief Justice William Rehnquist his "first judicial hero." He praised Rehnquist for "[leading] the charge in rebalancing Fourth Amendment law," noting that Rehnquist "fervently believed that the Supreme Court had taken a wrong turn in the 1960s and 1970s, and nowhere was he more forceful on this point than in the Fourth Amendment context, especially in cases involving violent crime and drugs." Judge Kavanaugh lauded Rehnquist for making "the probable cause standard more flexible and commonsensical," "expanding the category of special needs searches, those that could be done without a warrant or individualized suspicion," and opposing the "exclusionary rule by which courts would exclude probative evidence from criminal trials because the police had erred in how they obtained the evidence." According to Kavanaugh, Rehnquist viewed this "judge-created rule" as "beyond the four corners of the Fourth Amendment's text and imposed tremendous costs on society."

Judge Kavanaugh dissented from an important drug testing ruling under the Fourth Amendment. National Federation of Federal Employees v. Vilsack. A union challenged randomized drug testing of all employees of the Department of Agriculture's Job Corps Civilian Centers which operated residential job programs for at-risk youth, aged 16 to 24. The D.C. Circuit held that the policy was "a solution in search of a problem," and that the Department had failed to identify "special needs" for the testing, such as evidence of a drug problem among staff, which would have rendered the requirement for individualized suspicion impractical. But Kavanaugh would have upheld the testing on grounds of "common sense." He wrote: "In residential schools for at-risk youth, many of which have previously used drugs, it seems eminently sensible to implement a narrowly targeted drug testing program for the schools' employees. ... [I]ndeed, it would seem negligent not to test."

Judge Kavanaugh supported expansive "stop and frisk" by police when he strongly disagreed with a majority of the D.C. Circuit, including three Republican-appointed judges, which held that a defendant's Fourth Amendment rights were violated. United States v. Askew. The police conducted a "stop and frisk" search which produced no results, and then moved the defendant to where he could be identified by a witness and unzipped his jacket, revealing a gun. Kavanaugh wrote a 32-page dissent, arguing that the police action was justified because it was a reasonable continuation of the stop and frisk and helped show the defendant to a witness at an alleged robbery. "Prohibiting the police during [stop and frisk] stops from conducting identification procedures that constitute searches would lead to absurd and dangerous results." He wrote that not allowing limiting moving of clothing to identify suspects would "hamstring the police and prevent them from performing reasonable identification procedures that could solve serious crimes and to protect the community from violent criminals at large. "

J. REPRODUCTIVE RIGHTS IN JEOPARDY

Judge Kavanaugh poses a severe threat to the reproductive rights of women. His presence on Trump's shortlist confirmed his willingness to overturn Roe v. Wade. The vehemently pro-life Susan B. Anthony List organization praised Kavanaugh as an "outstanding choice" and

"principled jurist with a strong record of protecting life and constitutional rights." Indeed, Judge Kavanaugh reversed a lower court ruling allowing a 17-year-old undocumented immigrant in government custody to secure an immediate abortion consistent with Texas law which bans abortions after 20 weeks. Garza v. Hargan. When the full court swiftly overturned Judge Kavanaugh's decision, he accused his colleagues of inventing "a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand." With Brett Kavanaugh providing a fifth vote, the Court could overturn Roe outright or uphold abortion restrictions on the ground they pose no "undue burden." These decisions would have a tremendous impact on low-income women of color, who lack unfettered reproductive choices.

Judge Kavanaugh also sought to limit access to contraceptive care for employees of religious non-profit organizations. The D.C. Circuit upheld an Affordable Care Act regulatory accommodation for religiously affiliated non-profit employers to opt out of paying employees' contraception coverage. Priests for Life v. U.S. Department of Health and Human Services. Judge Kavanaugh dissented when the entire court refused to rehear the case, arguing that the objecting employers should have prevailed under the Religious Freedom Restoration Act. He wrote: "[T]he regulations substantially burden the religious organizations' exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious believes or else pay significant monetary penalties." His view raises serious questions about his willingness to use religion as a defense to discrimination.

K. FOE OF AFFORDABLE CARE ACT

Brett Kavanaugh poses a threat to ensuring access to health care regardless of preexisting conditions and to a minimal level of health care for everyone. Both are tremendously important for communities of color, who face longstanding and systemic barriers to quality health care. Significantly, Judge Kavanaugh dissented in the D.C. Circuit's ruling upholding the constitutionality of the Affordable Care Act. Seven-Sky v. Holder. He said the court lacked jurisdiction to rule on the individual mandate because the tax penalty first would have to be assessed. Alarmingly, he stated: "Under the Constitution, the president may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional, even if a court has held or would hold the statute constitutional." Several challenges to the Affordable Care Act are currently percolating in the lower courts; Brett Kavanaugh may soon have an opportunity to strike a devastating blow to health care protections for all.

L. ARGUED D.C.'S GUN REGULATIONS WERE UNCONSTITUTIONAL

After the Supreme Court held that the Second Amendment protects an individual's right to bear arms, Washington, D.C. passed gun laws banning assault weapons and high-capacity magazines and requiring certain firearms to be registered. In a constitutional challenge to the new laws, a panel majority of two Republican-appointed judges held that the bans were constitutional. Heller v. D.C. But Judge Kavanaugh dissented, arguing that the assault weapons ban was unconstitutional: "[T]the Supreme Court held that handguns—the vast majority of which today are semi-automatic—are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles."

M. BELIEVES PRESIDENT IS ABOVE LAW

Finally, and perhaps most importantly given shocking developments about Donald Trump's personal legal jeopardy, Brett Kavanaugh has asserted extreme views on presidential power. On August 21, Donald Trump was identified as an unindicted co-conspirator in the guilty plea of his personal lawyer, Michael Cohen, to felony violations of campaign finance laws relating to the presidential election. Judge Kavanaugh's views on the scope of executive power, immunity and

the ability of the courts to act as a check on executive power are deeply alarming, especially at this moment in history.

Despite his leading role during Kenneth Starr's independent counsel investigation of President Bill Clinton, Kavanaugh now believes presidents are immune from criminal investigations or prosecutions while in office, no matter what evidence of wrongdoing has been uncovered. In 2009, he wrote: "[W]e should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions." He continued: "And the country loses when the President's focus is distracted by the burdens of civil litigation or criminal investigation and possible prosecution." In another article, he proposed that Congress adopt a statute "to establish that a sitting president cannot be indicted." He argued that "[t]he Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can only occur after the President has left office." When asked on a panel at Georgetown Law School, "How many of you believe, that a sitting president cannot be indicted during the term of office," Kavanaugh responded in the affirmative.

Brett Kavanaugh has said the president should have "absolute discretion" to determine whether and when to appoint a special counsel like Robert Mueller. He also said that special counsels should be "removable in the same manner as other high-level executive branch officials" -- in other words, at the president's prerogative. He would not serve as a desperately needed independent check on the executive branch. Finally, Judge Kavanaugh questioned this ruling in United States v. Nixon, in which a unanimous Supreme Court ordered President Nixon to turn over his secret tape recordings involving Watergate, rejecting his claim of absolute privilege against a subpoena related to internal communications. In a 1999 lawyer roundtable, Brett Kavanaugh stated: "Maybe Nixon was wrongly decided – heresy though it is to say so. Maybe the tension of the time led to an erroneous decision." He stated that the case "took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official."

V. CONCLUSION

This year, our nation celebrated the 150th anniversary of ratification of the Fourteenth Amendment to the Constitution. The Fourteenth Amendment transformed our democracy by guaranteeing to all persons the right to equal protection under the law. One hundred and fifty years after its passage, our nation still struggles to realize the promise of equality under the Fourteenth Amendment.

The next appointment to the Supreme Court is pivotal to that struggle. The next Supreme Court justice will play an outsized role in determining whether African Americans move forward in our journey toward achieving full equality, whether we simply tread water for the next three decades, or whether we slide backward toward our former status as second-class citizens. We believe Brett Kavanaugh poses a severe threat to our decades-long progress in pursuing equal justice. There is no more important vote for any Senator in his or her entire career.

Thank you for considering the NAACP's strong opposition to the Kavanaugh nomination. Should you have any questions or comments, please contact Hilary Shelton, Director of the NAACP Washington Bureau and Senior Vice President for Policy and Advocacy at his office at (202) 463-2940.

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Supplement to the NAACP Legal Defense and Educational Fund, Inc.'s Report on the Civil Rights Record of Judge Brett Kavanaugh

I. Introduction

On August 30, 2018, the NAACP Legal Defense and Educational Fund, Inc. (LDF) released a detailed, 94-page report analyzing those aspects of Judge Brett Kavanaugh's record then available for review.[1]

As we explained throughout the report, the review was limited because of the restrictions on documents stemming both from the rushed process (before the National Archives completes its nonpartisan review of even the limited number of documents requested by the Chairman of the Senate Judiciary Committee) and from the Judiciary Committee majority's unprecedented use of "Committee Confidential" designations to render documents secret.[2]

After Judge Kavanaugh's hearings began on September 4, 2018, members of the Judiciary Committee made available certain documents that had previously been restricted due to Committee Confidential designations.[3] In addition, the New York Times and other media outlets released additional documents they received from their own sources.[4] As we expected, many of these documents provide valuable further insight on Judge Kavanaugh's views, particularly on issues of civil rights and racial justice.

It is important to stress, however, that thousands of documents remain unexamined. As our report explained, the National Archives' process could not provide the full body of documents to the Committee before the end of October.[5] Rather than follow the longstanding process in which the National Archives manages

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[1] LDF, *The Civil Rights Record of Judge Brett Kavanaugh* (Aug. 30, 2018), http://www.naacpldf.org/files/our-work/FINAL_Report%20on%20Brett%20Kavanaugh_FINAL_11_22.pdf (hereinafter "Kavanaugh Report").

[2] *See, e.g., id.* at 6–8.

[3] *See* Li Zhou & Kay Steiger, *A Republican Senator Threatened to Kick Cory Booker Out of the Senate Over Releasing "Confidential" Emails*, VOX, Sept. 6, 2018, https://www.vox.com/2018/9/6/17825596/cory-booker-brett-kavanaugh-hearing-emails.

[4] *See, e.g.*, Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, N.Y. TIMES, Sept. 6, 2018, https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html.

[5] *See* Kavanaugh Report at 6.

the release of documents, the Judiciary Committee outsourced the review of these documents to a private lawyer who works for President George W. Bush, to identify and screen documents for release. Even under this unprecedented arrangement, as of August 28, 2018, approximately 500,000 pages of the Chairman's requested documents had still not yet been produced.[6] Additionally, thousands of pages hidden under the "Committee Confidential" designation unilaterally imposed by Chairman Grassley remain unavailable.[7] Therefore, any review of Judge Kavanaugh's record is necessarily incomplete.

Thus, this brief supplement to Part IV.B of our report corresponds only to a very small fraction of documents released since the beginning of the hearings that are relevant to Judge Kavanaugh's qualifications. Nevertheless, these documents do provide further insight into Judge Kavanaugh's views on racial justice and race-conscious government action.

II. Analysis of New Documents

LDF's report described Judge Kavanaugh's work to support the anti-affirmative action Center for Equal Opportunity's attack on Hawaii's efforts to aid indigenous Hawaiians.[8] As part of this effort, Judge Kavanaugh engaged in a zealous media campaign in which he assailed Hawaii's program as a "naked racial-spoils system" and stated that "there can be no such thing as either a creditor or debtor race," language directly borrowed from Justice Scalia's concurrence in *Adarand Constructors, Inc. v. Pena*.[9]

Since Judge Kavanaugh's hearing began, emails previously marked Committee Confidential have been released that confirm the conclusions we reached in our report. For example, in an April 2001 email, Judge Kavanaugh states that he is "trouble[d]" that a proposed education bill seemed to incentivize States to take race-conscious educational efforts, and advocated for the addition of language stressing that the bill did not do so.[10] Commenting in August 2001 on a Department of

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[6] *See* Letter from Ranking Member Dianne Feinstein, and Senators Patrick J. Leahy, Richard J. Durbin, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Richard Blumenthal, Mazie K. Hirono, Cory A. Booker, and Kamala D. Harris, to Senator Charles E. Grassley, Chairman, Committee on the Judiciary to Jud. Comm. Chairman Charles E. Grassley, at 2 *(Aug. 28, 2018)*, https://www.feinstein.senate.gov/public/_cache/files/4/1/41748a5c-8069-4f4f-b938-c36b8a071628/5896693BA3D621868590005E18910237.feinstein-to-grassley-on-kavanaugh-process.pdf. On the night of September 3, approximately 42,000 more pages were made available.

[7] *See id.*

[8] *See* Kavanaugh Report at 30–32.

[9] *See id.* at 31 (citations omitted); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

[10] E-mail from Brett M. Kavanaugh to Jay P. Lefkowitz, Noel J. Francisco, and Joel D. Kaplan (April 20, 2001). All emails discussed herein are on file with LDF.

Transportation affirmative-action program that Justice John Paul Stevens had previously described as an effort to "eradicate racial subordination,"[11] Judge Kavanaugh complained that it was "a naked racial set-aside."[12] The next year, in an email remarking on a bill dealing with Native American small businesses, he asserted that the "desire to remedy societal discrimination is not a compelling interest" that would permit the use of race-conscious measures.[13] Finally, in June 2002, he commented on potential Congressional testimony that it "need[ed] to make clear that any program targeting Native Hawaiians as a group is subject to strict scrutiny and of questionable validity under the Constitution."[14] These comments are consistent with the troubling rhetoric Judge Kavanaugh employed in his advocacy in the *Rice* case.

Also of concern is Judge Kavanaugh's failure to condemn a colleague's suggestion that reliance on *Korematsu v. United States*[15] might be justified. In a January 2002 email, a colleague outlined possible rationales for certain airport security approaches. She stated that her view was that "we must at least consider how to construct a race-neutral system" but observed that "[a]nother school of thought is that if the use of race renders security measures more effective, th[e]n perhaps we should be using it in the interest of safety, now and in the long term, and that such action may be legal under cases such as Korematsu."[16] Although Judge Kavanaugh's reply did not endorse *Korematsu*, he failed to condemn the suggestion that this anticanonical case could ever be the basis for a government policy of racial profiling.[17] That should have been an easy response in 2001 as it should be today; as Chief Justice Roberts recently declared, *Korematsu* "was gravely wrong the day it was decided" and "has no place in law under the Constitution[.]"[18]

This is all the more disturbing in light of Judge Kavanaugh's refusal during his testimony before the Committee to say whether the government can ban individuals from entering the United States on the basis of race (citing "pending litigation"), or whether *Chae Chan Ping v. United States*[19] (more commonly known as

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[11] *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting).
[12] E-mail from Brett M. Kavanaugh to Timothy E. Flanigan, Noel J. Francisco, Alberto R. Gonzales, and Brett M. Kavanaugh (Aug. 8, 2001).
[13] E-mail from Brett M. Kavanaugh to Patrick J. Bumatay & James A. Brown (April 23, 2002).
[14] E-mail from Brett M. Kavanaugh to Lisa J. Macecevic (June 4, 2002).
[15] 323 U.S. 214 (1944).
[16] E-mail from Helgard C. Walker to Alberto R. Gonzales, Timothy E. Flanigan, & Distribution List (Jan. 17, 2002).
[17] *See* E-mail from Brett M. Kavanaugh to Helgard C. Walker (Jan. 17, 2002).
[18] *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).
[19] 130 U.S. 581 (1889).

The Chinese Exclusion Case) was correctly decided.[20] That case, as the name suggests, upheld a law that barred Chinese laborers previously present in the United States from returning.[21] In language that can only be described as racist, the Court said that Chinese immigration was occurring "in numbers approaching the character of an Oriental invasion," and suggested that the United States was the subject of "foreign aggression" from China's "vast hordes. . . crowding in upon us."[22] Judge Kavanaugh was asked clearly and explicitly to answer whether he "would be willing to say that [the *Chinese Exclusion Case*] was incorrectly decided?"[23] He refused to answer. Thus, despite asserting during in his testimony that *Plessy v. Ferguson*, the 1896 decision upholding state laws mandating racial segregation was "wrong on the day it was decided,"[24] Judge Kavanaugh would not give a similar answer for the similarly egregious *Chinese Exclusion Case*.

Our review of these documents solidifies our conclusion that Judge Kavanaugh's judicial philosophies demonstrate his "fail[ure] to recognize the reality of race in America."[25]

Moreover, the release of these documents underscores the importance of receiving all of the documents from Judge Kavanaugh's work in government. As documents continue to be released and analyzed over the course of the next several months, we will learn about Judge Kavanaugh's decision-making and fitness to serve on the Supreme Court. Any effort to hold a vote on Judge Kavanaugh's confirmation without a comprehensive review of these still-unreviewed documents reinforces the deeply flawed nature of this confirmation process. And it underscores the woefully inadequate evaluation of Judge Kavanaugh's full record by the Senate Judiciary Committee, which has prevented it from fulfilling its duty to fully assess the fitness of the nominee. It remains unclear how many documents of interest and relevance to Judge Kavanaugh's qualifications have not been released. We will continue to monitor document releases and evaluate whether the public interest would be served by further supplements to our report.

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[20] *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 3, Part 3*, C-SPAN (Sept. 6, 2018), at 49:42-52:00, https://www.c-span.org/video/?449706-3/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-3-part-3.

[21] Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1187 (2018).

[22] *The Chinese Exclusion Case*, 130 U.S. at 595, 606.

[23] C-SPAN, *supra* note 20, at 50:33–51:30.

[24] Seung Min Kim, Ann E. Marimow, Robert Barnes, and Elise Viebeck, *Supreme Court Nominee Brett Kavanaugh Won't Commit to Removing Himself from Cases Directly Affecting Trump*, WASH. POST, Sept. 5, 2018, https://www.washingtonpost.com/powerpost/kavanaugh-hearing-trumps-supreme-court-nominee-faces-senate-grilling/2018/09/05/97fda1ac-b081-11e8-9a6a-565d92a3585d_story.html?noredirect=on&utm_term=.2dd711aa49e7.

[25] Kavanaugh Report at 33.

III. Analysis of Nominee Testimony

Unfortunately, during his confirmation hearing, Judge Kavanaugh provided few if any meaningful, substantive answers to questions asked by Senators on racial justice or other issues. Nevertheless, some of Judge Kavanaugh's testimony is worth discussing. We noted above one set of questions that provided insight, which related to *The Chinese Exclusion Case* and whether Congress or the President could ban entry into the United States. Several more responses by Judge Kavanaugh are also worth noting.

- Judge Kavanaugh refused to answer whether "race can [ever] be used to remediate clearly proven discrimination[.]"[26]
- Asked what, in 1999, led him to assert that in no more than 20 years the Supreme Court could say that "we are all one race in the eyes of government," Judge Kavanaugh pointed only to his "hope" that it would occur.[27] Yet, given this country's history, hope—while important—is not a sufficient basis on which to proclaim that the need for the government to take account of race will disappear in 20 years. It is concerning that this was the best answer Judge Kavanaugh could give.
- He refused to answer whether the Supreme Court's cases upholding the use of affirmative action in higher education "were rightly decided[.]"[28]
- He declared that he was "proud" of his decision in *South Carolina v. United States*.[29] As our report explained, that decision upheld the validity of a voter identification law that disproportionately burdened African Americans and discounted evidence that the law was enacted with discriminatory purpose.[30]
- Citing "the independence of the judiciary, he refused to answer whether he agreed with President Trump's statement that there was "blame on both sides" at the Charlottesville white supremacist rally at which a young woman was killed.[31]
- He refused to explain what he meant when, in 1999, he called a Hawaiian voting system a "naked racial spoils system," which has long been a phrase associated with those most vehemently opposed to

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[26] *Day Two of Brett Kavanaugh's Supreme Court Confirmation Hearing*, WASH. POST, YouTube (Sept. 5, 2018), at 11:06:30–11:07:22, https://www.youtube.com/watch?v=uZBOy6pLj-k.
[27] *Id.* at 10:59:15–11:00:36.
[28] *Id.* at 11:07:22–11:09:08.
[29] *Id.* at 11:35:26–11:35:35.
[30] *See* Kavanaugh Report at 57–61.
[31] *Senator Harris Questions SCOTUS Nominee Judge Brett Kavanaugh—Day 2*, C-SPAN (Sept. 5, 2018), at 8:16–10:16, https://www.c-span.org/video/?c4747596/senator-harris-questions-scotus-nominee-judge-brett-kavanaugh-day-2.

affirmative action and other civil rights measures targeted at protecting African Americans.[32] Indeed, he purported to "not [be] sure what [he] was referring to" when he used it.[33] His use of this language is of particular concern given that, as we explained in our report, Hawaii's decision to permit only Native Hawaiians to vote for the Office of Hawaiian Affairs trustees was part of Hawaii's effort to remedy the past mistreatment of indigenous Hawaiians.[34]

- He refused to answer whether he believed that judges should be attacked based on their heritage.[35]
- On more than one occasion, Judge Kavanaugh spoke glowingly about *Brown v. Board of Education*.[36] But *Brown* did not end the struggle for racial equality in or outside of the courtroom. And Judge Kavanaugh failed to praise or even reference key cases in which the Court endeavored to ensure that *Brown* actually worked on the ground, such as the LDF-litigated *Green v. County School Board* and *Swann v. Charlotte-Mecklenburg Board of Education*. At the very least, this is telling of a failure to appreciate the necessity of continued judicial involvement in advancing racial equality.

In sum, although Judge Kavanaugh's responses were in large part uninformative, the questions that he refused to answer underscore the fears we raised in our report, and the questions he did answer suggested an inadequate understanding of the continued salience of the struggle for racial justice and the judiciary's role in that fight.

IV. Questions for the Record Responses

On September 12, 2018, Judge Kavanaugh returned responses to Questions for the Record submitted by members of the Judiciary Committee. These questions permit nominees to provide thoughtful, responsive, contextualized answers outside of the hearing setting.

Unfortunately, Judge Kavanaugh elected to be just as unresponsive and evasive in text as he was in the hearing, including in his responses to straightforward questions about allegations of sexual harassment that were made last year against

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[32] *Id.* at 10:25–14:40.
[33] *Id.* at 12:01–12:20.
[34] *See* Kavanaugh Report at 30–31.
[35] *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 3, Part 2*, C-SPAN (Sept. 6, 2018), at 2:37:50–2:39:30.
[36] *See, e.g., Day Two of Brett Kavanaugh's Supreme Court Confirmation Hearing, supra* note 26, at 9:06:30–9:06:45.

Judge Alex Kozinski, one of the judges for whom Kavanaugh clerked. For example: Judge Kavanaugh was asked whether he "ever s[aw] Judge Kozinski mistreat a law clerk or law clerk candidate [.]"[37] He responded that "I never saw him sexually harass a law clerk or law clerk candidate."[38] That does not answer the question. His answers to other, more-technical legal questions were similarly nonresponsive, and he continued to invoke amorphous concepts like the need to avoid "political controversy" and improperly asserted "judicial independence" as excuses to not answer.

V. Conclusion

In sum, after a careful review of Judge Kavanaugh's testimony, newly released documents, and his questions for the record responses, we conclude that he has failed to allay—and in some instances confirmed—the serious concerns highlighted in our report. We, therefore, reiterate our opposition to his confirmation to the Supreme Court.

[37] Hon. Brett M. Kavanaugh, Responses to Questions for the Record from Senator Coons (Sept. 12, 2018), at 13, https://www.judiciary.senate.gov/imo/media/doc/Kavanaugh%20Responses%20to%20Questions%20for%20the%20Record.pdf.

[38] *Id.*

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Second Supplement to the NAACP Legal Defense and Educational Fund, Inc.'s Report on the Civil Rights Record of Judge Brett Kavanaugh

On August 30, 2018, the NAACP Legal Defense and Educational Fund, Inc. (LDF) released a detailed, 94-page report analyzing those aspects of Judge Brett Kavanaugh's record then available for review.[1] We noted in the report that we would update our analysis as appropriate as the process moved forward. We produced a supplement to that report after Judge Kavanaugh's initial round of hearings on September 4–7, 2018.[2] We now update that supplement to include our analysis of the second round of hearings held September 27, 2018, which can be found at pages 8–10 of this report. Our review and analysis of the testimony presented at the hearing before the Judiciary Committee on September 27th reinforces, and indeed strengthens the conclusion we reached in our initial report: Judge Kavanaugh should not be confirmed for a seat on the United States Supreme Court.

I. Analysis of Initial Testimony and Associated Newly Produced Documents

A. Initial Round of Testimony

Perhaps the most striking aspect of the hearings held September 4–7, 2018, was how often Judge Kavanaugh often failed to provide meaningful, substantive answers to questions asked by Senators about racial justice and other civil rights issues. In other instances, his answers revealed a troubling disconnect from an understanding of the complex, urgent legal issues that are critical to understanding the Supreme Court's role in core civil rights cases.

One exchange of particular concern related to Judge Kavanaugh's refusal to say whether the government can ban individuals from entering the United States on the basis of race (citing "pending litigation"), or whether *Chae Chan Ping v. United States*[3] (more commonly known as *The Chinese Exclusion Case*) was correctly

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[1] LDF, *The Civil Rights Record of Judge Brett Kavanaugh* (Aug. 30, 2018), http://www.naacpldf.org/files/our-work/FINAL_Report%20on%20Brett%20Kavanaugh_FINAL_11_22.pdf (hereinafter "Kavanaugh Report").

[2] *See* LDF, *Supplement to the NAACP Legal Defense and Educational Fund, Inc.'s Report on the Civil Rights Record of Judge Brett Kavanaugh* (Sept. 14, 2018), http://www.naacpldf.org/files/case_issue/Kavanaugh%20Report%20Supplement%209.14%20Final%20%28002%29.pdf.

[3] 130 U.S. 581 (1889).

decided.[4] That case, as the name suggests, upheld a law that barred Chinese laborers previously present in the United States from returning.[5] In language that can only be described as racist, the Court said that Chinese immigration was occurring "in numbers approaching the character of an Oriental invasion," and suggested that the United States was the subject of "foreign aggression" from China's "vast hordes. . . crowding in upon us."[6] Judge Kavanaugh was asked clearly and explicitly to answer whether he "would be willing to say that [the *Chinese Exclusion Case*] was incorrectly decided?"[7] He refused to answer. Thus, despite asserting during in his testimony that *Plessy v. Ferguson*, the 1896 decision upholding state laws mandating racial segregation was "wrong on the day it was decided,"[8] Judge Kavanaugh would not give a similar answer for the similarly egregious *Chinese Exclusion Case*.

Additionally:

- Judge Kavanaugh refused to answer whether "race can [ever] be used to remediate clearly proven discrimination[.]"[9]
- Asked what, in 1999, led him to assert that in no more than 20 years the Supreme Court could say that "we are all one race in the eyes of government," Judge Kavanaugh pointed only to his "hope" that it would occur.[10] Yet, given this country's history, hope—while important—is not a sufficient basis on which to proclaim that the need for the government to take account of race will disappear in 20 years. It is concerning that this was the best answer Judge Kavanaugh could give.
- He refused to answer whether the Supreme Court's cases upholding the use of affirmative action in higher education "were rightly decided[.]"[11]

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[4] *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 3, Part 5*, C-SPAN (Sept. 6, 2018), at 49:42-52:00, https://www.c-span.org/video/?449706-3/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-3-part-5.

[5] Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1187 (2018).

[6] *The Chinese Exclusion Case*, 130 U.S. at 595, 606.

[7] C-SPAN, *supra* note 4, at 50:33–51:30.

[8] Seung Min Kim, Ann E. Marimow, Robert Barnes, and Elise Viebeck, *Supreme Court Nominee Brett Kavanaugh Won't Commit to Removing Himself from Cases Directly Affecting Trump*, WASH. POST, Sept. 5, 2018, https://www.washingtonpost.com/powerpost/kavanaugh-hearing-trumps-supreme-court-nominee-faces-senate-grilling/2018/09/05/97fda1ac-b081-11e8-9a6a-565d92a3585d_story.html?noredirect=on&utm_term=.2dd711aa49e7.

[9] *Day Two of Brett Kavanaugh's Supreme Court Confirmation Hearing*, WASH. POST, YouTube (Sept. 5, 2018), at 11:06:30–11:07:22, https://www.youtube.com/watch?v=uZBOy6pLj-k.

[10] *Id.* at 10:59:15–11:00:36.

[11] *Id.* at 11:07:22–11:09:08.

- He declared that he was "proud" of his decision in *South Carolina v. United States*.[12] As our report explained, that decision upheld the validity of a voter identification law that disproportionately burdened African Americans and discounted evidence that the law was enacted with discriminatory purpose.[13]

- Citing "the independence of the judiciary, he refused to answer whether he agreed with President Trump's statement that there was "blame on both sides" at the Charlottesville white supremacist rally at which a young woman was killed.[14]

- He refused to explain what he meant when, in 1999, he called a Hawaiian voting system a "naked racial spoils system," which has long been a phrase associated with those most vehemently opposed to affirmative action and other civil rights measures targeted at protecting African Americans.[15] Indeed, he purported to "not [be] sure what [he] was referring to" when he used it.[16] His use of this language is of particular concern given that, as we explained in our report, Hawaii's decision to permit only Native Hawaiians to vote for the Office of Hawaiian Affairs trustees was part of Hawaii's effort to remedy the past mistreatment of indigenous Hawaiians.[17]

- He refused to answer whether he believed that judges should be attacked based on their heritage.[18]

- On more than one occasion, Judge Kavanaugh spoke glowingly about *Brown v. Board of Education*.[19] But *Brown* did not end the struggle for racial equality in or outside of the courtroom. And Judge Kavanaugh failed to praise or even reference key cases in which the Court endeavored to ensure that *Brown* actually worked on the ground, such as the LDF-litigated *Green v. County School Board* and *Swann v. Charlotte-Mecklenburg Board of Education*. At the very least, this is

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[12] *Id.* at 11:35:26–11:35:35.
[13] *See* Kavanaugh Report at 57–61.
[14] *Senator Harris Questions SCOTUS Nominee Judge Brett Kavanaugh—Day 2*, C-SPAN (Sept. 5, 2018), at 8:16–10:16, https://www.c-span.org/video/?c4747596/senator-harris-questions-scotus-nominee-judge-brett-kavanaugh-day-2.
[15] *Id.* at 10:25–14:40.
[16] *Id.* at 12:01–12:20.
[17] *See* Kavanaugh Report at 30–31.
[18] *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 3, Part 2*, C-SPAN (Sept. 6, 2018), at 2:37:50–2:39:30.
[19] *See, e.g., Day Two of Brett Kavanaugh's Supreme Court Confirmation Hearing, supra* note 9, at 9:06:30–9:06:45.

telling of a failure to appreciate the necessity of continued judicial involvement in advancing racial equality.

In sum, although Judge Kavanaugh's responses were in large part uninformative, the questions that he refused to answer underscore the fears we raised in our report. The questions he did answer suggested an inadequate understanding of the continued salience of the struggle for racial justice and the judiciary's role in that fight.

B. Previously Unavailable Documents

After the hearings before the Judiciary Committee on September 4–7, 2018, members of the Committee made available certain documents that were previously unavailable due to the Committee Chair's unprecedented unilateral use of Committee Confidential designations to conceal entire documents from public view or release.[20] Those documents amplified many of the issues raised in our report. For example, we discussed in the report Judge Kavanaugh's work to support the anti-affirmative action attack by the Center for Equal Opportunity's on Hawaii's efforts to support the electoral strength of indigenous Hawaiians.[21] As part of this effort, Judge Kavanaugh engaged in a zealous media campaign in which he assailed Hawaii's program as a "naked racial-spoils system" and stated that "there can be no such thing as either a creditor or debtor race," language directly borrowed from Justice Scalia's concurrence in *Adarand Constructors, Inc. v. Pena*.[22]

Emails released after the report went to press confirm the conclusions we reached in our report. For example, in an April 2001 email, Judge Kavanaugh states that he is "trouble[d]" that a proposed education bill seemed to incentivize States to take race-conscious educational efforts, and advocated for the addition of language stressing that the bill did not do so.[23] Commenting in August 2001 on a Department of Transportation affirmative-action program that Justice John Paul Stevens had previously described as an effort to "eradicate racial subordination," [24] Judge Kavanaugh complained that it was "a naked racial set-aside."[25] The next year, in an email remarking on a bill dealing with Native American small businesses, he asserted

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[20] *See, e.g., id.* at 6–8; Li Zhou & Kay Steiger, *A Republican Senator Threatened to Kick Cory Booker Out of the Senate Over Releasing "Confidential" Emails*, VOX, Sept. 6, 2018, https://www.vox.com/2018/9/6/17825596/cory-booker-brett-kavanaugh-hearing-emails.

[21] *See* Kavanaugh Report at 30–32.

[22] *See id.* at 31 (citations omitted); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

[23] E-mail from Brett M. Kavanaugh to Jay P. Lefkowitz, Noel J. Francisco, and Joel D. Kaplan (April 20, 2001). All emails discussed herein are on file with LDF.

[24] *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting).

[25] E-mail from Brett M. Kavanaugh to Timothy E. Flanigan, Noel J. Francisco, Alberto R. Gonzales, and Brett M. Kavanaugh (Aug. 8, 2001).

that the "desire to remedy societal discrimination is not a compelling interest" that would permit the use of race-conscious measures.[26] Finally, in June 2002, he commented on potential Congressional testimony that it "need[ed] to make clear that any program targeting Native Hawaiians as a group is subject to strict scrutiny and of questionable validity under the Constitution."[27] These comments are consistent with the troubling rhetoric Judge Kavanaugh employed in his advocacy in the *Rice* case.

The newly released documents also revealed Judge Kavanaugh's concerning failure to condemn a colleague's suggestion that reliance on *Korematsu v. United States*[28] might be justified. In a January 2002 email, a colleague outlined possible rationales for certain airport security approaches. She stated that her view was that "we must at least consider how to construct a race-neutral system" but observed that "[a]nother school of thought is that if the use of race renders security measures more effective, th[e]n perhaps we should be using it in the interest of safety, now and in the long term, and that such action may be legal under cases such as Korematsu."[29] Although Judge Kavanaugh's reply did not endorse *Korematsu*, he failed to condemn the suggestion that this anticanonical case could ever be the basis for a government policy of racial profiling.[30] That should have been an easy response in 2001 as it should be today; as Chief Justice John Roberts recently declared, *Korematsu* "was gravely wrong the day it was decided" and "has no place in law under the Constitution[.]"[31]

Our review of these documents solidifies our conclusion that Judge Kavanaugh's judicial philosophies demonstrate his "fail[ure] to recognize the reality of race in America."[32]

C. Responses to Questions for the Record

On September 12, 2018, Judge Kavanaugh returned responses to Questions for the Record submitted by members of the Judiciary Committee. These questions permit nominees to provide thoughtful, responsive, contextualized answers outside of the hearing setting.

Unfortunately, in response to several questions, Judge Kavanaugh was just as unresponsive and evasive in text as he was in the hearing, including in his responses

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[26] E-mail from Brett M. Kavanaugh to Patrick J. Bumatay & James A. Brown (April 23, 2002).
[27] E-mail from Brett M. Kavanaugh to Lisa J. Macecevic (June 4, 2002).
[28] 323 U.S. 214 (1944).
[29] E-mail from Helgard C. Walker to Alberto R. Gonzales, Timothy E. Flanigan, & Distribution List (Jan. 17, 2002).
[30] *See* E-mail from Brett M. Kavanaugh to Helgard C. Walker (Jan. 17, 2002).
[31] *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).
[32] Kavanaugh Report at 33.

to straightforward questions about allegations of sexual harassment that were made last year against former Ninth Circuit Court of Appeals Judge Alex Kozinski. Judge Kavanaugh clerked for Judge Kozinski, was introduced by Judge Kozinski at his 2006 confirmation hearing, and has been described by Judge Kozinski as his "friend."[33] When Judge Kavanaugh was asked whether he "ever s[aw] Judge Kozinski mistreat a law clerk or law clerk candidate[.]," [34] he responded "I never saw him sexually harass a law clerk or law clerk candidate."[35] Many of his more-technical legal answers were similarly nonresponsive. For example, in his opening statement on September 4, 2018, he asserted that his interpretation of the Constitution is informed by "history and tradition." When asked to whose "history and tradition" he was referring, he stated only that "The Supreme Court has repeatedly stated that the Constitution 'must be interpreted to its text, by considering history, tradition, and precedent[.]"[36]

D. Unresolved Document Restrictions

As we explained throughout our initial report, the public's ability to examine Judge Kavanaugh's record was limited by restrictions on documents stemming from the rushed process (before the National Archives completes its nonpartisan review of even the limited number of documents requested by the Chairman of the Senate Judiciary Committee) and from the Judiciary Committee majority's unprecedented use of "Committee Confidential" designations.[37] As noted in Part I.A, above, certain previously restricted documents were made available by members of the Judiciary Committee, and certain media outlets also released documents they received from their own sources.[38]

To be clear, however: thousands of documents remain unexamined. As our report explained, the National Archives' process could not provide the full body of documents to the Committee before the end of October.[39] Rather than follow the

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[33] Susan Matthews, *Brett Kavanaugh Failed the Alex Kozinski Test*, Slate, Sept. 6, 2018, https://slate.com/news-and-politics/2018/09/kavanaugh-confirmation-hearing-alex-kozinski-sexual-harassment.html.

[34] Hon. Brett M. Kavanaugh, Responses to Questions for the Record from Senator Coons (Sept. 12, 2018), at 13, https://www.judiciary.senate.gov/imo/media/doc/Kavanaugh%20Responses%20to%20Questions%20for%20the%20Record.pdf.

[35] *Id.*

[36] Hon. Brett M. Kavanaugh, Responses to Questions for the Record from Senator Feinstein (Sept. 12, 2018), at 5 (citation omitted), https://www.judiciary.senate.gov/imo/media/doc/Kavanaugh%20Responses%20to%20Questions%20for%20the%20Record.pdf.

[37] *See* Kavanaugh Report at 6–8.

[38] *See* Zhou & Steiger, *supra* note 20; *See, e.g.*, Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, N.Y. TIMES, Sept. 6, 2018, https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html.

[39] *See* Kavanaugh Report at 6.

longstanding process in which the National Archives manages the release of documents, the Judiciary Committee outsourced the review of these documents to a private lawyer who works for President George W. Bush, to identify and screen documents for release. Even under this unprecedented arrangement, as of August 28, 2018, approximately 500,000 pages of the Chairman's requested documents had still not yet been produced.[40] Additionally, thousands of pages hidden under the "Committee Confidential" designation unilaterally imposed by Chairman Grassley remain unavailable.[41] The National Archives has not updated its timeline. It is important to keep in mind, therefore, that any review of Judge Kavanaugh's record remains incomplete.

This all means that we will continue to learn more about Judge Kavanaugh's fitness to serve as a Justice of the Supreme Court over the next several months as documents continue to be released and analyzed. Any effort to hold a vote on Judge Kavanaugh's confirmation without a comprehensive review of these still-unreviewed documents reinforces the deeply flawed nature of this confirmation process. And it underscores the woefully inadequate evaluation of Judge Kavanaugh's full record by the Senate Judiciary Committee, which has prevented it from fulfilling its duty to fully assess the fitness of the nominee. It remains unclear how many documents of interest and relevance to Judge Kavanaugh's qualifications have not been released. For example, on October 3, 2018, the Electronic Privacy Information Center reported that the National Archives had—in response to a Freedom of Information Act lawsuit—confirmed "that there are hundreds of records concerning Brett Kavanaugh's role in controversial White House surveillance programs, including warrantless wiretapping and the Patriot Act."[42] These still unreleased documents ought to be critical to any final decision on Judge Kavanaugh's fitness for confirmation.

II. Hearing on Sexual Misconduct Allegations Held September 27, 2018

The concerns outlined above are independent from what has been the most significant development of the past few weeks: the emergence of credible sexual misconduct allegations against Judge Kavanaugh. As an initial matter, this

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[40] *See* Letter from Ranking Member Dianne Feinstein, and Senators Patrick J. Leahy, Richard J. Durbin, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Richard Blumenthal, Mazie K. Hirono, Cory A. Booker, and Kamala D. Harris, to Senator Charles E. Grassley, Chairman, Committee on the Judiciary to Jud. Comm. Chairman Charles E. Grassley, at 2 *(Aug. 28, 2018)*, https://www.feinstein.senate.gov/public/_cache/files/4/1/41748a5c-8069-4f4f-b938-c36b8a071628/5896693BA3D621868590005E18910237.feinstein-to-grassley-on-kavanaugh-process.pdf. On the night of September 3, approximately 42,000 more pages were made available.

[41] *See id.*

[42] *National Archives Confirms Existence of Numerous Kavanaugh Records on Surveillance Programs*, Electronic Privacy Information Center, Oct. 3, 2018, https://epic.org/2018/10/national-archives-confirms-exi.html.

underscores the danger of the rushed process and inadequate vetting performed with respect to this nominee. LDF called for an FBI investigation that would examine these allegations and address the critical question of whether Judge Kavanaugh lied under oath when asked directly about sexual assault in his initial confirmation hearings, as well as during the hearing on September 27th. However, the hearing held to examine these allegations revealed additional concerns regarding the confirmation process and Judge Kavanaugh himself. During the September 27th hearing, Judge Kavanaugh's testimony was intemperate, partisan, and lacked credibility.

When the American Bar Association's Standing Committee on the Federal Judiciary evaluates judicial temperament, it "considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law." [43] Under this standard, Judge Kavanaugh's presentation at the September 27 hearing fell short. Judge Kavanaugh's performance when he was questioned by Democratic Senators was combative, non-responsive, belligerent, intemperate and at times disrespectful. In one of the most notable exchanges, Judge Kavanaugh asked Senator Amy Klobuchar whether she had ever been blackout drunk.[44] Throughout his presentation, at times it appeared that Judge Kavanaugh was not in control of his temper or emotions. Whatever the understandable pressure of the moment, Judge Kavanaugh displayed an alarming absence of judicial temperament.

Judge Kavanaugh's remarks at the September 27th hearing also demonstrated a revealing and alarming level of partisanship, which calls into question his judicial impartiality. Our judicial system relies on both the impartiality of judges and the appearance of their impartial and nonpartisan approach to the law.[45] During his confirmation hearings, Justice Neil Gorsuch expressed the judicial ideal: "There's no such thing as a Republican judge or a Democratic judge . . . .[w]e just have judges in this country."[46] Judge Kavanaugh initially expressed similar sentiments, stating that the court "must never, never be viewed as a partisan institution" and that the

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[43] *See* AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 3 (2017), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.authcheckdam.pdf.

[44] *See Brett Kavanaugh and Christine Blasey Ford Testify Before Senate Committee—Watch Live*, GUARDIAN NEWS, (Sept. 27, 2018), at 7:12:45–7:13:24, https://www.youtube.com/watch?v=5-N08HKKbno (hereinafter "September 27th Testimony").

[45] *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

[46] Garrett Epps, *America's Red and Blue Judges*, THE ATLANTIC, Sept. 25, 2017, https://www.theatlantic.com/politics/archive/2017/09/americas-red-and-blue-judges/540924/.

"justices on the Supreme Court do not sit on opposite sides of an aisle[.]"[47] On September 27, however, Judge Kavanaugh spoke in nakedly partisan terms. He described "a frenzy on the left to come up with something, anything, to block my confirmation," and indicted "the behavior of several of the Democratic members of the committee at my [initial] hearing a few weeks ago" as "an embarrassment."[48] He spoke of a "calculated and orchestrated political hit," "revenge on behalf of the Clintons" and "millions of dollars in money from outside left-wing opposition groups."[49]

For our judicial system to function with integrity, litigants must have faith that the judiciary's rulings rest on neutral, unbiased principles. Judge Kavanaugh's comments undermine this goal, causing future litigants who may appear before him to question his ability to rule impartially. Such doubts not only do damage to the faith litigants may have in Judge Kavanaugh but degrades trust in our judicial system as a whole.

Finally, many of Judge Kavanaugh's answers have called his credibility into question. Various careful, detailed sources have examined Judge Kavanaugh's testimony on this front at length.[50] We will just note two of the most glaring examples here, although media accounts have noted many others:

- Repeatedly, Judge Kavanaugh insisted that "all four witnesses who were allegedly at the event [at which Dr. Ford says he sexually assaulted her] have said it didn't happen[.]"[51] This is incorrect. The statements by Mark Judge, Patrick Smyth, and Leland Keyser to which Judge Kavanaugh is referring say only that they do not *recall* the party or the event in question, not that the event did not happen.[52] This is misleading at best.

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[47] Greg Stohr & Laura Litvan, *Kavanaugh Promises Impartiality After Hearings Erupt Into Rancor*, BLOOMBERG, Sept. 4, 2018, https://www.bloomberg.com/news/articles/2018-09-04/kavanaugh-will-vow-to-be-impartial-arbiter-as-hearings-open.

[48] September 27th Testimony, *supra* note 44, at 5:21:10–20, 5:22:55–23:04.

[49] *Id.* at 5:24:30–5:25:00.

[50] *See* Paul Waldman, *All of Brett Kavanaugh's Lies, Distortions and Absurdities*, WASH. POST. (Oct. 2, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/10/02/all-of-brett-kavanaughs-lies-distortions-and-absurdities/?noredirect=on&utm_term=.15694e501c79; Nathan J. Robinson, *How We Know Kavanaugh is Lying*, Current Affairs (Sept. 29, 2018), https://www.currentaffairs.org/2018/09/how-we-know-kavanaugh-is-lying.

[51] *E.g.*, September 27th Testimony, *supra* note 44, at 7:43:50–59; *see also id.* at 7:47:29–32 ("[A]ll four witnesses say it didn't happen[.]").

[52] Calvin Woodward & Chloe Kim, *AP Fact Check: Kavanaugh's Claim of Exoneration*, WASH. POST. (Sept. 27, 2018), https://www.washingtonpost.com/politics/ap-fact-check-kavanaughs-claim-of-exoneration/2018/09/27/95069de6-c2a6-11e8-9451-e878f96be19b_story.html?utm_term=.d7a4d8a88444; *see also* Robinson, *supra* note 50.

- Asked about a reference in his high school yearbook to his being a "Renate Alumnius[sic]," Judge Kavanaugh claimed that the "reference was clumsily intended to show affection, and that she [contemporary Renate Dolphin] was one of us."[53] But any examination of the yearbook renders that claim risible. The New York Times not only examined the yearbook, but talked to several contemporaries, and listed substantial evidence that the reference was far from the innocent reference Judge Kavanaugh claimed it was.[54] Most notably, another self-proclaimed "Renate Alumnus" included a poem: "You need a date/and it's getting late/so don't hesitate/to call Renate." Again, Judge Kavanaugh's answers are not credible.

III. Conclusion

A careful review of Judge Kavanaugh's testimony, newly released documents, and his questions for the record responses confirmed the serious concerns highlighted in our report. And his behavior in the September 27 hearing raised further concerns regarding his temperament, perceived partisanship, and credibility. We, therefore, reiterate our opposition to his confirmation to the Supreme Court.

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[53] September 27th Testimony, *supra* note 44, at 5:49:15–5:50:30.

[54] *See* Kate Kelly & David Enrich, *Kavanaugh's Yearbook Page is "Horrible, Hurtful" to a Woman it Named*, N.Y. TIMES, (Sept. 24, 2018), https://www.nytimes.com/2018/09/24/business/brett-kavanaugh-yearbook-renate.html?action=click&module=Top%20Stories&pgtype=Homepage.

Brett Kavanaugh

President Trump nominated Brett Kavanaugh to the U.S. Supreme Court on July 9, 2018. Kavanaugh is anti-choice.

Career

- Law clerk, Hon. Judge Walter K. Stapleton, Third Circuit Court of Appeals, 1990-1991
- Law clerk, Hon. Alex Kozinski, Ninth Circuit Court of Appeals, 1991-1992
- Staff Attorney, U.S. Office of the Solicitor General, 1992-1993
- Law clerk, Associate Justice Anthony Kennedy, U.S. Supreme Court, 1993-1994
- Associate Counsel, Office of Independent Counsel Kenneth W. Starr, 1994-1997, 1998
- Partner, Kirkland & Ellis, 1997-1998, 1999-2001
- Associate Counsel to President George W. Bush, 2001-2003
- Senior Associate Counsel to President George W. Bush, 2003
- Assistant and Staff Secretary to President George W. Bush, 2003-2006
- Judge, U.S. Court of Appeals for the D.C. Circuit, 2006-present

Record on Choice-Related Issues

Court Cases Since 2006 Senate Confirmation Vote

- Kavanaugh issued a strongly worded dissent against a D.C. Circuit decision that allowed an undocumented young woman to access abortion care. Kavanaugh argued that despite the fact that the girl had already met all of Texas' burdensome requirements for young women seeking abortion care (a mandatory delay between when she received state-mandated counseling and when she could get the procedure, a judge's approval that she had met all of the requirements for judicial bypass in the absence of parental consent, etc.), she still should have to wait until she had an immigration sponsor to make "that momentous life decision."[1] He wrote, "The en banc majority...reflects a philosophy that unlawful immigrant minors have a right to immediate abortion on demand, not to be interfered with even by Government efforts to help minors navigate what is undeniably a difficult situation by expeditiously transferring them to their sponsors."[2]

- In a heated dissent in *Priests for Life v. HHS*, Kavanaugh argued that the Affordable Care Act's existing accommodation for religious employers who wanted an exemption from the contraceptive-coverage policy still placed a substantial burden on the

employers' beliefs, even "if the religious organizations are misguided in thinking that this scheme...makes them complicit in facilitating contraception or abortion."[3]

Notable Information

- President Trump has repeatedly promised to put "pro-life justices on the court" who would overturn *Roe v. Wade* "automatically."[4] Thus Trump's list of 25 potential Supreme Court nominees, including Kavanaugh, must have passed this unprecedented litmus test. This is likely the reason Trump has said he will not ask nominees about overturning *Roe* - because he already knows the answer.
    - After Kavanaugh and four others were added to the list in late 2017, anti-choice groups praised the additions:
        - Concerned Women for America President Penny Nance said, "[Trump's] selections have been spot on at every level, and we are so thankful to him for delivering for the American people in such a crucial area... The thousands of women I represent applaud President Trump on this announcement and will continue to support him in the selection of constitutional judges who respect their limited roles as jurists and not legislators."[5]
        - Susan B. Anthony List President Marjorie Dannenfelser said, "These five judges are exceptionally qualified and any one of them would make an outstanding Supreme Court justice. President Trump set a high standard with Justice Neil Gorsuch and continues to impress with his excellent list of nominees for future vacancies. President Trump continues to nominate only judges who are loyal to the Constitution, not to an activist pro-abortion agenda."[6]

- Shortly after Kavanaugh's nomination to the Supreme Court was announced, anti-choice groups celebrated the pick:
    - Brian Fisher of the Human Coalition said, "Kavanagh gives great hope to the pro-life movement that the end of *Roe v. Wade* and legal abortion is in sight. We are grateful to the President for his continued commitment to defending human life."[7]
    - Marjorie Dannenfelser, President of Susan B. Anthony List, said, "Moments ago, President Trump announced his Supreme Court pick: Judge Brett Kavanaugh. In doing so, President Trump has kept his promise to the Pro-Life Movement to only nominate pro-life judges to the Supreme Court."[8]
    - Troy Newman of Operation Rescue said, "Times have changed and a new day when abortion will finally be relegated to the ash heap of history where this barbarism truly belongs."[9]

- He served as Senior Associate Counsel and in various other positions in the anti-choice George W. Bush White House. In these roles, he was responsible for

"marshaling the fleet" of George W. Bush's far-right, anti-choice judicial nominees, including Priscilla Owen and William Pryor.[10] In fact, Kavanaugh oversaw the nomination of the most extreme anti-choice judicial nominees seen until that time. Only Donald Trump has surpassed Bush in appointing extremist nominees.

- In 2017, Kavanaugh gave a speech in which he said the following about the right to abortion:

  Consider next the Fourteenth Amendment and abortion. The Supreme Court said in *Roe v. Wade* that there was a right to abortion in certain circumstances. But that has raised a follow-on issue that has come up again and again in the years since *Roe*. What regulations of abortion are permissible? Informed consent, waiting periods, partial-birth bans, doctor licensing, parental notice, and the like. What is the answer and more importantly for present purposes, what is the nature of the test we should use to figure out the answer? Since 1992, the Court has settled on an undue burden test. That test is very much a common-law kind of test. Does the law burden the woman's right? And if so, is that burden "undue"? The word "undue" calls for a classic assessment of the pros and cons of the regulation in question. And not surprisingly, that is how Justice Breyer articulated the test in the most recent abortion case, *Whole Woman's Health*.[11]

- Kavanaugh is active in the conservative Federalist Society.[12] In fact, he co-chaired the group's School Choice Subcommittee of the Religious Liberties Practice Group.[13] The Federalist Society is led by Leonard Leo, the anti-choice activist who is heavily involved in selecting Trump's Supreme Court and lower court nominees. Leo has been outspoken in his anti-choice views, calling abortion "an act of force" and "a threat to human life,"[14] and serves as co-chairman of Students for Life,[15] a group whose mission is to "abolish abortion."[16]

- Kavanaugh has made campaign contributions to anti-choice politicians including Henry Hyde and Orrin Hatch – both vehemently anti-choice.[17]

Record on Other Key Issues

- Kavanaugh dissented when the D.C. Circuit upheld D.C.'s ban on assault weapons and large-capacity magazines, arguing that the majority should have applied a "text, history, and tradition standard," and that that standard would have led them to strike down the ban.[18]

- Kavanaugh has vigorously defended even the most questionable conduct of former independent counsel Kenneth Starr. Kavanaugh himself was responsible for drafting the office's articles of impeachment against President Clinton, which even conservative commentators have criticized as "strain[ing] credulity" and based on "shaky allegations."[19]

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[1] Garza v. Hargan, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)
[2] Garza v. Hargan, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)
[3] Priests for Life v. HHS, 808 F.3d 1, 2 (D.C. Cir. 2015) (Kavanaugh, J., dissenting)
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NATIONAL ALLIANCE TO END SEXUAL VIOLENCE:
"COSTS, CONSEQUENCES AND SOLUTIONS"

Costs, Consequences and Solutions

endsexualviolence.org/where_we_stand/costs-consequences-and-solutions

The best available research tells us that crime victimization costs the United States $450 billion annually (National Institute of Justice, 1996). Rape is the most costly of all crimes to its victims, with total estimated costs at $127 billion a year (excluding the cost of child sexual abuse). In 2008, researchers estimated that each rape cost approximately $151,423 (DeLisi, 2010). Sexual abuse has a negative impact on children's educational attainment (MacMillan, 2000), later job performance (Anda et al., 2004), and earnings (MacMillan, 2000). Sexual violence survivors experience reduced income in adulthood as a result of victimization in adolescence, with a lifetime income loss estimated at $241,600 (MacMillan, 2000). Sexual abuse interferes with women's ability to work (Lyon, 2002). Fifty percent of sexual violence victims had to quit or were forced to leave their jobs in the year following their assaults due to the severity of their reactions (Ellis, Atkeson, & Calhoun, 1981). In 2008, violence and abuse constituted up to 37.5% of total health care costs, or up to $750 billion (Dolezal, McCollum, & Callahan, 2009).

Appropriate and Early Intervention Can Mitigate Costs and Consequences A 2006 study found that when victims receive advocate-assisted services following assaults, they receive more helpful information, referrals, and services and experience less secondary trauma or re-victimization by medical and legal systems (Campbell, 2006). Furthermore, the same study found that when advocates are present in the legal and medical proceedings following rape, victims fare better in both the short- and long-term, experiencing less psychological distress, physical health struggles, sexual risk-taking behaviors, self-blame, guilt, and depression. Rape survivors with advocates were 59% more likely to have police reports taken than survivors without advocates, whose reports were only taken 41% of the time.

Funding Sexual Assault Services is Paramount The Violence Against Women Act (VAWA) has helped to reduce the societal cost associated with the criminal victimization of women throughout the U.S. Based on researchers' cost-benefit analysis, the net benefit of VAWA is estimated at $16.4 billion (Clark, Biddle, & Martin, 2002). Approximately $14.8 billion in victimization costs are averted due to VAWA, which only costs $1.6 billion to implement. At the individual level, VAWA is estimated to cost $15.50 per U.S. woman, yet saves $159 per U.S. woman in averted victimization costs, suggesting VAWA to be a fiscally efficient program.

Without rape crisis advocates, victims are less likely to receive critical services (such as referrals to community-based services, filing of police reports, information about sexually transmitted diseases and pregnancy) in the immediate aftermath of their attacks. Additionally, without an advocate present, secondary victimization, or being blamed or re-victimized by first responders, is more likely in these systems. Both an absence of helpful services and secondary victimization have been linked to increased psychological distress, physical health struggles, sexual risk-taking behaviors, self-blame, guilt, depression, and a reluctance to seek

further help among rape survivors. Over time, these consequences can take an emotional and financial toll on victims and the larger society. Supportive, non-victim-blaming interventions provided immediately following rape may help to prevent complex, long-term health and mental health struggles among victims and survivors. Therefore, rape crisis center advocacy funded by such programs as the Sexual Assault Services Program (SASP), Victims of Crime Act (VOCA) and the Preventive Health and Health Services Block Grant can be considered a cost-saving and fiscally responsible approach.

Rape Crisis Services are Scarce According to a 2010 Internet survey by the National Alliance to End Sexual Violence of 644 rape crisis centers from all 50 states, Washington D.C. and two territories:

- 56% of rape crisis centers had been forced to reduce staff in the past year.
- 25% of rape crisis centers had a waiting list for crisis services.
- 66% of rape crisis centers had to reduce prevention education/public awareness efforts because of funding losses.
- 61% of rape crisis centers had three (3) or less staff.
- 60% of rape crisis centers indicated they need at least four (4) full-time staff to meet the current demand for sexual assault services in their community.
- 93% of rape crisis center employees were paid less than $40,000 a year.

Full funding for cost-effective programs such as the Sexual Assault Services Program in the Violence Against Women Act and the Victims of Crime Act in the US Department of Justice as well as the Preventive Health and Health Services Block Grant in CDC would equip rape crisis centers to address victims' needs and reduce the long-term costs and consequences of rape for both victims and communities.

For more information, contact Terri Poore, Vice President, National Alliance to End Sexual Violence, tpoore@fcasv.org, (850) 363-2918.

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National Archives Works to Release Records Related to Judge Kavanaugh

archives.gov/news/articles/archives-staff-release-records-related-to-judge-kavanaugh

August 15, 2018

By National Archives News Staff

WASHINGTON, August 15, 2018 — Each time a candidate is nominated to the Supreme Court by the President, the staff at the National Archives and Records Administration immediately begin the task of reviewing and releasing records related to that nominee.

The process is governed by several laws, including the Presidential Records Act, the Federal Records Act, and the Freedom of Information Act. All of the records, electronic and paper, must be reviewed by archival staff before being released.

This is a challenging task that National Archives staff are currently working to meet. Some records might be withheld or released in redacted form for various reasons: to preserve the secrecy of grand jury proceedings; to protect the personal privacy of living individuals; to protect the identities of confidential sources; and to protect confidential communications within the White House.

In addition to the challenges of reviewing the records, the archival staff face an enormous number of documents—in Judge Brett Kavanaugh's case, far more than previous nominees. While National Archives processed and released roughly 70,000 pages on Chief Justice John Roberts and 170,000 pages on Justice Elena Kagan, there are the equivalent of several million pages of paper and email records related to Judge Kavanaugh in the holdings of the George W. Bush Presidential Library and Museum and in the National Archives.

"Because Judge Kavanaugh served both in the White House Counsel's Office and as Staff Secretary under President George W. Bush, was then nominated to the U.S. Court of Appeals by President Bush, and also served with the Office of Independent Counsel Kenneth W. Starr, the Archives has literally millions of pages of records related to him," said Gary M. Stern, National Archives General Counsel.

Approximately 900,000 pages of email and paper records were requested by Senate Judiciary Committee Chairman Senator Charles Grassley. These records are related to Judge Kavanaugh's service in President Bush's White House Counsel's Office and his nomination to

the U.S. Court of Appeals. This was a "special access" request that meets the requirements of the Presidential Records Act (PRA).

On July 31, 2018, the National Archives received a request from the Senate Judiciary Committee's Ranking Minority Member Senator Dianne Feinstein and the other minority members of the committee for Judge Kavanaugh's Staff Secretary records, which number the equivalent of several million pages. However, this request does not meet the requirements of section 2205(2)(C) of the Presidential Records Act, as the Archivist of the United States David S. Ferriero explained in an August 2, 2018, letter to Senate Minority Leader Charles Schumer. On August 6, 2018, Senator Feinstein asked the Archivist to reconsider this position, and the Archivist responded on August 10, 2018.

As noted in both letters, since the Presidential Records Act was enacted in 1978, the National Archives longstanding and consistent practice has been to respond only to requests from the Chair of Congressional Committees, regardless of which political party is in power. For the same reason that the National Archives was not able to respond to Senator Feinstein's request, the agency also declined to respond to the requests by Republican Ranking Members for Presidential records during President Obama's Administration.

Other requests for records include an August 3, 2018, joint request from Senator Grassley and Senator Feinstein for records from Judge Kavanaugh's service in the Office of Independent Counsel. In addition to Congressional requests, the agency has also received several FOIA requests for these records.

A team of more than 30 archivists and archives technicians from the George W. Bush Presidential Library and Museum, the William J. Clinton Presidential Library, and the Barack Obama Presidential Library, along with the Presidential Materials Division is currently processing the more than 900,000 pages of White House Counsel's Office and nomination records in response to Senator Grassley's special access request and FOIA requests. They expect to complete their review of the first roughly 300,000 pages by August 20, and the remaining 600,000 pages by the end of October. They then have to provide notification to the current and former Presidents. The records will be released on a rolling basis following the completion of the review by the current and former Presidents. This effort is also described in the August 2, 2018, letter from National Archives General Counsel Gary M. Stern to Senator Grassley.

In another effort, the National Archives Special Access and FOIA staff is processing the Office of Independent Counsel records. Archives staff have already posted more than 9,700 pages on the agency website, and expects to complete this review by the end of August.

Meanwhile, a separate review – completely apart from the National Archives and the George W. Bush Presidential Library's efforts – is also underway. The Presidential Records Act provides former Presidents with an independent right of access to the records of his

administration. Accordingly, the PRA representative of President George W. Bush requested and received from the National Archives a copy of the White House Counsel's Office and nomination records and has begun to provide copies of those records directly to the Senate Judiciary Committee, which is something that has never happened before. This effort by former President Bush does not represent the National Archives or the George W. Bush Presidential Library. The Senate Judiciary Committee is publicly releasing some of these documents on its website, which also do not represent the National Archives.

The public can access the released records through a Special Topics page on archives.gov. This web page also describes the volume of relevant archival records that National Archives has on Judge Kavanaugh and provides links to the correspondence that the agency has had with Congress.

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Testimony for the Judiciary Committee
of the United States Senate
Kim Gandy, President and CEO, National Network to End Domestic Violence
Regarding the Hearing on
Supreme Court of the United States Nominee Judge Brett Kavanaugh
on September 27, 2018

To Chairman Grassley, Ranking Member Feinstein, and members of the Judiciary Committee:

Thank you for this opportunity to provide testimony on the importance and impact of these hearings.

I am President and CEO of the National Network to End Domestic Violence (NNEDV), the nation's leading voice for victims of domestic violence and their advocates. We represent the 56 state and territorial domestic violence coalitions, their over 2,500 member domestic violence and sexual assault programs, and the millions of victims they serve each year. Our direct connection with victims and those who serve them gives us a unique understanding of their needs – their fears, the impacts of trauma, and the rationale behind reporting or not. We are honored to share these perspectives with you today.

Our movement is proud of the progress we have made over the last 40 years to bring hidden crimes like domestic and sexual violence into the light, centering each survivor's safety and well-being, and transforming our nation's response to these crimes. These last few weeks underscore that so much more needs to be done. While we have made progress in many ways – with laws, protections, support and resources for survivors – we have a long way to go with attitudes and assumptions.

Today you will hear the credible testimony of Dr. Christine Blasey Ford. Dr. Ford has nothing to gain from coming forward at this time. She is an American with vital information for this committee, for this process, and we urge the committee to treat her testimony as an opportunity to shed light on the character of a nominee for a lifetime appointment to the highest court in the land.

We echo leaders in the sexual assault field who have provided you with compelling testimony outlining why survivors are reluctant to come forward.

And we remind the Committee that the person before you today, Dr. Ford, is reporting a terrifying incident that was seared into her consciousness as a young adolescent – a 15-year-old assaulted by an older boy. It is almost absurd to assume that many young women would have done anything differently than young Christine Blasey did at the time, in the early 1980's.

Let us all recall the responses that sexual assault victims received before the passage of state and federal laws that criminalized sexual assault and created training programs for first responders. Let us recall that "date rape" and "acquaintance rape" had **yet** to be debated, defined, understood, or criminalized. Let us recall that spousal rape was not even accepted or understood until the 1990s in many states.

Let us recall that in 2018 we have forensic evidence in rape kits sitting untested in part because there is bias against rape victims. Let us remember that in 2017, convicted rapist Brock Turner got six months in jail for a rape that was witnessed by two bystanders, and was released after serving only three months. Let us remember that Bill Cosby, sentenced this week, openly joked about drugging and raping women – he just didn't call it rape.

Before you sits a credible witness. Professor Ford provided a detailed account, along with therapist notes from six years ago, and passed a lie detector test. Yet she has faced death threats and has had to endure suspicion, ridicule, defamation and scorn. Her identity was revealed, her motives have been questioned and her credibility has been attacked. A *prosecutor* has been hired to question her. She is being treated like she is on trial.

We believe Dr. Ford. She is before you today as one survivor shouldering the burden of many who have come forward and many, many more who have not. As we learned this week, her account is in keeping with other reports from women Dr. Ford does not know. It is past time to halt these confirmation hearings and conduct a thorough and fair bipartisan investigation, adhering to trauma-informed principles.

This Committee had the privilege of hearing from another credible and brave witness in 1991 regarding the nomination of Clarence Thomas to the Supreme Court. Professor Anita Hill recounted the humiliation, shame, fear and disrespect she experienced working with Judge Thomas. Survivors and their advocates – who heard their stories resounded in Professor Hill's – watched pensively as the Judiciary Committee heard unprecedented testimony on an issue that was widespread yet widely ignored at the time. The message this body sent at the time was "don't come forward – you won't be believed, your suffering doesn't matter to us, we are moving on."

The 2018 Judiciary Committee now has the blessing of hindsight. You must send the right message to our young people who face assault – we will help you, we will believe you. And to those who commit assault – even if they are our friends and colleagues – you will be held accountable for your actions.

Think about the survivors who are watching this process unfold. They are thinking, "How will be I treated if I come forward?"

Our daughters are watching and wondering: "Is this what will happen to me if I'm assaulted and tell someone?" Would it be any wonder if they didn't come forward?

Countless survivors, and their families, friends and advocates, are watching the Senate, to see what kind of tone you will set, and so far it's not a good one. Senators should be leading by example. And that means treating Dr. Ford with respect, and treating her charges, and the others that have come

forward, as what they are – allegations of wrongdoing that deserve an actual investigation, not just a "hearing."

We have to foster an environment where survivors will feel safe, supported, heard, and understood, and where charges of sexual assault or domestic violence are fully and properly investigated, even when the timing is inconvenient.

In this very public arena, we urge the Senate Judiciary Committee to get this right.

A Worthy Pick

NR nationalreview.com/2018/07/brett-kavanaugh-worthy-pick-for-supreme-court/

July 10, 2018

President Trump with Supreme Court nominee Judge Brett Kavanaugh at the White House, July 9, 2018. *(Jim Bourg/Reuters)*

Judge Brett Kavanaugh, President Donald Trump's new nominee for the Supreme Court, is a whip-smart legal conservative. As a judge in the highest-profile appeals court in the nation, he has shown an exemplary dedication to the rule of law. He has defended the separation of powers against threats coming from multiple directions. He has repeatedly cautioned his colleagues on the bench not to attempt to play a legislative role. He has also insisted on enforcing constitutional structures of accountability on government agencies. He has vindicated the right to free speech (against certain campaign-finance regulations), to bear arms (against the D.C. government's attempts to implement sweeping bans), and to religious liberty (against a version of the Obama administration's "contraceptive mandate"). And he has followed Supreme Court precedents even when gently suggesting they should be rethought.

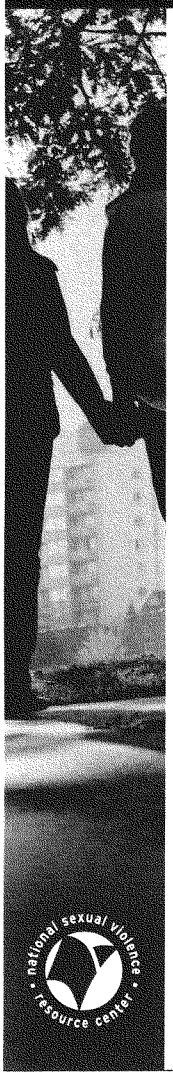
His decisions have also been influential, with the Supreme Court repeatedly adopting his analysis and in one case running several block quotes from his opinion. Some conservatives have faulted the reasoning of a few of his opinions, but usually have not disagreed with the decisions he reached. His ruling on a challenge to Obamacare's individual mandate is an exception to this rule — some conservatives do fault his decision — but even it has an asterisk. He would have dismissed the case on the ground that the courts did not yet have jurisdiction over it, in keeping with views he has long advocated. He did not bless the idea that the federal government could order people to buy a product, as the four most liberal members of the Supreme Court later would have done. Nor did he rewrite the text of Obamacare to uphold it, as Chief Justice John Roberts did.

It would be utterly implausible, indeed laughable, for Senate Democrats to try to portray Kavanaugh as unqualified. They will instead try to present him as a right-wing monster. They will try to make him pledge to keep the Supreme Court rather than legislatures in charge of abortion policy, even though the Constitution requires no such thing; then they will condemn him for refusing to take the pledge. They will portray his concern for the structural limits on government power as a blanket hostility to government, which it is not. And they will cherry-pick decisions in which he ruled against a sympathetic cause or litigant, as is sometimes a judge's duty.

They will call him every name in the book. But before too long, they will, as they should, be calling him "Justice."

The Impact of Sexual Violence

Fact Sheet



Sexual violence occurs whenever a person is forced, coerced, and/or manipulated into any unwanted sexual activity, including when s/he is unable to consent due to age, illness, disability, or the influence of alcohol or other drugs.

Forms of sexual violence

Sexual violence includes rape, incest, child sexual assault, ritual abuse, non-stranger rape, statutory rape, marital or partner rape, sexual exploitation, sexual contact, sexual harassment, exposure, and voyeurism. It is a crime not typically motivated by sexual desire but by the desire to control, humiliate, and/or harm.

Sexual violence can violate a person's trust and feeling of safety. It can, and does, happen to people of all ages, races, genders, sexual orientations, religions, professions, incomes, and ethnicities. Sexual violence affects all of us: survivors, significant others, communities, and society.

Impact on survivors

Each survivor reacts to sexual violence in her/his own unique way. Personal style, culture, and context of the survivor's life may affect these reactions. Some express their emotions while others prefer to keep their feelings inside. Some may tell others right away what happened, others will wait weeks, months, or even years before discussing the assault, if they ever choose to do so. It is important to respect each person's choices and style of coping with this traumatic event.

Whether an assault was completed or attempted, and regardless of whether it happened recently or many years ago, it may impact daily functioning. A wide range of reactions can impact victims.

Emotional reactions

- Guilt, shame, self blame
- Embarrassment
- Fear, distrust
- Sadness
- Vulnerability
- Isolation
- Lack of control
- Anger
- Numbness
- Confusion
- Shock, disbelief
- Denial

Psychological reactions

- Nightmares
- Flashbacks
- Depression
- Difficulty concentrating
- Post Traumatic Stress Disorder (PTSD)
- Anxiety
- Eating disorders
- Substance use or abuse
- Phobias
- Low self esteem

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Physical reactions

- Changes in eating or sleeping patterns
- Concerns about physical safety
- Physical injury
- Concerns about pregnancy or contracting an STI or HIV

Impact on significant others

Sexual violence can affect parents, friends, partners, children, spouses, and/or coworkers of the survivor. As they try to make sense of what happened, significant others may experience similar reactions and feelings to those of the survivor. Fear, guilt, self-blame, and anger are but a few reactions they may experience. In order to best support the survivor, it is important for those close to them to get support. Local social services providers offer free confidential services to those affected by sexual violence.

Impact on communities

Schools, workplaces, neighborhoods, campuses, and cultural or religious communities may feel fear, anger, or disbelief if a sexual assault happened in their community. Additionally, there are financial costs to communities. These costs include medical services, criminal justice expenses, crisis and mental health services fees, and the lost contributions of individuals affected by sexual violence.

According to the U.S. Department of Justice (1996) the cost of crime to victims is an estimated $450 billion per year. Rape is the most costly to its victims, totaling $127 billion annually.

Impact on society

Sexual violence endangers critical societal structures through climates of violence and fear. According to the 1995 U.S. Merit Systems Protection Board, sexual harassment alone cost the federal government an estimated $327 million in losses associated with job turnover, sick leave, and individual and group productivity among federal employees.

Fifty percent of rape victims lost or were forced to quit their jobs in the year following their rapes due to the severity of their reactions (Ellis, Atkeson & Calhoun, 1981). Scholars at Johns Hopkins University School of Public Health indicated that development of Post Traumatic Stress Disorder (PTSD) is likely in 50 to 95 percent of rape cases (1999). Lifetime income loss, due to sexual violence in adolescence, is estimated at $241,600 (MacMillan, 2000).

The contributions and achievements that may never come as a result of sexual violence is a cost to society that can't be measured.

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Qualified Kavanaugh: A prudent pick for the court

unionleader.com/article/20180711/OPINION01/180719891

EDITORIAL
July 10, 2018 8:15PM

The "grassroots" campaigns for and against the confirmation of Judge Brett Kavanaugh to the U.S. Supreme Court were off and running well before President Donald Trump made his announcement on Monday night.

Conservative groups prepared websites in support of Kavanaugh and the other judges reportedly on Trump's shortlist. Liberal protesters waved preprinted signs opposing Kavanaugh in front of the Supreme Court.

Senators on both sides of the aisle quickly announced their votes on Kavanaugh's nomination. To their credit, neither Sen. Jeanne Shaheen nor Sen. Maggie Hassan were part of this rush to judgment.

They promise to examine Kavanaugh's extensive record. It stands in opposition to their liberal judicial philosophy, and we doubt Kavanaugh will give them the assurances they seek on the outcome of future cases involving abortion and gay rights. Both Shaheen and Hassan voted against confirming Justice Neil Gorsuch in 2016 based solely on his conservative judicial philosophy, not any lack of qualifications.

Kavanaugh is an experienced, well-qualified pick, and would have easily won confirmation if that were the criteria used. But that standard has eroded to nothingness since Democrats smeared Robert Bork 31 years ago.

Judges, including Supreme Court justices, should be weighed on their ability to interpret the law as written, not the political preferences of those voting on their nominations.

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Blaming the Victim in the Case of Rape

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At the heart of "A Theory of Blame" is the Path Model of Blame, a map of the four or five information-processing steps that Malle, Guglielmo, and Monroe (this issue) propose are necessary and sufficient to account for observers' ascription of blame to norm violators. The path model outlines the routes to blame from event detection onward and includes judgments of agent causality and intentionality as well as finer distinctions involving consideration of the agent's reasons, obligations, and capacity to act in relation to the event.

Our recent research has focused on cases that may represent exceptions to standard models of blame, including perhaps the Path Model of Blame—sexual assault[1] and rape.[2] On one hand, rape involves a clear perpetrator (the rapist) and a clear victim (the individual who is raped); observers may be expected to assign blame to the perpetrator and to the perpetrator alone. On the other hand, assigning some degree of blame to rape victims is not uncommon (e.g., Bieneck & Krahe, 2011; Catellani, Alberici, & Milesi, 2004; Jones & Aronson, 1973; Krahe, 1991; Krahe, Temkin, & Bieneck, 2007; McCaul, Veltum, Boyechko, & Crawford, 1990). Indeed, the basic pattern of relatively lenient judgments of perpetrators alongside relatively harsh judgments of victims in the case of rape has been found in examinations of legal and medical proceedings, as well as social psychological experiments in which participants assign blame in the case of rape versus nonsexual crimes such as robbery (e.g., Bieneck & Krahe, 2011; Campbell, Wasco, Ahrens, Sefl, & Barnes, 2001; Daly & Bouhours, 2010; Krahe et al., 2007; McGuire, Donner, & Callahan, 2012). In this commentary, we investigate whether the Path Model of Blame accommodates the phenomenon of victim blaming, as often observed in the case of rape.

The most straightforward application of the model to the case of rape proceeds as follows (Figure 1, left panel). First, observers detect rape as the norm-violating event. Second, observers detect the rapist as the causal agent. Third, observers determine the rapist's intentions and reasons. Finally, observers assign some degree of blame to the rapist. As such, the path model accounts for how observers might assign blame to the perpetrator, that is, the rapist, in the case of rape. How might the path model apply to the victim? Following event detection is determination of agent causality: Did the victim cause the rape? A negative answer here results in no blame assigned to the rape victim (Figure 1, right panel).

Yet, as evidence indicates, observers often assign blame to rape victims (e.g., Bieneck & Krahe, 2011; Catellani et al., 2004; Jones & Aronson, 1973; Krahe et al., 2007; McCaul et al., 1990). For illustration, we start with a case study: Recently publicized incidents at Patrick Henry College (PHC), which highlight the complex psychology of blame in the case of sexual assault. When a PHC student brought her own experience of sexual assault to the attention of the Dean of Student Affairs, she received the following response (Feldman, 2014): "You are in part responsible for what happened, because you put yourself in a compromising situation.... Actions have consequences" (para. 72). The suggestion here is that *responsibility* and, likely, *blame* are appropriately assigned at least in part to the alleged victim. But if the perpetrator (and not the victim) in the case of sexual assault is the causal agent (Figure 1, left panel), how are we to make sense of victim blaming? Can both the victim and the perpetrator be causal agents? According to the dean's statement just presented, a victim, by her "action" of being present, can be "in part responsible" for the perpetrator's decision to rape her.

We turn to the question of whether the Path Model of Blame accommodates victim blaming. We think that Malle et al. specify a series of conditions that

[1]Sexual assault has been defined by the National Institute of Justice: "Sexual assault covers a wide range of unwanted behaviors—up to but not including penetration—that are attempted or completed against a victim's will or when a victim cannot consent because of age, disability, or the influence of alcohol or drugs. Sexual assault may involve actual or threatened physical force, use of weapons, coercion, intimidation, or pressure" (National Institute of Justice, 2010).

[2]Rape has been defined by the National Institute of Justice: "Most [rape] statutes currently define rape as nonconsensual oral, anal, or vaginal penetration of the victim by body parts or objects using force, threats of bodily harm, or by taking advantage of a victim who is incapacitated or otherwise incapable of giving consent. Incapacitation may include mental or cognitive disability, self-induced or forced intoxication, status as minor, or any other condition defined by law that voids an individual's ability to give consent" (National Institute of Justice, 2010).

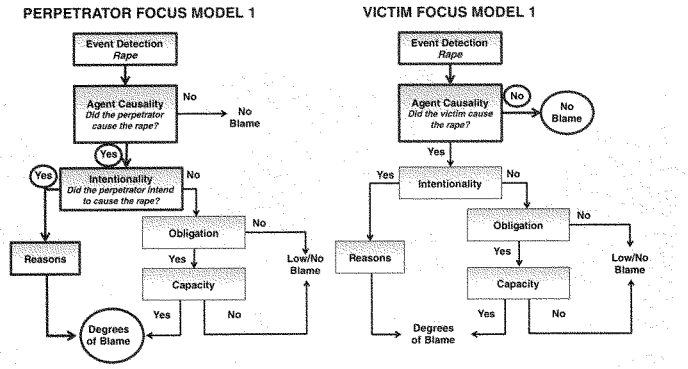

Figure 1. Malle et al.'s Path Model of Blame applied to evaluation of the perpetrator (left panel) and the victim (right panel) in the case of rape. (Color figure available online.)

may pave the way for victim blaming (Figure 2). First, victim blaming requires ascribing causality to the victim for the perpetrator's action; such ascriptions of causality are consistent with the dean's statement. The next question is whether the victim *intended* to cause herself to be raped. Assuming the answer is "No," the next step is to determine whether the victim had an *obligation* to prevent causing the rapist to rape her. If the answer here is "Yes," the next step is to determine whether the victim had the *capacity* to fulfill her obligation. If the answer here is "Yes," then the victim will be ascribed some degree of blame (Figure 2). If not, "low blame" and "no blame" judgments remain options.

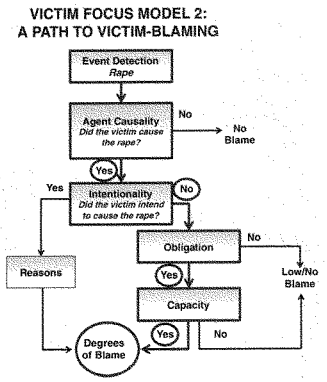

Figure 2. Malle et al.'s Path Model of Blame applied to evaluation of the victim in the case of rape. *Note.* Here, when the victim is determined to have caused the event at least in part, degrees of blame may be assigned to the victim. (Color figure available online.)

Let's take a closer look at the critical notion of *obligation*. The dean's statement represents a certain pattern of responses to sexual assault and sexual assault victims. The dean implies that the alleged (female) victim should have known to not put herself in a "compromising situation", for example, studying in private with another (male) student, the alleged perpetrator. She should have predicted that her own assault would follow from the situation, and therefore she should have met an implicit obligation to prevent the assault.

Our own recent research has targeted the impact of ideological factors on people's attitudes toward victims of sexual versus nonsexual crimes. We found, across a number of experiments, that participants rated sexual crime victims (i.e., hypothetical victims of rape and molestation) as *more contaminated* and *less injured* relative to nonsexual crime victims (i.e., hypothetical victims of stabbing and strangling). Moreover, perceptions of sexual assault victims as contaminated versus injured were predicted by ambivalent sexism, moral valuation of purity norms, and male gender. We also measured whether participants implicitly ascribed causality to the victim: Participants predicted whether *he* or *she* would be the next word in the following sentence stem: "George raped Julie

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because ..." (Garvey & Caramazza, 1974; Hartshorne, 2013; Hartshorne & Snedeker, 2013; Pickering & Majid, 2007). The vast majority of participants selected *he*, implicitly ascribing causality to the rapist. In other words, most participants may have considered reasons why George caused the event (e.g., "because he is prone to violence," "... is a terrible person," "...wanted to teach her a lesson," "...couldn't control his desire"). Notably, though, the participants who selected "she" were more likely to report sexist attitudes and conservative moral values (including concern for purity and respect for authority). These participants may have been more likely to consider Julie's causal role in the event (e.g., "because she was walking alone at night," "...was drunk and passed out," "...was wearing a short skirt"). Consistent with their implicit ascription of causality to the victim, the participants who completed the sentence stem "George raped Julie because..." with *she* were also more likely to rate sexual crime victims as less injured and to associate at an implicit level (based on a Single-Category Implicit Association Test) rape with *sex* rather than rape with *harm*.

Future work is needed to determine the precise relationship between blame and each of the measures used in our research: explicit assessments about injury and contamination of sexual assault victims, implicit associations between rape and sex versus rape and harm, and implicit ascriptions of causality to rape victims. Nevertheless, the cognitive processes underlying these attitudes are likely to play some role in blame judgments, including victim blaming. For example, sexism and moral valuation of purity and authority, which we found to track with implicit and explicit attitudes toward sexual assault victims, may relate to attitudes about female sexuality that may, in turn, explain the sentiments expressed in the dean's statement. Specifically, benevolent sexism involves attributing a woman's worth in part to her sexual and spiritual "purity," whereas hostile sexism involves condemning women who do not adhere to traditional gender norms including ideals of female purity (Glick & Fiske, 1997). Women may be seen by some as under an *obligation* to keep themselves pure and to prevent themselves from being defiled or contaminated by sexual assault.

It is worth noting at this point that we have explored two possible interpretations of the evidence: Either victim blaming is an important exception unaccounted for by the path model (Figure 1, right panel) or victim blaming can, in fact, be accommodated by the path model (Figure 2). An important normative question remains: Is victim blaming rational? We think not, in accordance with the official position of the administration of PHC. The PHC Office of Communication released a statement in the aftermath

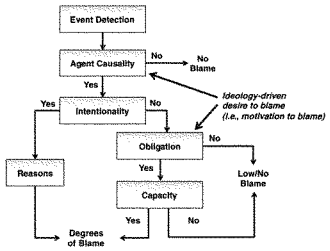

Figure 3. Within the Path Model of blame, agent causality and obligation judgments represent potential targets of ideology-driven desire to blame that may increase victim blaming in the case of rape.

of the media explosion involving their response to sexual assault (Dreher, 2014):

> Patrick Henry College believes it is offensive to suggest that persons who have been assaulted are somehow 'responsible' for the crime that has been perpetrated against them. The College and its administrators do not take the view, and have never taken the view, that female students somehow are responsible if they have been subjected to a sexual assault. (para. 21)

Indeed, evidence suggests that ideological factors may be strong drivers of victim blaming in the case of sexual assault. We suggest further that ideological motivation to blame the victim affects information processing particularly at the agent causality and obligation nodes of the path model (Figure 3). Yet the path model does not appear to allow for the key influence of ideology or motivated cognition on victim blaming. If it is not a desire to blame the victim in service of sexism or the maintenance of purity and authority norms that informs what is meant by *obligation* in the path model as applied to sexual assault, then what are the factors that enable rational judgments about obligation or even causation? We call on Malle et al. to clarify their position on whether victim blaming (in general or specifically in the case of sexual assault) represents an exception to the path model and the extent to which motivated cognition has a role to play in victim blaming.

Note

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Democrats' demented assault on Brett Kavanaugh

nypost.com/2018/07/10/democrats-demented-assault-on-brett-kavanaugh/

Opinion

editorial
By Post Editorial Board

Senate Democrats are treating President Trump's selection of Judge Brett Kavanaugh for the Supreme Court as the end of civilization. And that's not much of an exaggeration.

"Judge Brett Kavanaugh represents a direct and fundamental threat to the promise of equality" and to "the health care of hundreds of millions of Americans," said Sen. Kamala Harris (D-Calif.), a top contender for her party's 2020 presidential nomination.

So much for a fair and honest evaluation — which they aren't even pretending to make before declaring their opposition. Then again, the over-the-top, patently ridiculous rhetoric proves that Democrats see this as nothing but a political game.

It's likely to backfire, though: Lacking a Senate majority, the Dems will have to peel off one or two Republicans to stop Kavanaugh.

But one of their prime targets, Sen. Susan Collins of Maine, let it be known Tuesday that she's not buying the argument that the judge is unfit for the high court.

"When you look at the credentials that Judge Kavanaugh brings to the job," she said, "it'll be very difficult for anyone to argue that he's not qualified for the job."

Indeed, he's more than just qualified. In his 12 years on the federal appeals bench, he's built an exemplary record that's left a decided impact on the law: The Supreme Court has fully adopted the logic behind 11 of his decisions in its own rulings.

And while that record is reliably conservative, he's far from the "hard right" extremist described by, among others, New York's own Chuck Schumer. The Senate minority leader vows to fight Kavanaugh "with everything I've got."

"Everything" includes breaking with 25 years of precedent to press Kavanaugh to say how he'd vote on specific cases.

This, notwithstanding the warning by Ruth Bader Ginsburg that doing so shows "disdain for the entire judicial process." When "Notorious RBG" said that at her 1993 confirmation hearing, Democrats cheered.

Now, however, this is all about appeasing the party's increasingly extreme base, which has long looked to the federal courts as a de facto liberal legislature.

Justice-designate Kavanaugh, on the other hand, would ensure faithful adherence to the Constitution. No wonder Schumer & Co. are terrified.

I don't know Kavanaugh the judge. But Kavanaugh the carpool dad is one great guy.

washingtonpost.com/opinions/i-dont-know-kavanaugh-the-judge-but-kavanaugh-the-carpool-dad-is-one-great-guy/2018/07/10/a1866a2c-8446-11e8-9e80-403a221946a7_story.html

By Julie O'Brien

July 10

Julie O'Brien lives in Chevy Chase.

Much has been written about Brett Kavanaugh as President Trump's nominee for the Supreme Court, but the discussion has focused on his record as a federal judge and in his legal career. I'd like to talk about him as Coach K. Like the one at Duke University, this Coach K also is a mentor to student-athletes who love basketball. But his players are sixth-grade girls.

Brett's older daughter and mine have been classmates at Blessed Sacrament School, a small Catholic school in the District, for the past seven years. On evenings and weekends, you're likely to find Brett at a local gym or athletic field, encouraging his players or watching games with his daughters and their friends. He coaches not one but two girls' basketball teams. His positive attitude and calm demeanor make the game fun and allow each player to shine. The results have been good: This past season, he led the Blessed Sacrament School's sixth-grade girls team to an undefeated season and a citywide championship in the local Catholic youth league. To the parents with players on the squad, it's no surprise that the team photograph with the trophy is displayed prominently in his chambers.

Brett's contribution to our school's community extends beyond the sidelines. He and his wife, Ashley, support their two daughters and other children at countless school and church functions throughout the year. In the summer, Brett is the "carpool dad," often shuttling students to and from practices, games and activities. And in a city where professional obligations can often take priority over personal ones, Brett is a steady presence at his daughters' events, even if it means racing across town just to catch the last 15 minutes of a game or program.

Brett's friendship and mentorship have touched my family in an especially personal way. A few years ago, my husband died. One of the many difficult aspects of that loss was that my daughter had no one to accompany her to the school's annual father-daughter dance. That first year — and every year since my husband's passing — Brett has stepped forward to take my daughter to the dance alongside his own.

I'll leave it to others to gauge Judge Kavanaugh's qualifications for the Supreme Court as a jurist. But as someone who would bring to his work the traits of personal kindness, leadership and willingness to help when called on, he would receive a unanimous verdict in his favor from those who know him.

Brett Kavanaugh nomination might be the calm before the storm

ocregister.com/2018/07/10/brett-kavanaugh-nomination-might-be-the-calm-before-the-storm/

July 10, 2018

Opinion

President Donald Trump shakes hands with Judge Brett Kavanaugh his Supreme Court nominee, in the East Room of the White House, Monday, July 9, 2018, in Washington. (AP Photo/Alex Brandon)

By The Editorial Board | opinion@scng.com |
PUBLISHED: July 10, 2018 at 8:00 pm | UPDATED: July 11, 2018 at 5:02 pm

Brett Kavanaugh, President Trump's nominee to replace retiring "swing vote" Justice Anthony Kennedy, is a sound, safe choice to fill the upcoming Supreme Court vacancy.

Impeccably credentialed, conventionally conservative, and less likely than other shortlisted judges to overturn landmark culture-war case law, Kavanaugh indicates a willingness on Trump's part to sometimes opt against ratcheting up open political conflict.

Of course, that has not stopped the usual ideological suspects from flying into action to discredit and impugn Kavanaugh. In today's paranoiac partisan atmosphere, critics have already accused Kavanaugh of being Kennedy's own all-but-handpicked successor, or Trump's favorite due to his prior opinions on executive immunity.

A nationally respected expert on administrative law, Kavanaugh has also been subject to cries that he will slavishly serve the interests of big business. Much nearer to the truth is informed speculation that, if confirmed, Kavanaugh will find occasion to chip away at the federal bureaucracy more to curb government excess than to line the pockets of CEOs.

In that sense, the wave of enthusiasm from Republican circles for Kavanaugh's nomination reflects an earnest hope on the part of established conservative elites for an eventual return to "normal" after, if not during, Trump's tenure in office. Observers across the ideological spectrum had braced for a confrontational choice from Trump, worried the legitimacy of the Supreme Court might come under real doubt. That dark cloud appears to have passed.

But even mainline liberal commentators have begun to speak up in favor of radical "reforms" to the court, including term-limiting justices and packing the bench with an expanded roster. And on the right, pro-life activists, especially among Kavanaugh's fellow Catholics, have grown more emboldened, warning that a failure to overturn Roe v. Wade should result in a political revolt against governing Republicans.

Despite Kavanaugh's reassuring image of normality and judicial cohesion, his presence on the

court will probably do nothing to tamp down or discourage deepening polarization in America and the continued weakening of institutional authority.
In the midst of so much dry kindling, Kavanaugh could surprise and help strike a spark for out and out political warfare. Even if he does not, however, his confirmation is apt to function more as a breather before a fresh round of potentially wrenching national change than as ballast for business as usual. Administrative rot, weak constitutional law, and the vagaries of life in our digital age all conspire to strengthen today's political and legal storms.

Less than a decade ago, the safe bet was that jurists like Kavanaugh would go on filling Supreme Court vacancies until the end of days. But that was the sort of bet that resulted in top analysts giving Hillary Clinton overwhelming odds of winning the White House. Not only are times changing — more and more, Americans with extreme, comprehensive views desire even greater change. Looking back, there is a real chance Kavanaugh will seem like one of the last of a passing breed.

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Statement of Professor Gary Orfield on Nomination of Judge Brett Kavanaugh

September 12, 2018

I believe that Judge Kavanaugh is a clear and present danger to the rights of more than one hundred million people of color in the U.S. and to their communities and descendants. The United States has always had serious problems of racial inequality and discrimination. The only periods of strong government action on behalf of equalizing rights were the Reconstruction following the civil war, where major parts of the changes were possible only because the South had no representation in Congress for a time after the war. The great civil rights accomplishments of the Reconstruction—three great Constitutional amendments and major civil rights laws were interpreted away by conservative Supreme Courts in the decades after the withdrawal of federal forces from the South. The courts did nothing to stop the restoration of a powerful system of black social and economic subordination, segregation in many aspects of life, and white supremacy that held for six decades after the Supreme Court's *Plessy v. Ferguson*, separate but equal decision which, in practice, meant whatever state and local whites wanted to do. The second period of reform was begun by the *Brown* decision in 1954 and reached its peak in the 1960s in the passage of three great civil rights laws and extremely important and usually unanimous decisions by the Supreme Court. Those laws, decisions, and constitutional amendments on the poll tax and intermarriage brought vast changes, particularly in the 17 states with a history of segregation mandated by state law and constitutions. The key to large changes was the law moving from focus on individual violations, of which there were countless millions, to requiring conscious plans for integrating and equalizing opportunity. The Supreme Court recognized the need for those plans in powerful decisions recognizing that the legacy of racial subordination was powerful and self-perpetuating and could only be reversed with systematic strategies. Those changes generated massive resistance among a substantial part of the white communities, and transformation of both national political parties as well as many other changes. The Warren Court was transformed by five Nixon and Ford appointments and the expansion of civil rights law on racial discrimination ended. By a single vote the Supreme Court said that

there was no federal right to equal schools in the 1973 *Rodriguez* case and the Court ruled,5-4, that the suburbs would be exempt from school desegregation policies in *Milliken* v. *Bradley*, making it impossible in many metros with segregated nonwhite central city school systems even when the segregation was proven to be the product of discrimination. Both of these historic decisions for separation and against equality were made by the margin of one vote on the Supreme Court and have held for more than four decades. Each appointment can have life changing consequences for the rights of millions of Americans.

As a very young professor at Princeton Univ. I testified against the confirmation of William Rehnquist to the Supreme Court in 1971. I had testified about two other failed Nixon nominees because I knew the cases they had decided and what their civil rights records were. I decided to testify against Rehnquist when the FBI called my home and demanded to know by midnight whether I planned to testify against Rehnquist and what my sources were. In my testimony I reviewed his limited public record and saw clear signs that he would be actively hostile to civil rights. He had taken a position against *Brown* as a clerk on the Supreme Court and had opposed a public accommodations law in Phoenix opening restaurants and other facilities to minorities and he had been actively challenging minority voters in polling places. At that time, I spoke to many members and staff about my concerns about what this meant. A number of them said, don't worry, judges can change and he finished very high in his class at Stanford Law School. In his testimony he lied about his opposition to the *Brown* decision as a clerk on the Supreme Court when it was considered, as documented by former Nixon White House Counsel John Dean who managed the nomination for the administration in his book, *The Rehnquist Choice*. His 1952 memo in which he held that the Brown decision was a mistake and the "separate but equal" *Plessy v. Ferguson* "was right and should be re-affirmed." Rehnquist lied also about his challenging minority voters. Efforts to postpone the vote on his nomination were voted down, and he served for almost 34 years, becoming Chief Justice for more than half. He had a major impact on constitutional rights for more than eight presidential terms. A single appointee to a closely divided Court can have far larger impact on American society than most Presidents.

Rehnquist was a consistent opponent of civil rights, especially school desegregation, often in extreme terms, and he authored the *Dowell* decision in 1991, that began a continuous increase of segregation, which had reached its low point in the late 1980s and following *Dowell* increased year by year, losing all of the progress since late 1960s. School districts across the country have resegregated, sometimes through court decisions forbidding school districts to keep integration plans that they believed to be educationally and socially beneficial. That decision is a principal reason for the backward movement for higher segregation and for the resulting harm to students of color forced to attend schools more afflicted by weaker educational offerings.

It is clear from the limited documents provided to the public that Brett Kavanaugh was a very active opponent of affirmative action in the run-up to the key decision protecting policies the great majority of major universities thought necessary for their educational mission in *Grutter v. Bollinger* 359 U.S. 306 (2003). Kavanaugh's position was that affirmative action should be declared unconstitutional because it was not necessary. He claimed that affirmative action should be rejected on the basis of the claim that it was unnecessary, resting especially on the experience in Texas and in Florida. He either did not know or was not interested in the widely publicized research that showed that the Texas plan had fallen far short and that the Florida plan had been massively misrepresented by Gov. Jeb Bush and that, in fact, it had not made the claimed gains and the students who met the criteria were only entitled to admission of a non-

competitive school where they probably could have been admitted anyway. The Supreme Court, in an opinion by Reagan appointee Justice Sandra Day O'Connor, rejected the argument argument as did Justice Kennedy's. Subsequent research published in 2015 showed that there were no feasible alternatives that would accomplish what affirmative action has done. In the documents it is clear that Kavanaugh was working very closely with other leading opponents of affirmative action and civil rights policy in general. His attitudes expressed on minority contracting showed a similar pattern. His drive is to take control of the courts by advocates of very restrictive readings of civil rights law.

His central role in the White House Counsel's office was to manage court appointments. He obviously does not believe that judges become neutral umpires when they go on courts but that they must be screened and staged to win ideological control of the courts. He was closely involved with the Federalist society which has screened all GOP judicial appointments for decades and helped prepare President Trump's list The Federalist society has featured strong opposition to modern civil rights law. Kavanaugh had played highly political roles both in the prosecution of the Clinton impeachment and in the judicial appointments area and in helping shape the Bush Administration's efforts to roll back civil rights. He is very intelligent but he is clearly a highly political ideological partisan. His role in Bush judicial appointments is evident in the passage in George W. Bush's book on his Presidency, (*Decision Points*, p. 98) where he notes that he turned to Kavanaugh for advice in choosing Chief Justice Roberts even though Kavanaugh was already away from the White House and serving on the DC Circuit Court of Appeals.

What we have in Kavanagh, evident in the documents released so far, is a politically active movement conservative who worked hard to remake the federal courts as a bastion of conservative ideology. He is clearly a skeptic of positive policies specifically aimed at racial inequality and would be inclined to use the power of the courts to outlaw practices almost all the leading U.S. universities employ and for which research shows there is no effective and feasible alternative. There is in his emails none of the concern expressed in the *Bakke* and *Grutter* decisions for the traditional autonomy of the universities in making academic judgments. While some judges have evolved and changed their views somewhat over time, the conservatives trained in conservative agencies, deeply involved with the Federalist society and its worldview, and with no practical experience in the realities of racial inequality in the U.S. have been disconcertingly predictable. I have been involved in many leading civil rights cases and all of the discussions begin with the assumption that there are four hostile votes on the Supreme Court now that will always be opposed and I know of no cases where that has not been true. Kavanaugh, I believe, would be the fifth. I would be very happy to be proved wrong but I know this kind of judicial mindset.

Appointing Kavanaugh and consolidating an anti-civil rights majority is risking the future of the country. We are a profoundly multiracial and extremely unequal society. There has never been a day in which black and white and Latino students in America have received the same opportunities. We give the best opportunities to those who are most privileged. Civil rights law was supposed to help solve that inequality. We have not solved our problems. We've been going backwards toward greater inequality on some key dimensions for decades and the Supreme Court which was long viewed as a protector of the excluded has become one of the leading causes of this regression. Our racial problems are at a very explosive point following the most racially divisive national election in more than a century, with our political parties split on

race and racial fears and stereotypes being played for political advantage. We have the remnants of civil rights law that was largely focused on black-white problems in the South but our country is now a four-race society in which whites are already a minority in its two largest regions and there are frightening patterns of metropolitan separation. Racial segregation in education is at a half-century high and the schools are profoundly unequal. The gap in college completion which is very threatening for the future of our society and economy has actually grown.

We will pay dearly if we create a Court that dismantles the limited tools remaining, running roughshod over the great precedents of the civil rights. Era. We could face some of the classic problems of a society where a dominant minority suppresses a very disadvantaged majority of people of color and closes crucial doors. That was surely not the vision of the great civil war amendments. Putting the controlling vote over vital decisions about what kind of a society we are in the hands of Judge Kavanagh would be a serious step backward. Pluralistic societies with profound inequality are fragile. It has not been healthy for the law that our closely divided society has had a constant Supreme Court majority of judges appointed by the conservative party nearly a half century. To turn the High Court over to a determined group from the far right of that party, all white males with no relevant social experience or apparent empathy, would be closing the door to one of the most important adaptive institutions in our society.

I think that the Senate should require the production and examination of the full record of this very political judge, make sure that he is telling the truth, and debate it seriously before deciding that he should be given the power to deepen racial inequality and, for example, resegregate the nation's colleges, one of the aspects of our society that is most profoundly admired across the world by denying them the opportunity to what they are convinced the need to do to educate well our future generations.

Orfield is Distinguished Research Professor of Education, Law, Political Science & Urban Planning at the University of California, Los Angeles

He is co-founder and co-director of the Civil Rights Project, the nation's most active research center on civil rights and education and author or editor of many books and research studies on these issues. For further information and reports see civilrightsproject.ucla.edu.

Statement for the Record from Planned Parenthood Federation of America and Planned Parenthood Action Fund

Submitted to the Senate Judiciary Committee

Nomination of the Honorable Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States

September 4, 2018

Planned Parenthood Federation of America ("Planned Parenthood") and Planned Parenthood Action Fund have a long history of advocating and working to protect and expand reproductive health care access and rights, and for these reasons, strongly oppose the nomination of D.C. Circuit Court Judge Brett Kavanaugh to the U.S. Supreme Court.

Planned Parenthood is the nation's leading provider and advocate of high-quality, affordable health care for women, men, and young people, as well as the nation's largest provider of sex education. With over 650 health centers across the country, Planned Parenthood provides affordable birth control, lifesaving cancer screenings, testing and treatments for sexually transmitted infections, and other essential care to nearly three million patients every year. Nearly 78 percent of Planned Parenthood patients have incomes at or below 150 percent of the federal poverty level, and they are among the most vulnerable, facing limited access to reliable and affordable health care.

The nation's courts, particularly the U.S. Supreme Court, play a vital role in the fight for equal rights for women and for protecting reproductive and individual freedoms. Given the unprecedented attacks on women's health taking place at the federal and state levels, it is imperative that any nominee to the Supreme Court affirms our basic rights and rebuffs these attempts to restrict women's access to health care.

President Trump's Supreme Court nominee Brett Kavanaugh has an alarming history of interfering with reproductive rights and health, including women's access to birth control and abortion, and unless he affirmatively declares that the Constitution protects individual liberty and the rights of all people to make personal decisions about their bodies and personal relationships, the Senate should not confirm him.

The Constitution's protection of individual liberty—which safeguards our personal decisions relating to marriage, abortion, contraception, and more—finds deep roots in our nation's history, traditions, and jurisprudence. And for good reason. Over the last several decades, we as a nation have made great progress towards the promise of equal dignity and rights for women, due in no small part to women's ability to control their bodies. Indeed, the Supreme Court has long recognized that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to

control their reproductive lives."[1] In keeping with that promise, for more than 45 years, the fundamental right to safe and legal abortion has been the law of the land.

Every nominee to the federal courts, and especially any nominee to the Supreme Court, must make clear that they will protect our fundamental rights—including the right of a woman to control her body without interference. There has never been a more important Supreme Court nomination.

Brett Kavanaugh's judicial record, unfortunately, makes clear that he does not respect women's right to control their own bodies. Last year, Kavanaugh blocked a lower court's order requiring the federal government to allow an undocumented woman entering the United States to have an abortion. Kavanaugh reasoned that allowing the government to indefinitely delay the young woman's abortion was not an "undue burden"—even though the government had already delayed the woman's abortion by more than one month, pushing her into the second trimester. Kavanaugh said that allowing the woman to exercise her constitutional right to abortion was in fact judicial creation of a "new right . . . to obtain immediate abortion."[2] As Judge Patricia Millett observed, "[s]ettled precedent" from the Supreme Court did not allow the government to continue to block the young woman's abortion, and the Constitution's protection of liberty "affords this 17-year-old a modicum of the dignity, sense of self-worth, and control over her own destiny that life seems to have so far denied her."[3]

Further, Kavanaugh has supported allowing employers to deny their employees access to birth control coverage under the guise of religious freedom. When the D.C. Circuit ruled that the Obama Administration's accommodation for religious employers did not violate those employers' rights, Kavanaugh dissented, expressing the view that the accommodation for religious nonprofits did not go far enough; he believed the employer's had the right to deny their employees health insurance coverage for birth control—effectively placing a woman's boss between her and her health care provider.[4]

In another case, Judge Kavanaugh ruled people with intellectual disabilities who had been deemed legally incompetent to make independent health care decisions had no right to have input into whether they should have an elective surgery, including abortion. In the case, three women claimed that their rights were violated when they were forced to have elective surgeries—one who had an eye surgery and the other two who were forced to have abortions. Kavanaugh ruled that the Constitution does not require the government to even attempt to ascertain the patients' wishes, saying it makes no "logical sense" to seek their input. His decision neither acknowledged nor appeared to consider that a person could have an intellectual disability but still might understand the nature of a surgery or have a right to know, think about, or decide whether to undergo a procedure. As the lower court reasoned, the argument that individuals who cannot make independent decisions about their health care cannot nevertheless communicate a choice or preference about their medical treatment defies both common sense and the dignity of those individuals.[5]

Yet another decision shows that Judge Kavanaugh's confirmation poses an existential threat to the Affordable Care Act. Dissenting from the D.C. Circuit's decision upholding the individual mandate, Kavanaugh wrote that the ACA was "unprecedented on the federal level in American history" and questioned whether Congress had the authority to enact it. He even suggested that the President could choose not to enforce the ACA, even if the courts found the law was constitutional. He also made the argument that Texas and 19 other states are now advancing in another lawsuit, which, if the courts

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[1] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).
[2] *Garza v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).
[3] *Id.* at 737–38, 742 (Millett, J., concurring).
[4] *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1 (D.C. Cir. 2015).
[5] *Doe ex. rel. Tarlow v. Dist. of Columbia*, 489 F.3d 376 (D.C. Cir. 2007).

accept, would ring the death knell for the ACA.[6] If the ACA were invalidated, 55 million women would lose access to no-copay preventive services—including birth control, screenings for sexually transmitted infections, and lifesaving preventive services such as cancer screenings. As many as 130 million Americans with preexisting conditions (such as pregnancy, HIV/AIDS, or cancer) could lose coverage too.

Kavanaugh's contributions to conservative organizations opposed to abortion rights—and the praise they have showered on him—further confirm he will not uphold our constitutional rights. In a speech to the American Enterprise Institute, Kavanaugh praised Justice Rehnquist's dissent in *Roe v. Wade* and said the constitutional right to abortion was a product of a "freewheeling" reading of the Constitution. Kavanaugh also said Rehnquist was his "first judicial hero" and follows in his mold. Rehnquist voted in more than 15 cases to uphold **every** abortion restriction challenged in the Supreme Court, including in *Roe*, which he had said was "wrongly decided."[7] Kavanaugh has also been given the seal of approval by right-wing anti-abortion groups like the Federalist Society, Heritage Foundation, Susan B. Anthony List, and many others. It should be no surprise, then, that one of his former law clerks wrote: "On the vital issues of protecting religious liberty and enforcing restrictions on abortion, no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh." Or why Trump nominated Kavanaugh after promising to appoint only anti-abortion-rights judges who would "automatically" overturn *Roe*.

Opinions like those of Judge Kavanaugh's are not what the American people want. Since the nomination of Judge Kavanaugh, activists across the country have been speaking out in opposition to share deep concerns about the balance of the Court and sharing concerns about returning to a time before *Roe v. Wade* when abortion access was limited. A sample of stories from women who shared their personal health care stories prior to the *Roe v. Wade* decision include:

- **Wendy:** "I know firsthand that overturning *Roe* will not stop women from needing abortion—overturning *Roe* will deny women access to safe abortion. When I was 17, the Supreme Court had not yet recognized the right to abortion and even New York, where I lived, had not yet made abortion safe and legal in the state. But I was pregnant and decided to have an abortion. The first doctor I found was not a reputable provider. I would have had to risk my safety and wellbeing if I allowed this doctor to perform an illegal abortion, so I did what many young women in my situation could not afford to do: I walked out. I found another doctor who performed my abortion in the dark of night. As I lay there, he lectured me, called me a sinner, and threatened that if I made any noise, he'd stop the procedure and let everyone "know my shame." No one should have to go through what I went through to access basic health care. Yet, as scary and dangerous as my experience was, I know I am one of the lucky ones. I survived. And I am not ashamed. I ask the Senate to stop the appointment of Judge Kavanaugh to the Supreme Court and stand up not only for the women of my generation who know the pain and hardship of abortion bans, but so the next generation never has to know our suffering."

- **Dev:** "I was working my way through college and I had a part-time job and found out I was pregnant through the student health center when I kept throwing up and couldn't figure out why. I thought I had the flu." After connecting with a friend of a friend who knew someone who would provide an abortion, Dev was taken in the middle of the night to a hotel where someone she was told was a doctor was going to perform her abortion. "They just took me into this hotel room and told me to lie down on the bed. I followed orders," she says. "She did the procedure with a

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[6] *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

[7] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *see also Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting) (stating that *Casey* was "wrongly decided").

rubber tube. They put a rubber tube up into your uterus, I guess, and basically to trigger a miscarriage. So it wasn't really aborted at that time, it had to stay in my body for a long time. I can't remember if I had to pull it out or it fell out, but essentially it was a miscarriage that was induced by this rubber tube that they put into me. I knew this was my only option." Dev later retired in 2016 after a career as a scientist at the CDC. She has a son and a daughter.

- **Pam:** "I was an 18-year-old student at Ohio State in 1971. In those days, it was not easy to get access to birth control, and many of us lacked comprehensive sex education. My boyfriend and I, like so many couples, did not use protection—and I became pregnant. I went to the Planned Parenthood clinic that was near campus. They couldn't provide me with an abortion because it was not legal. In Ohio at that time, the only way you could get a safe, legal abortion was if three psychiatrists signed off that you would hurt yourself or the pregnancy if you carried to term. So Planned Parenthood referred me to a clinic in New York City—an eight-hour, 500-mile trip away. My boyfriend and I drove straight there without stopping. I would have walked through broken glass to get this abortion, and there was no way I was not going to do it. After the procedure, we drove right back home—against medical advice. I had to drive some of the way. At the time, this was actually a good deal. Many women became victims of botched abortions, and many women attempted to self-abort. Many women suffered physical damage, and some even died. I was lucky because I was able to end the pregnancy without physical harm and move forward with my life. I was so grateful to have access to abortion that right after *Roe v. Wade*, I decided to work at the first abortion clinic in Ohio and the surrounding states. I was proud to work there for years, taking appointments and signing in patients at the front desk."

Judge Kavanaugh's appointment to the Supreme Court would swing the balance of the Court against abortion access—potentially for generations to come—returning millions of women to a time when abortion was illegal or impossible to access. In fact, there are currently thirteen cases involving abortion pending in the federal courts of appeals that are one step from the Supreme Court—all of which threaten *Roe v. Wade* and a woman's liberty to control her body and future. Judge Kavanaugh may have the opportunity to cast the deciding vote in one or more of these cases, which would impose medically unnecessary laws that have the effect of shuttering abortion providers, shame women for their decision to have an abortion, and further restrict abortion access in many parts of the country.

Moving the Court in this direction is widely unpopular and out of touch with voters. The majority of Americans support access to safe and legal abortion, and about seven in ten Americans oppose *Roe v. Wade* being overturned. People simply do not believe that politicians or judges should be making decisions for women about their birth control or their pregnancies.

We, therefore, call on every United States Senator to uphold a fundamental standard: only confirm a justice who declares they believe the Constitution protects individual liberty and the right of all people to make personal decisions about their bodies and personal relationships—including the right to use contraception, to have an abortion, and the freedom to marry whom they choose. Judge Brett Kavanaugh's alarming history of opposing reproductive rights and health demonstrates that he does not share this belief; his confirmation poses a grave threat to our most basic and fundamental rights and freedoms.

Planned Parenthood Federation of America and the Planned Parenthood Action Fund urge Senators to oppose the nomination of Judge Brett Kavanaugh.

Staff secretaries aren't traffic cops. Stop treating Kavanaugh like he was one.

washingtonpost.com/opinions/republicans-are-obstructing-a-fair-vetting-of-brett-kavanaugh/2018/07/30/9d823d00-9410-11e8-80e1-00e80e1fdf43_story.html

Opinions

By John Podesta and

Todd Stern

July 30

John Podesta served as White House staff secretary from 1993 to 1995 and later as chief of staff to President Bill Clinton and counselor to President Barack Obama. Todd Stern served as White House staff secretary from 1995 to 1998 and as U.S. special envoy for climate change from 2009 to 2016.

As former White House staff secretaries, we watch with bemusement as Republicans attempt to play down Supreme Court nominee Brett M. Kavanaugh's role in that position when he held it under President George W. Bush. The Republican phrase du jour is that Kavanaugh was just a "traffic cop." As in, merely a paper pusher in the White House.

Yet Kavanaugh himself, in describing his role as staff secretary at a 2004 Senate hearing, said that his job was "to give recommendations and advice" to the president. It seems apparent that Republicans — such as Senate Judiciary Committee Chairman Charles E. Grassley (Iowa), who has refused to request documents related to Kavanaugh's staff secretary tenure on behalf of the committee — are trying to keep closed the potential Pandora's box of Kavanaugh's staff secretary documents before they get out into public view. We should not tolerate this obstructionism.

First, staff secretaries are not traffic cops. They don't just wave memos or speeches through to the president or hold them in the queue until the next day. They are integrally involved in the decision-making process for an extraordinarily wide range of policy issues, since virtually everything comes to them before it goes to the president.

When we handled the job for President Bill Clinton, in much the same way that staff secretaries did for President George H.W. Bush, we wrote concise cover memos for every decision memo that went to the president. We summarized the underlying memo, identified the core decision points and options, and conveyed the views of key senior staff members from whom we had sought comment. We wrote hundreds of these memos. When we thought a memo needed further discussion before going to the president, we worked with the chief of

staff to arrange a meeting either to reach consensus on the advice or to better focus the points of disagreement. We had our hands in nearly every important matter that went to the president.

Of course, we tried to be honest brokers when presenting policy options and the views of senior advisers. But staff secretaries do get pulled into active debates about options. As trusted senior advisers, we often offered our thoughts on the right course for the president to take. Staff secretaries before us, such as Richard G. Darman for President Ronald Reagan and James Ciccone for President George H.W. Bush, were important senior advisers as well. And before he resigned from the Trump White House last year, staff secretary Rob Porter was widely described as an influential adviser.

It is clear that Kavanaugh, too, was an important player in the George W. Bush White House. Bush's top adviser, Karl Rove, described Kavanaugh as being at the heart of the Bush administration in shaping White House policy. Kavanaugh himself has said he worked on legislation, drafted executive orders and had a frequent role on presidential speeches. Indeed, that Kavanaugh was promoted from the White House counsel's office to assistant to the president (the highest rank in the White House structure) and staff secretary is a clear indication of Bush's regard for his advice and judgment.

Grassley says that Kavanaugh's staff secretary documents are "the least relevant to Judge Kavanaugh's legal thinking," but that's not the way Kavanaugh sees it. In 2010, explaining which of his experiences was most useful to him as a judge, he said his White House years "and especially my three years as staff secretary for President Bush" were "the most interesting and in many ways the most instructive." And in 2006, when considering Kavanaugh's nomination to the Court of Appeals, then-Judiciary Committee Chairman Orrin G. Hatch (R-Utah) said, "His background as staff secretary may prove to be particularly good judicial training."

Many issues are potentially relevant to Kavanaugh's confirmation process, particularly those in which he may well have been substantively involved, given advice or expressed views as staff secretary. Bush signed legislation limiting abortion in 2003, and his administration pushed to amend the Constitution to ban same-sex marriage. Bush made extraordinary use of signing statements — including for a law outlawing the torture of detainees — to claim a right to not execute any statute that he interpreted as unconstitutional. At his 2006 confirmation hearing for his Court of Appeals nomination, Kavanaugh denied knowledge about the infamous Justice Department torture memo drafted by then-Assistant Attorney General Jay S. Bybee. If Kavanaugh had a role in matters like these or many others, members of the Senate and the American people have a right to know.

Brett Kavanaugh has never been a "traffic cop." He is seeking a lifetime appointment to the highest court in our land. Just as it was fair for senators to review Justice Elena Kagan's documents as a policy adviser in the Clinton White House, it is fair for them now to review those of Kavanaugh as staff secretary.

JUDGE BRETT KAVANAUGH'S DECISIONS IN CASES WITH LEADING BUSINESS ASSOCIATION INVOLVEMENT

chamberofcommercewatch.org/judge-kavanaugh-business-decisions

Public Citizen August 30, 2018

Over the last several decades, Big Business associations, led by the U.S. Chamber of Commerce, have become far more active in federal litigation. Agency regulators now anticipate a lawsuit from a trade association when they issue major regulations. And trade associations led by the Chamber regularly file amicus briefs. Those briefs make legal arguments; they also serve to signal to judges what the Chamber and other trade associations believe to be important.

For this report, we identified cases that came before Judge Kavanaugh and in which the Chamber of Commerce, National Association of Manufacturers (NAM), or the American Petroleum Institute (API) participated as a party or amicus curiae.

To compile the list of relevant cases, we did Westlaw and Bloomberg searches for D.C. Circuit decisions where Judge Kavanaugh sat on the panel or that were heard en banc, and that included "Chamber of Commerce" or "National Association of Manufacturers" or "American Petroleum Institute." We assessed whether Judge Kavanaugh sided for or against the business group.

Our findings: In 25 of the 33 cases (76%) we found that were relevant to this inquiry, Judge Kavanaugh sided with the position advanced by the U.S. Chamber of Commerce, National Association of Manufacturers or American Petroleum Institute. In 8 cases (24%), he ruled against the position of the business group.[1]

Sided With Business Group

Case Name	Citation	Business Group
FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.	892 F.3d 1264 (D.C. Cir. 2018)	Chamber as Amicus for Appellee
American Petroleum Institute v. EPA	883 F.3d 918 (D.C. Cir. 2018)	API as Appellant
Loan Syndications and Trading Association v. SEC	882 F.3d 220 (D.C. Cir. 2018)	Chamber as Amicus for Appellant

Case Name	Citation	Business Group
PHH Corporation v. CFPB	881 F.3d 75 (D.C. Cir. 2018)	Chamber as Amicus for Petitioner
National Labor Relations Board v. CNN America, Inc.	865 F.3d 740 (D.C. Cir. 2017)	Chamber as Amicus for Appellee; NAM as Amicus for Petitioner
Americans for Clean Energy v. EPA	864 F.3d 691 (D.C. Cir. 2017)	API as Intervenor Respondent[2]
American Petroleum Institute v. EPA	862 F.3d 50 (D.C. Cir. 2017)	API and NAM as Appellants
FedEx Home Delivery, an operating division of FedEx Ground Package System, Inc. v. National Labor Relations Board	849 F.3d 1123 (D.C. Cir. 2017)	Chamber and NAM Amicus for Appellant
PHH Corporation v. CFPB	839 F.3d 1 (D.C. Cir. 2017)	Chamber as Amicus for Petitioner
EarthReports, Inc. v. FERC	828 F.3d 949 (D.C. Cir. 2016)	API as Respondent-Intervenor
District of Columbia v. Department of Labor	819 F.3d 444 (D.C. Cir. 2016)	NAM as Amicus for Appellee
Defenders of Wildlife and Center for Biological Diversity v. Jewell	815 F.3d 1 (D.C. Cir. 2016)	API as Intervenor Appellee
U.S. ex rel. Purcell v. MWI Corp.	807 F.3d 281 (D.C. Cir. 2015)	NAM as Amicus in support of reversal
Energy Future Coalition v. EPA	793 F.3d 141 (D.C. Cir. 2015)	API as Intervenor for Respondent
In re Kellogg Brown & Root, Inc.	756 F.3d 754 (D.C. Cir. 2014)	Chamber as Amicus for Petitioner; NAM as Amicus for Petitioner

Case Name	Citation	Business Group
Center for Biological Diversity v. EPA	749 F.3d 1079 (D.C. Cir. 2014)	API as Intervenor Appellees
White Stallion Energy Center, LLC v. EPA	748 F.3d 1222 (D.C. Cir. 2014)	Chamber as Amicus for Petitioner
Texas v. EPA	726 F.3d 180 (D.C. Cir. 2013)	NAM and API as Amicus for Petitioner
American Petroleum Institute v. EPA	706 F.3d 474 (D.C. Cir. 2013)	API as Petitioner
Grocery Manufacturers Association v. EPA	704 F.3d 1005 (D.C. Cir. 2013)	API as Petitioner
National Association of Manufacturers v. NLRB	2012 WL 1521549 (D.C. Cir. 2012)	NAM as Appellant
Coalition for Responsible Regulation v. EPA	2012 WL 6621785 (D.C. Cir. 2012)	Chamber, NAM, and API as Intervenors for Petitioner
Doe v. Exxon Mobil Corp.	654 F.3d 11 (D.C. Cir. 2011)	Chamber and NAM as Amicus for Appellees
Pharmaceutical Care Management Association v. District of Columbia	613 F.3d 179 (D.C. Cir. 2010)	Chamber as Amicus for Appellee
Sierra Club v. EPA	536 F.3d 673 (D.C. Cir. 2008)	API as Intervenor Appellee

Sided Against Business Group

Case Name	Citation	Business Group
Murray Energy Corp. v. EPA	788 F.3d 330 (D.C. Cir. 2015)	Chamber and NAM as Amicus for Petitioners

Case Name	Citation	Business Group
American Meat Institute v. Department of Agriculture	760 F.3d 18 (D.C. Cir. 2014)	NAM and Chamber as Amicus in support of Appellants
National Mining Association v. McCarthy	758 F.3d 243 (D.C. Cir. 2014)	Chamber, API, and NAM as Amicus for Appellees
National Association of Manufacturers v. EPA	750 F.3d 921 (D.C. Cir. 2014)	NAM as Appellant
Delta Air Lines, Inc. v. Export-Import Bank of the U.S.	718 F.3d 974 (D.C. Cir. 2013)	NAM as Amicus for Appellee
Mingo Logan Coal Co. v. EPA	714 F.3d 608 (D.C. Cir. 2013)	Chamber as Amicus for Appellee
New York-New York, LLC v. NLRB	676 F.3d 193 (D.C. Cir. 2012)	Chamber as Amicus for Petitioner
Nat'l Association of Home Builders v. OSHA	602 F.3d 464 (D.C. Cir. 2010)	Chamber and NAM as Petitioners

[1] Cases from our searches not included in this tally were primarily cases in which the groups appeared in the court's opinion in a case citation. In addition, in *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), the Chamber appeared as amicus in support of neither party arguing that if the Affordable Care Act's individual mandate was unlawful, then the court should strike down the entire Act because the mandate was not severable. The court held that the individual mandate was within Congress's power. Judge Kavanaugh dissented on jurisdictional grounds, arguing that the Anti-Injunction Act barred the suit, and did not weigh in on the merits.

[2] In this case, Judge Kavanaugh agreed with two of the three arguments advanced by API.

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Yoo, John C <John.C.Yoo@usdoj.gov>
BCC: timothy flanigan (timothy flanigan [WHO])
Sent: 9/17/2001 3:28:35 AM
Subject: : 4A issue

```
###### Begin Original ARMS Header ######
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ] )
CREATION DATE/TIME:17-SEP-2001 07:28:35.00
SUBJECT:: 4A issue
TO:"Yoo, John C" <John.C.Yoo@usdoj.gov> ( "Yoo, John C" <John.C.Yoo@usdoj.gov> [ UNKNOWN ]
)
READ:UNKNOWN
BCC:timothy flanigan ( timothy flanigan [ WHO ] )
READ:UNKNOWN
###### End Original ARMS Header ######

Any results yet on the 4A implications of random/constant
surveillance of phone and e-mail conversations of non-citizens who are in
the United States when the purpose of the surveillance is to prevent
terrorist/criminal violence?
```

From: Willett, Don <Don.Willett@usdoj.gov>
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>;Koebele, Steve <Steve.Koebele@usdoj.gov>;'Alex_Dahl@judiciary.senate.gov' <Alex_Dahl@judiciary.senate.gov>;'Manuel_Miranda@judiciary.senate.gov' <Manuel_Miranda@judiciary.senate.gov>;Sales, Nathan <Nathan.Sales@usdoj.gov>
Sent: 7/21/2002 9:48:17 AM
Subject: : Re: Owen/Money

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:"Willett, Don" <Don.Willett@usdoj.gov> ("Willett, Don" <Don.Willett@usdoj.gov> [UNKNOWN])
CREATION DATE/TIME:21-JUL-2002 13:48:17.00
SUBJECT:: Re: Owen/Money
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
TO:"Koebele, Steve" <Steve.Koebele@usdoj.gov> ("Koebele, Steve" <Steve.Koebele@usdoj.gov> [UNKNOWN])
READ:UNKNOWN
TO:"'Alex_Dahl@judiciary.senate.gov'" <Alex_Dahl@judiciary.senate.gov> ("'Alex_Dahl@judiciary.senate.gov'" <Alex_Dahl@judiciary.senate.gov> [UNKNOWN])
READ:UNKNOWN
TO:"'Manuel_Miranda@judiciary.senate.gov'" <Manuel_Miranda@judiciary.senate.gov> ("'Manuel_Miranda@judiciary.senate.gov'" <Manuel_Miranda@judiciary.senate.gov> [UNKNOWN])
READ:UNKNOWN
TO:"Sales, Nathan" <Nathan.Sales@usdoj.gov> ("Sales, Nathan" <Nathan.Sales@usdoj.gov> [UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

I believe Steve has a copy of the 60 Minutes piece (which aired almost 15 years after an earlier 60 Minutes piece re. how blindly pro-plaintiff the Texas Supreme Court used to be).

DPW
--- Sent from my BlackBerry.

-----Original Message-----
From: Manuel Miranda <Manuel_Miranda@judiciary.senate.gov>
To: Willett, Don <Don.Willett@USDOJ.gov>; Sales, Nathan <Nathan.Sales@USDOJ.gov>; Koebele, Steve <Steve.Koebele@USDOJ.gov>; 'Brett(u)M.(u)Kavanaugh(a)who.eop.gov' <Brett_M._Kavanaugh@who.eop.gov>; Alex Dahl <Alex_Dahl@judiciary.senate.gov>
Sent: Sun Jul 21 12:07:15 2002
Subject: Owen/Money

I suspected that was the answer. Dems are passing around the 60 Minutes tape.
I didn't know what it was until now. Is there a way to get a copy so that Alex
and I could see it after the Murder Board.

Intel suggests that Leahy will concentrate on all things Money...and how can
Feingold resist. Texans also suggested that Cantwell is keen on election related issues.

_____Reply Separator_____
Subject: Re: Owen
Author: "Koebele; Steve" <Steve.Koebele@usdoj.gov>
Date: 7/19/2002 7:28 PM

Manny -- research will certainly reveal (1) a clear correlation between Owen,

TLR and TCJL donors, and (2) many similarities in specific donors among the three.

Leahy will be looking at it in order to show the extent of the tort reform movement in Texas. Exhibit A will be a 60 Minutes profile of "how far the Court
has moved in favor of business interests and against consumers, workers, etc
(insert case cites).

I have a copy of the 60 Minutes piece if you would like to dub.

Thank you, Steve.

-----Original Message-----
From: Manuel Miranda <Manuel_Miranda@judiciary.senate.gov>
To: Willett, Don <Don.Willett@USDOJ.gov>; Sales, Nathan
<Nathan.Sales@USDOJ.gov>; Koebele, Steve <Steve.Koebele@USDOJ.gov>;
Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
Sent: Fri Jul 19 19:15:18 2002
Subject: Owen

Any answer to this below? And why the Leahy people are looking into it?

What is the connection between Owen and Texans for Lawsuit Reform (larger issue)
and the Texas Civil Justice League (smaller)? Is their any coincidence in her
donors and theirs?

From: Leitch, David G.
To: <Gonzales, Alberto R.>;<Addington, David S.>;<Kavanaugh, Brett M.>;<Francisco, Noel J.>
Sent: 3/6/2003 10:38:09 AM
Subject: FW: Signing Statements

Thought you'd enjoy this . . .

-----Original Message-----
From: Douglas, Richard (RPC) [mailto:[redacted]
Sent: Thursday, March 06, 2003 10:31 AM
To: Leitch, David G. [redacted]
Subject: Signing Statements

3/6/03

John, David, Whit, I thought you might find this interesting. I asked CRS a couple of weeks ago to comment on the Bush signing statements for the State 03 authorization bill and the Omnibus. Here is the informal reply. You guys are obviously out of control. Keep up the good work.

Rich

-----Original Message-----
From: Morton Rosenberg [mailto:[redacted]
Sent: Thursday, March 06, 2003 10:21 AM
To: Douglas, Richard (RPC)
Subject: signing statements

Richard,

Dave Ackerman e-mailed your interest in presidential signing statements that evince a predilecton (threat) not to obey parts of congressional enactments the President doesn't like. Reagan started the practice by getting his signing statements as part of the official "legislative history" of laws. For the most part he (DOJ) identified provisions that might be unconstitutional (like legislative vetoes which he said would treat as notification provisions. Subsequent presidents have modestly used the vehicle since, though Clinton once directed the Secretary of Energy to ignore a law creating a new, independent agency within DOE which created a constitutional flap for 8 months until Clinton had to back down. Interestingly, the basis of the President's objection was not legal or constitutional but on policy: he didn't like it that the Secretary did not have direct authority over the new agency (the NNSA).

But the Bush administration has taken the use of signing statements to a new level not seen before. There are at least a dozen statements issued that identify one or more provisions as violative of the "unitary executive," separation of powers principles, deliberative process, etc that he declares will not be followed. Perhaps the most prominent is the Homeland Security Act statement which declares he will not follow numerous congressional oversight requirements, among others. If you want to talk further, please call. 77480.

Mort

From: Powell, Benjamin A.
To: william_smith@judiciary.senate.gov <william_smith@judiciary.senate.gov>;Brian.A.Benczkowski@usdoj.gov <Brian.A.Benczkowski@usdoj.gov>;William.Hall2@usdoj.gov <William.Hall2@usdoj.gov>;William.Hall2@usdoj.gov <Kavanaugh, Brett M.>;William.Hall2@usdoj.gov <Snee, Ashley>;ehaden@balch.com <ehaden@balch.com>;ehaden@balch.com <Smith, Matthew E.>
Sent: 6/5/2003 3:33:58 PM
Subject: 4pm conference number

We are having a 4pm conf call to discuss Pryor and coordinate plans and efforts. Let me know if you are not available. Call-in number below.

Time: 4:00pm, June 5

Dial in #: 202-395-6392

Code: 976638

Ben Powell

456-7909

From: Powell, Benjamin A.
To: william_smith@judiciary.senate.gov <william_smith@judiciary.senate.gov>;brian.a.benczkowski@usdoj.gov <brian.a.benczkowski@usdoj.gov>;william.hall2@usdoj.gov <william.hall2@usdoj.gov>;william.hall2@usdoj.gov <Snee, Ashley>;ehaden@balch.com <ehaden@balch.com>;ehaden@balch.com <Smith, Matthew E.>;ehaden@balch.com <Mamo, Jeanie S.>;ehaden@balch.com <Kavanaugh, Brett M.>;Kristi.L.Remington@usdoj.gov <Kristi.L.Remington@usdoj.gov>
CC: <Bumatay, Patrick J.>
Sent: 6/5/2003 4:53:28 PM
Subject: Pryor Working Group Contact List

Please send to me and cc: pbumatay@who.eop.gov the following information:

Your title/position

work phone

cell phone

home phone

blackberry yes or no?

I will make a contact list to distribute. Also,if someone could send me information for Jay, Leonard, other groups/persons (and other numbers we should have on the list) that are going to be involved, that would be helpful.

William -- please add other folks from the Senator's office (your press shop, others who are helping) who people can contact as you will be very busy.

Thanks.

From: Leitch, David G.
To: <Kavanaugh, Brett M.>
Sent: 6/26/2003 9:34:28 AM
Subject: RE: revised draft Rehnquist statement

I love the guy, but it's hard for me to think that the author of Morrison v. Olson should be praised for "faithfully interpret[ing] the Constitution to . . . maintain the Constitutional separation of powers."

-----Original Message-----
From: Kavanaugh, Brett M.
Sent: Thursday, June 26, 2003 9:11 AM
To: Leitch, David G.
Subject: revised draft Rehnquist statement

The 16th Chief Justice of the United States, William Rehnquist has rendered extraordinary and distinguished service to America. He served in the United States Army Air Forces during World War II, as a law clerk on the Supreme Court of the United States, and as Assistant Attorney General in the Department of Justice. In 1972, he was appointed to the Supreme Court by President Nixon. In 1986, President Reagan appointed Justice Rehnquist as the 16th Chief Justice of the United States. As a jurist for more than 30 years, Chief Justice Rehnquist has faithfully interpreted the Constitution to ensure equal justice under law and to maintain the Constitutional separation of powers. While a Justice, he also has authored three important books on American legal history. During his 17 years as Chief Justice, he provided effective and disciplined leadership of the Federal Judiciary in its efforts to ensure fair pay, adequate resources, and a prompt confirmation process. Chief Justice Rehnquist's vision, leadership, and opinions have had an enormous and enduring impact on American life and American law. We wish him the best in retirement.

I intend to nominate a successor very soon.

[redacted] REV_00124536

From: CN=Bradford A. Berenson/OU=WHO/O=EOP [WHO]
To: [redacted] [WHO] <Courtney S. Elwood>
CC: [redacted] [WHO] <brett m. kavanaugh>; [redacted] [WHO] <alberto r. gonzales> [redacted] [WHO] [redacted] [WHO] <bradford a. berenson> [redacted] [WHO] <helgard c. walker> [redacted] [WHO] <stuart w. bowen>;h [redacted] [WHO] <h. christopher bartolomucci> [redacted] [WHO] <rachel l. brand> [redacted] [WHO] <noel j. francisco> [redacted] [WHO] <robert w. cobb>
Sent: 3/27/2001 3:15:40 AM
Subject: : Re: Adarand -- other considerations

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Bradford A. Berenson (CN=Bradford A. Berenson/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME:27-MAR-2001 08:15:40.00
SUBJECT:: Re: Adarand -- other considerations
TO:Courtney S. Elwood (CN=Courtney S. Elwood/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
CC:brett m. kavanaugh (CN=brett m. kavanaugh/OU=who/O=eop@eop [WHO])
READ:UNKNOWN
CC:alberto r. gonzales (CN=alberto r. gonzales/OU=who/O=eop@eop [WHO])
READ:UNKNOWN
CC:timothy e. flanigan (CN=timothy e. flanigan/OU=who/O=eop@eop [WHO])
READ:UNKNOWN
CC:bradford a. berenson (CN=bradford a. berenson/OU=who/O=eop@eop [WHO])
READ:UNKNOWN
CC:helgard c. walker (CN=helgard c. walker/OU=who/O=eop@eop [WHO])
READ:UNKNOWN
CC:stuart w. bowen (CN=stuart w. bowen/OU=who/O=eop@eop [WHO])
READ:UNKNOWN
CC:h. christopher bartolomucci (CN=h. christopher bartolomucci/OU=who/O=eop@eop [WHO])
READ:UNKNOWN
CC:rachel l. brand (CN=rachel l. brand/OU=who/O=eop@eop [WHO])
READ:UNKNOWN
CC:noel j. francisco (CN=noel j. francisco/OU=who/O=eop@eop [WHO])
READ:UNKNOWN
CC:robert w. cobb (CN=robert w. cobb/OU=who/O=eop@eop [WHO])
READ:UNKNOWN
End Original ARMS Header

Of course the Clinton administration gave us some cover on this by declining to defend the constitutionality of the statute at issue in Dickerson last Term -- to near-universal praise by the media.

Courtney S. Elwood
03/27/2001 08:12:14 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: Adarand -- other considerations

Another consideration: Although Olsen would likely find it troubling to do so, he and the AG, in deciding whether to defend the program, may take into consideration the "long-standing practice" of the Department "to defend [a] statute against [constitutional] challenge unless there is no reasonable argument that could be made in defense. See, e.g. The Attorney

General's Duty To Defend the Constitutionality of Statutes, 43 Op. Atty. Gen. 325 (1981) (Opinion of Attorney General Smith); The Attorney General's DutyTo Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Atty. Gen. 275 (1980)." Letter from Dick Thornburgh to Senator Strom Thurmond, dated Oct. 7, 1999 (appended to the Brief of Amici Curiae former Attorneys General of the United States William P. Barr and Edwin Meese III Supporting Affirmance in Dickerson v. United States, No. 99-5525.

While in Adarand, the constitutionality challenged law is a regulatory program and not a statute, the practice may nonetheless have some application. I don't know. In any event, if the decision is made not to defend the constitutionality of the program, I suspect we will hear the words of these Republican attorneys general repeated back to us in the press and in briefs before the Supreme Court.

Brett M. Kavanaugh
03/26/2001 08:58:32 PM
Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject: Adarand -- other considerations

A few more preliminary thoughts, although they are phrased somewhat more definitively. But these are really just initial ideas.

1. My sense, for what it is worth, is that it would be better for the SG to independently assess and come to a constitutional conclusion about the program -- and only then advise the President of it -- than for the White House to dictate -- or even hint -- to the SG what the SG's position should be. Indeed, in my view, the White House should not be involved in the SG's formulation of a position in the first instance, but rather only in approving or disapproving what the SG proposes.

This is admittedly not my ideal of how a unitary executive should work, but it is the real world, and there is a very strong tradition in the Executive Branch -- and in the Congress and media -- that the SG is independent and should come to his or her own independent conclusions about the constitutionality of laws. It is also why SG is such a critically important position. That is not to say that the SG's office cannot be overruled by the President/White House; it can be and has been in the past and will be in the future. It is to say, however, that there is a serious long-term political cost to the perception or reality that the SG's positions and recommendations are being driven in the first instance by the White House. Lincoln Caplan's book The Tenth Justice is a fine example of the kinds of criticism that can occur.

Apart from that public relations/political consideration, as a matter of standard process, moreover, the SG is in the best position to assess a case like this in the first instance and propose a course of action.

I thus would recommend that, if asked and forced to answer, the President and Ari might say something like the following about the President's position:

In the Executive Branch, it is the role of the Solicitor General, acting under the Attorney General and ultimately the President, to represent the United States in the Supreme Court. In cases involving the United States, therefore, it is properly the role of the Solicitor General and the Department of Justice to examine and study the facts and the law in the first instance and to make appropriate decisions and

recommendations. Of course, the President is the head of the Executive Branch and in particularly important Supreme Court cases previous Presidents have approved -- and, on occasion, disapproved -- the Department of Justice's recommended course of action. In any particularly important case like that, however, this President would await the Department of Justice's recommendation before making any decision.

I also would recommend that the Judge communicate to the Attorney General that the President will await the recommendation of the Attorney General and Solicitor General as to the constitutionality of this program and the proper course of action in the Supreme Court. I would propose that there be no other communications between the White House and Department about this case.

2. This case makes Ted Olson's hearing more likely to gain attention and draw fire given what he has written and who he has represented in race cases.

3. An approach referenced but not elaborated in my earlier e-mail is for the SG to file a brief saying that the program is unconstitutional, thus refusing to defend the constitutionality of the program and forcing the Supreme Court to appoint counsel to defend the program. That is, in fact, my personal opinion about what the SG ought to do, but that is only my personal opinion. Again, however, if this is the SG's ultimate position, this is much better coming from the SG than being dictated or hinted in any way to the SG.

Message Sent
To:
Alberto R. Gonzales/WHO/EOP@EOP
Timothy E. Flanigan/WHO/EOP@EOP
Bradford A. Berenson/WHO/EOP@EOP
Helgard C. Walker/WHO/EOP@EOP
Courtney S. Elwood/WHO/EOP@EOP
Stuart W. Bowen/WHO/EOP@EOP
H. Christopher Bartolomucci/WHO/EOP@EOP
Rachel L. Brand/WHO/EOP@EOP
Noel J. Francisco/WHO/EOP@EOP
Robert W. Cobb/WHO/EOP@EOP

Message Copied
To:
alberto r. gonzales/who/eop@eop
timothy e. flanigan/who/eop@eop
bradford a. berenson/who/eop@eop
helgard c. walker/who/eop@eop
stuart w. bowen/who/eop@eop
h. christopher bartolomucci/who/eop@eop
rachel l. brand/who/eop@eop
noel j. francisco/who/eop@eop
robert w. cobb/who/eop@eop

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Dinh, Viet <Viet.Dinh@usdoj.gov>
Sent: 4/3/2002 3:49:22 AM
Subject: : RE: Owen

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME: 3-APR-2002 08:49:22.00
SUBJECT:: RE: Owen
TO:"Dinh, Viet" <Viet.Dinh@usdoj.gov> ("Dinh, Viet" <Viet.Dinh@usdoj.gov> [UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

I assume we are not giving anything out this morning, correct?

"Dinh, Viet" <Viet.Dinh@usdoj.gov>
04/03/2002 07:42:43 AM
Record Type: Record

To: "Keefer, Wendy J" <Wendy.J.Keefer@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Willett, Don" <Don.Willett@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Koebele, Steve" <Steve.Koebele@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
cc: "Newstead, Jennifer" <Jennifer.Newstead@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), Brett M. Kavanaugh/WHO/EOP@EOP
Subject: RE: Owen

Wendy, thank you for your extraordinary efforts here. Jennifer and Don, can we get some temporary paralegal help in ASAP to help with the ministerial collation work?

Please make sure that whatever talkers we put out to anyone on the bypass Doe cases are reviewed and signed off by Brett Kavanaugh. I would also like to see them.

thanks much.

-----Original Message-----
From: Keefer, Wendy J
Sent: Tuesday, April 02, 2002 9:31 PM
To: Willett, Don; Koebele, Steve
Cc: Dinh, Viet; Newstead, Jennifer
Subject: Owen

Guys:

I have the 9 binders for the GOP members of the Judiciary Committee put together. I have also made 5 additional copies for extra staffers who may show up and for you two to have. I have made myself a binder (the perogative of the binder-maker) to use during the meeting. The only thing left to do is I want, with the copies not in binders (because we ran out of binders big enough), to at least put the tabs in each bundle. So, I will do that tomorrow morning. We will also want to make sure a copy is available for Viet and for Jen, but I assume we can take care of that either tomorrow a.m. or when we return from the meeting, as I am sure the

binder materials will be evolving. We also need to look carefully at the "case summaries" that are currently included and make sure (for future, i.e. actual prep once a hearing is schedule) there is a need for them. Some of the cases, although somewhat noteworthy, are not likely to be real issues and just create the potential for confusion. The big issues are clearly the judicial bypass/abortion cases and Enron. The other issues are those that many of our nominees face and are basic and general allegations of conservatism (e.g. pro-business, anti-plaintiff, pro-tort reform, etc.) and I think we have good responses to those with Owen as the basic response for all of those cases is her application of already settled Texas law and her respect for stare decisis.

As I am likely not to get home until about 11pm, I may be a little late tomorrow a.m., but should be here by about 9:15-9:30. I assume that although Don you are meeting us at the Owen meeting that Pat O'Brien has a car coming. I will need some help carrying the box(es) of binders/materials.

See you guys tomorrow.

Don -- I have reviewed much of the info on Howard, but not all, and should have a pretty good idea by the end of the day if there are any troubling issues other than basic conservative actions while AUSA and N.H. A.G. and the campaign fiasco re: the 2000 gubenatorial primary.

Wendy

From: CN=Helgard C. Walker/OU=WHO/O=EOP [WHO]
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
Sent: 5/6/2002 4:22:21 AM
Subject: : Re: Removal

```
###### Begin Original ARMS Header ######
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Helgard C. Walker ( CN=Helgard C. Walker/OU=WHO/O=EOP [ WHO ] )
CREATION DATE/TIME: 6-MAY-2002 08:22:21.00
SUBJECT:: Re: Removal
TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )
READ:UNKNOWN
###### End Original ARMS Header ######

How about on second blush?



Brett M. Kavanaugh
05/04/2002 12:31:21 PM
Record Type: Record

To: Alberto R. Gonzales/WHO/EOP@EOP, Timothy E.
Flanigan/WHO/EOP@EOP, Helgard C. Walker/WHO/EOP@EOP, David S.
Addington/OVP/EOP@EOP
cc:
Subject: Removal

"As Justice Scalia intimated in Morrison, at first blush it is unclear why
the President does not have the authority to dismiss any Executive Branch
official at will." Kavanaugh, The President and the Independent Counsel,
86 Geo. L.J. 2133, 2151 (1998) (emphasis in original).
```

Committee Confidential

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: H. Christopher Bartolomucci/WHO/EOP@EOP [WHO] <H. Christopher Bartolomucci>
Sent: 5/15/2002 3:10:38 PM
Subject: : Re: Justice Owen

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME:15-MAY-2002 19:10:38.00
SUBJECT:: Re: Justice Owen
TO:H. Christopher Bartolomucci (CN=H. Christopher Bartolomucci/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

She should not talk about her views on specific policy or legal issues. She should say that she has a commitment to follow Supreme Court precedent, that she understands and appreciates the role of a circuit judge, that she will adhere to statutory text, that she has no ideological agenda. She probably should deal with the contributions issue emphasizing the themes that were in Judge Gonzales' letter.

H. Christopher Bartolomucci
05/15/2002 07:02:30 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: Justice Owen

Tomorrow, Sen. Hutchison is taking Owen to meet with Sen. Feinstein (at 11:45) and Sen. Kohl (at 3:30). Hutchison's office wants to know if there are any subjects we do not want Owen to talk about at these meetings. What do you suggest we tell them?

From: Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN]
To: Dinh; Viet <Viet.Dinh@usdoj.gov>;Willett; Don <Don.Willett@usdoj.gov>;Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
Sent: 7/18/2002 8:34:56 AM
Subject: : Highly confidentail

```
###### Begin Original ARMS Header ######
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [ UNKNOWN ] )
CREATION DATE/TIME:18-JUL-2002 12:34:56.00
SUBJECT:: Highly confidentail
TO:"Dinh; Viet" <Viet.Dinh@usdoj.gov> ( "Dinh; Viet" <Viet.Dinh@usdoj.gov> [ UNKNOWN ] )
READ:UNKNOWN
TO:"Willett; Don" <Don.Willett@usdoj.gov> ( "Willett; Don" <Don.Willett@usdoj.gov> [
UNKNOWN ] )
READ:UNKNOWN
TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )
READ:UNKNOWN
###### End Original ARMS Header ######

Brett,
It looks like Biden's staff is asking him not to attend the hearing. This
does not bode well. It means that they will depend on paper since they
have refused to meet with her. This increases reliance on Leahy's staff.
Think thru what options you all have down there. If we think that it is
better for him to be there, perhaps Hatch could call him but Hatch may not
want to. Hatch may need a butch from the WH to call Biden. Is any direct
pressure on Biden possible...a Gonzales meeting?
On a related note, the Nation article linking Owen to Rove is being
distributed by the Leahy staff.
Manny
```

From: Charnes, Adam ("Charnes, Adam" <Adam.Charnes@usdoj.gov> [UNKNOWN]) <Adam.Charnes@usdoj.gov>
Sent: Wednesday, December 11, 2002 6:27 AM
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
Cc: Benjamin A. Powell (CN=Benjamin A. Powell/OU=WHO/O=EOP@EOP [WHO]); Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@EOP [WHO])
Subject: : Re: CA11

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:"Charnes, Adam" <Adam.Charnes@usdoj.gov> ("Charnes, Adam" <Adam.Charnes@usdoj.gov> [UNKNOWN]) CREATION DATE/TIME:11-DEC-2002 07:26:49.00
SUBJECT:: Re: CA11
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN CC:Benjamin A. Powell (CN=Benjamin A. Powell/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN CC:Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

Brett, at your request, I asked Matt to speak with Pryor about his interest. Pryor responded that he was "intrigued" but needed to speak with his wife. Incidentally, he will be at the WH today for a Christmas party, and is staying at the Willard, so you might want to speak with him directly. Also, we should probably communicate, either directly or through Matt, a deadline for him to let us know definitively, because of the time pressure imposed by Steele's renomination.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Charnes, Adam <Adam.Charnes@USDOJ.gov>
CC: Benjamin_A._Powell@who.eop.gov <Benjamin_A._Powell@who.eop.gov>; Alberto_R._Gonzales@who.eop.gov <Alberto_R._Gonzales@who.eop.gov>
Sent: Tue Dec 10 18:15:57 2002
Subject: Re: CA11

Adam, actually, I think we should discuss this. Makes sense to think through this seat carefully for many reasons. In particular, we perhaps should think about recommending Pryor for CA11 and Steele for one of the district court seats, which would be a very solid result on both CA11 and district court and avoid a potentially serious problem that we can discuss.

(Embedded
image moved "Charnes, Adam" <Adam.Charnes@usdoj.gov>
to file: 12/10/2002 05:57:21 PM
pic32120.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: CA11

Told by Lembke that Pryor may now be viable candidate for CA11 if Steele isn't renominated (because GOP governor). I assume that there is no question that Steele will be renominated?

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Kyle Sampson/WHO/EOP@EOP [WHO] <Kyle Sampson>
Sent: 12/16/2002 9:57:43 AM
Subject: : Re: CA11

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME:16-DEC-2002 14:57:43.00
SUBJECT:: Re: CA11
TO:Kyle Sampson (CN=Kyle Sampson/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

call me

Kyle Sampson
12/16/2002 01:35:42 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: CA11

How did the Pryor interview go?

From: Miranda, Manuel (Judiciary) <Manuel_Miranda@Judiciary.senate.gov>
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
Sent: 1/13/2003 1:37:44 PM
Subject: : RE: Judiciary Dems obstruct on reorganization

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:"Miranda, Manuel (Judiciary)" <Manuel_Miranda@Judiciary.senate.gov> ("Miranda, Manuel (Judiciary)" <Manuel_Miranda@Judiciary.senate.gov> [UNKNOWN])
CREATION DATE/TIME:13-JAN-2003 18:37:44.00
SUBJECT:: RE: Judiciary Dems obstruct on reorganization
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

I am told that all Dems on JC.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, January 13, 2003 5:08 PM
To: Miranda, Manuel (Judiciary)
Subject: Re: Judiciary Dems obstruct on reorganization

Who signed this?

(Embedded
image moved "Miranda, Manuel (Judiciary)"
to file: <Manuel_Miranda@Judiciary.senate.gov>
pic03873.pcx) 01/13/2003 03:45:56 PM

Record Type: Record

To:

cc:
Subject: Judiciary Dems obstruct on reorganization

Dear Senator Daschle:

We members of the Senate Judiciary Committee write to request that you include negotiations over blue slip practices and a fair and measured protocol on judicial nomination hearings in your discussions with the Republican leadership regarding reorganization of the Senate.

As you know, when Senator Hatch chaired the Judiciary Committee during six years of President Clinton's tenure, he had a firm blue slip practice and did not schedule a hearing on any nominee who did not have both blue slips returned positively from both home-state Senators. Every failure of a Republican Senator to return a positive blue slip on a judicial nominee was honored. In addition, of course, Senator Hatch delayed and refused to

schedule hearings and votes on a number of additional nominees because anonymous Senators in the Republican Caucus or on the Judiciary Committee had concerns.

When Senator Leahy became Chairman of the Committee, he maintained Senator Hatch's blue slip practices and respected the views of the home-state Senators. Under Senator Leahy, for the first time the Judiciary Committee made public blue slips including the fact that a Senator had yet to return a blue slip and the fact that a Senator returned a negative blue slip. This helped ensure that blue slips were not being abused by home-state Senators.

Senator Hatch has made several comments suggesting he is no longer going to give deference to the objections of home-state Senators. The changes he has hinted that he will unilaterally make will undercut what incentive the White House has for thorough and meaningful consultation with home-state Senators and, in particular, Democratic home-state Senators before the President decides on judicial nominations. Meanwhile, Republicans would reap a reward for having blocked so many of President Clinton's judicial nominees and the White House has indicated that without some check from the Senate it will seek to fill judicial vacancies with nominees committed to advancing a right-wing ideological agenda.

This shift in blue slip practices would weaken what democratic [small "d" in original] check there is to moderate the President's choices and likely shift the balance on a number of circuit courts across the country. It could also lead to extended debate before the Senate over the lack of consultation and advice sought by the White House regarding particular judicial nominees.

We take seriously the Framers' balancing of powers in the nomination process. The Constitution provides that the Senate not only has the power of consent, it has the right to advise, as well. Especially now, when effective checks and balances are being lost among our branches of government, Democratic Senators need to be consulted on important judicial nominations.

Likewise, Senator Hatch, Senator Kyl and others have been talking about unilaterally establishing hearing schedules on important judicial nominations that are unprecedented and unreasonable. That is another important topic to be discussed and on which bipartisan agreement should be obtained before the Senate's reorganization. Recent precedent for such a discussion and agreement is the document signed by the parties' leaders and the Judiciary Chairman and Ranking Member in 1985 when the White House and Senate were both controlled by republicans. Building upon that precedent and our recent experience we would urge that the following be included in any agreement on an organizing resolution: that hearings not be

scheduled
until the ABA has submitted its peer review and the Committee has had
three
weeks to review the nomination; that each hearing contain only one
controversial nominee; that each hearing include only one circuit court
nominee; that hearings not be held more frequently than every three or
four
weeks. [Emphasis added] This is the only effective means of enforcing
Senators' rights under the Constitution to advise the President on
judicial
nominations, and will allow members of the Committee to discharge their
duty
responsibly.

Thank you for considering these concerns. We look forward to discussing
them with you in the near future.

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Saturday, March 08, 2003 6:31 PM
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]); Manuel_Miranda@frist.senate.gov [UNKNOWN]
Subject: : Re: Kuhl / For your prep

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME: 8-MAR-2003 19:30:31.00
SUBJECT:: Re: Kuhl / For your prep
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
TO:Manuel_Miranda@frist.senate.gov (Manuel_Miranda@frist.senate.gov [UNKNOWN]) READ:UNKNOWN
End Original ARMS Header

I will get them for you. She did not go through commission because that is only for dct but we had extensive consultation with boxer and feinstein over kuhl including kuhl meeting with them individually before nomination and answering written questions. At the time sens were much more concerned about chris cox.

.

----- Original Message -----
From:<Manuel_Miranda@frist.senate.gov>
To:Brett M. Kavanaugh/WHO/EOP@EOP
Cc:
Date: 03/08/2003 07:24:36 PM
Subject: RE: Kuhl / For your prep

Can one get the answers she gave on this? From the Commission?

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Saturday, March 08, 2003 7:09 PM
To: Miranda, Manuel (Frist); brian.a.benczkowski@usdoj.gov; Nathan.Sales@usdoj.gov; Kristi.L.Remington@usdoj.gov; Brett_M._Kavanaugh@who.eop.gov
Subject: Re: Kuhl / For your prep

Kuhl has dealt with this in her answers to boxer and feinsteins written questions that she did before she was ever nominated. Note that she is catholic so any attempt to accuse her of pro bob jones sympathy can be countered. This
case and roe are 2 big issues with her.

..

----- Original Message -----
From:<Manuel_Miranda@frist.senate.gov>
To:brian.a.benczkowski@usdoj.gov,
<Nathan.Sales@usdoj.gov>,
Kristi.L.Remington@usdoj.gov,
Brett M. Kavanaugh/WHO/EOP@EOP
Cc:
Date: 03/08/2003 04:33:37 PM

Subject: Kuhl / For your prep

As you may know, the Dems were expecting Kuhl to come up this coming week and are surprised by Owen.

Dem JC counsel have all received copies of 2 news articles from 1982 (one NYT article by Stuart Taylor and one Washington Post article by Charles Babcock). These articles refer to the change in the Reagan Administration's policy that led to the reversal of the 11-year old policy of denying tax exemptions to racially discriminatory private schools, and discuss Kuhl's role in the decision. According to Dems, these articles mention:

1) That more than 200 lawyers in the Justice Department's civil rights division signed a letter expressing serious concerns about the change in policy. They stated that "the extension of tax-exempt status to these institutions violates existing federal civil rights law, as expressed in the Constitution, acts of Congress, and Federal court interpretations thereof."

2) That, the Senate Finance Committee held hearings after that decision, in 1982, on whether to pass a law making it illegal to grant such exemptions. According to the news accounts, documents released to the Finance Committee included "internal memorandums between high Justice and Treasury officials and correspondence with members of Congress." There was also Testimony by William Bradford Reynolds, then head of the Civil rights division, and Deputy AG Edward Schmults.

According to the news articles, the documents show that "Mr. Reynolds and his allies, Bruce Fein, an aide to Mr. Schmults, and Carolyn Kuhl, an aide to Attorney General Smith, began to argue in early December, the documents and testimony . . . show, that the Administration should reverse its position. . . "

The documents also apparently show that Mr. Reynolds was one of the chief advocates of the view that even segregationist schools are legally entitled to tax exemptions, and that he and his allies (Scmults and AG Smith) prevailed over objections by the head of the IRS (Roscoe Egger), and other career Justice Department lawyers, including then-OLC head Ted Olson, and Lawrence Wallace, the Deputy SG in charge of the pending Supreme Court case involving the issue.

Dems are trying to track down testimony and the related documents from that Finance Committee hearing.

- att1.htm

From: Kavanaugh, Brett M.
To: <Grubbs, Wendy J.>
Sent: 4/9/2003 1:27:33 PM
Subject: From Manny on Frist's staff

"According to Democrat sources, several Democrat Senators have expressed concern about any filibuster of a judicial nominee that is based on substance, as opposed to process. The Senators that may be wavering or opposed to an extended debate are: Lincoln, Pryor, Carper, Graham, Nelson (Fl), Nelson (NE), Bayh, Landrieu, Breaux, Dorgan, Conrad, Baucus, Hollings, Bryd and Miller."

From:	Joel Pardue <judicialumbrella@yahoo.com>
To:	jpardue@fed-soc.org [UNKNOWN] <jpardue@fed-soc.org>
BCC:	Brett M. Kavanaugh (Brett M. Kavanaugh/WHO/EOP [WHO])
Sent:	6/5/2003 10:06:28 AM
Subject:	: Emergency Umbrella Meeting Tomorrow
Attachments:	P_LCTYG003_WHO.TXT_1.txt

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Joel Pardue <judicialumbrella@yahoo.com> (Joel Pardue <judicialumbrella@yahoo.com>
[UNKNOWN])
CREATION DATE/TIME: 5-JUN-2003 14:06:28.00
SUBJECT:: Emergency Umbrella Meeting Tomorrow
TO:jpardue@fed-soc.org (jpardue@fed-soc.org [UNKNOWN])
READ:UNKNOWN
BCC:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

There will be an emergency umbrella meeting tomorrow at 2:30 PM (right
after the 1:30 call) at the law firm of Baker & Hostetler (1050
Connecticut Ave., Suite 1100). We need to discuss nominee Bill Pryor's
hearing next Wednesday and there are important confirmation process issues
with Judge Kuhl that need to be addressed.

Do you Yahoo!?
Free online calendar with sync to Outlook(TM).
- att1.htm
ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_LCTYG003_WHO.TXT_1>

From: Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN]
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>;Sales; Nathan <Nathan.Sales@usdoj.gov>;Koebele; Steve <Steve.Koebele@usdoj.gov>;Willett; Don <Don.Willett@usdoj.gov>
Sent: 7/28/2002 2:38:29 PM
Subject: : Help requested

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN])
CREATION DATE/TIME:28-JUL-2002 18:38:29.00
SUBJECT:: Help requested
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
TO:"Sales; Nathan" <Nathan.Sales@usdoj.gov> ("Sales; Nathan" <Nathan.Sales@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
TO:"Koebele; Steve" <Steve.Koebele@usdoj.gov> ("Koebele; Steve" <Steve.Koebele@usdoj.gov>
[UNKNOWN])
READ:UNKNOWN
TO:"Willett; Don" <Don.Willett@usdoj.gov> ("Willett; Don" <Don.Willett@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

I would ask that no action be taken by any of your offices on this for now except as I request. It is important that it be confidential to the recipients of this email and up your chains of authority only.
As I mentioned on Friday, Senator Leahy?s staff has distributed a ?confidential? letter to Dem Counsel on Thursday from Collyn Peddie, who served as the attorney for ?Jane Doe? in some or several of the Texas bypass cases. According to either the letter or the Leahy staff Ms. Peddie sent this letter in the strictest confidence because she is up for partner, and believes she will be fired if it is publicized. Several members of her firm are lead supporters of the Owen nomination. Leahy?s staff is only sharing with Democratic counsels. However, we might expect this letter to be used like the Brenda Polkey in Pickering at a moment when we are unable to respond.
Ms. Peddie is being portrayed as a small oppressed lawyer fearing repercussions if her name gets out and the brave attorney who represented the ?girl in trouble? in Jane Doe 1. In fact, she is the attorney for Planned Parenthood who argued JD cases and the Buffer Zone case and on the board of Planned Parenthood of Texas, among other things. I will copy you on our research on her.
For now I need priority help early Monday from the A team in briefly commenting on these items (two or three sentences). I have not seen the letter but it strongly criticizes Owen?s actions on the Doe cases, especially for her ?appalling insensitivity? to the pregnant minors before her court.
Owen violated the confidentiality of the Jane Does in her written opinions Specifically, Peddie accuses Owen of publishing ?dissents and concurrences in which paragraph after paragraph of confidential testimony was quoted in great detail.?
Owen sought delay of order granting bypass
Owen sought to stop the entry of Jane Doe 1?s bypass until the court had published all its opinions. The court issued the order over Owen?s objection, but if the Court had adopted Owen?s position, the pregnant minor would have had to wait three more months to get the abortion.
3. Owen?s Dissent in Jane Doe 4
Peddie criticized Owen?s dissent in Jane Doe 4 which argued that parental rights should trump the risk that ?parents would throw a minor girl out on the street upon finding out she was pregnant.?

From:	CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To:	Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN] <Manuel_Miranda@judiciary.senate.gov>
CC:	sales; nathan <nathan.sales@usdoj.gov>;koebele; steve <steve.koebele@usdoj.gov>;willett; don <don.willett@usdoj.gov>
Sent:	7/28/2002 3:03:12 PM
Subject:	: Re: Help requested

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME:28-JUL-2002 19:03:12.00
SUBJECT:: Re: Help requested
TO:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN])
READ:UNKNOWN
CC:"sales; nathan" <nathan.sales@usdoj.gov> ("sales; nathan" <nathan.sales@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
CC:"koebele; steve" <steve.koebele@usdoj.gov> ("koebele; steve" <steve.koebele@usdoj.gov>
[UNKNOWN])
READ:UNKNOWN
CC:"willett; don" <don.willett@usdoj.gov> ("willett; don" <don.willett@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

Nathan and Steve should elaborate, but my preliminary take:

1. First, the name Jane Doe is used precisely to protect privacy of the individuals. Second, all Justices in these cases discussed and quoted from the record extensively. See the majority opinion in Doe 2, the Gonzales opinion in Doe 3, the Enoch opinion in Doe 3, the majority opinion in Doe 4, etc. This is simply a bogus charge to direct at Owen.

2. Justice Owen believed that opinions could be written in a few days as courts often do in emergency cases of this nature. She specifically stated that the judgment with opinions should have been issued on March 13 instead of a summary order without opinions on March 10. She did not suggest delaying decision "for months."

3. In this case, the court unanimously agreed that the record did not meet the standard for a bypass. Six Justices concluded that a remand was appropriate. Justice Owen and two others argued, however, that Doe simply failed to make the required showing and that a remand was inappropriate. Justice Owen argued, moreover, that the potentially negative reaction of the parents of a pregnant minor when the minor becomes an adult does not meet the statutory "best interest" standard for a bypass.

Manuel_Miranda@judiciary.senate.gov (Manuel Miranda)
07/28/2002 06:33:10 PM
Record Type: Record

To: "Willett; Don" <Don.Willett@usdoj.gov>, "Sales; Nathan"
<Nathan.Sales@usdoj.gov>, "Koebele; Steve" <Steve.Koebele@usdoj.gov>,

Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: Help requested

I would ask that no action be taken by any of your offices on this for now except as I request. It is important that it be confidential to the recipients of this email and up your chains of authority only.
As I mentioned on Friday, Senator Leahy?s staff has distributed a ?confidential? letter to Dem Counsel on Thursday from Collyn Peddie, who served as the attorney for ?Jane Doe? in some or several of the Texas bypass cases. According to either the letter or the Leahy staff Ms. Peddie sent this letter in the strictest confidence because she is up for partner, and believes she will be fired if it is publicized. Several members of her firm are lead supporters of the Owen nomination. Leahy?s staff is only sharing with Democratic counsels. However, we might expect this letter to be used like the Brenda Polkey in Pickering at a moment when we are unable to respond.
Ms. Peddie is being portrayed as a small oppressed lawyer fearing repercussions if her name gets out and the brave attorney who represented the ?girl in trouble? in Jane Doe 1. In fact, she is the attorney for Planned Parenthood who argued JD cases and the Buffer Zone case and on the board of Planned Parenthood of Texas, among other things. I will copy you on our research on her.
For now I need priority help early Monday from the A team in briefly commenting on these items (two or three sentences). I have not seen the letter but it strongly criticizes Owen?s actions on the Doe cases, especially for her ?appalling insensitivity? to the pregnant minors before her court.
Owen violated the confidentiality of the Jane Does in her written opinions Specifically, Peddie accuses Owen of publishing ?dissents and concurrences in which paragraph after paragraph of confidential testimony was quoted in great detail.?
Owen sought delay of order granting bypass
Owen sought to stop the entry of Jane Doe 1?s bypass until the court had published all its opinions. The court issued the order over Owen?s objection, but if the Court had adopted Owen?s position, the pregnant minor would have had to wait three more months to get the abortion.
3. Owen?s Dissent in Jane Doe 4
Peddie criticized Owen?s dissent in Jane Doe 4 which argued that parental rights should trump the risk that ?parents would throw a minor girl out on the street upon finding out she was pregnant.?

From:	Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN]
To:	Willett; Don <Don.Willett@usdoj.gov>;Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
Sent:	7/28/2002 4:16:32 PM
Subject:	: Biden and Feinstein, etc.
Attachments:	P_NEQ29003_WHO.TXT_1.doc

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CREATOR:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [ UNKNOWN ] )
CREATION DATE/TIME:28-JUL-2002 20:16:32.00
SUBJECT:: Biden and Feinstein, etc.
TO:"Willett; Don" <Don.Willett@usdoj.gov> ( "Willett; Don" <Don.Willett@usdoj.gov> [
UNKNOWN ] )
READ:UNKNOWN
TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )
READ:UNKNOWN
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I would like to get together with just the two of you Monday or Tuesday,
if not on the Hill at your conveinience, I can come toward DOJ (I live
across the street), maybe Dell lunch at my place or drinks anywhere. By
then I can provide useful info to map out Biden and Feinstein, and others.
As promised on Friday, below is the Biden-speak . We have a general CRS
report on standards used, have not read it yet myself but will get to you
tomorrow. Tell me your fax numbers again.
- Biden4.doc
ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_NEQ29003_WHO.TXT_1>
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From:	Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN]
To:	Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
CC:	dinh; viet <viet.dinh@usdoj.gov>;Heather Wingate/WHO/EOP@EOP [WHO] <Heather Wingate>;willett; don <don.willett@usdoj.gov>
Sent:	7/30/2002 8:30:08 AM
Subject:	: Re[2]: NEWS
Attachments:	P_OGI49003_WHO.TXT_1.pcx

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN])
CREATION DATE/TIME:30-JUL-2002 12:30:08.00
SUBJECT:: Re[2]: NEWS
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
CC:"dinh; viet" <viet.dinh@usdoj.gov> ("dinh; viet" <viet.dinh@usdoj.gov> [UNKNOWN])
READ:UNKNOWN
CC:Heather Wingate (CN=Heather Wingate/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
CC:"willett; don" <don.willett@usdoj.gov> ("willett; don" <don.willett@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

They appear not to be worried about Kohl.

_____Reply Separator_____
Subject: Re: NEWS
Author: Brett_M._Kavanaugh@who.eop.gov
Date: 7/30/2002 11:45 AM

What about Kohl?

(Embedded
image moved Manuel_Miranda@judiciary.senate.gov (Manuel
to file: Miranda)
pic23048.pcx) 07/30/2002 11:43:04 AM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP, "Willett; Don"
<Don.Willett@usdoj.gov>,
"Dinh; Viet" <Viet.Dinh@usdoj.gov>, Heather Wingate/WHO/EOP@EOP

cc:
Subject: NEWS

I have it on 100 info that Leahy is trying to convene the Dems this
afternoon

after Policy Lunch to check on where they stand on Owen. He is seeking to place
Owen on for this Thursday with the view that we would hold over. Feinstein and
Feingold are still not saying how they will vote and this bothers them. The bad
news is that they are not concerned about Biden. That bothers me.

Suggested action. WH should intervene with Feingold and Feinstein as soon as
possible. OLP might write Leahy and remind him that he promised Owen the ample
opportunity to respond to questions (Kennedy's came out today. In either case,
refer only to rumor, not to me.

Received: from mailsims1.senate.gov ([156.33.203.10]) by
mailexch.senate.gov
with SMTP
(IMA Internet Exchange 3.13) id 004B95E5; Tue, 30 Jul 2002 11:48:34 -0400
Received: from eop1.eop.gov (eop151.eop.gov)
by mailsims1.senate.gov (Sun Internet Mail Server
sims.3.5.2000.03.23.18.03.p10)
with SMTP id <0H0200658JVFBI@mailsims1.senate.gov> for
Manuel_Miranda@judiciary.senate.gov; Tue, 30 Jul 2002 11:47:44 -0400 (EDT)
Received: from CONVERSION-DAEMON by EOP.GOV (PMDF V5.2-33 #41062)
id <01KKPDRUE11S9PP30Z@EOP.GOV> for Manuel_Miranda@judiciary.senate.gov;
Tue,
30 Jul 2002 11:46:39 -0400 (EDT)
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by EOP.GOV (PMDF V5.2-33 #41062) with ESMTP id
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Tue, 30 Jul 2002 11:46:09 -0400 (EDT)
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by mhub.eop.gov (PMDF V6.1-1 #41014)
with SMTP id <01KKPDR7AALI9D9D1R@mhub.eop.gov>; Tue,
30 Jul 2002 11:45:56 -0400 (EDT)
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id 85256C06.0056956D ; Tue, 30 Jul 2002 11:45:43 -0400
Date: Tue, 30 Jul 2002 11:45:37 -0400
From: Brett_M._Kavanaugh@who.eop.gov
Subject: Re: NEWS
To: Manuel_Miranda@judiciary.senate.gov (Manuel Miranda)
Cc: "willett; don" <don.willett@usdoj.gov>, "dinh; viet"
<viet.dinh@usdoj.gov>,
Heather_Wingate@who.eop.gov
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File attachment <P_OGI49003_WHO.TXT_1>

From: Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN]
To: Willett; Don <Don.Willett@usdoj.gov>;Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
Sent: 7/30/2002 8:30:10 AM
Subject: : Re[2]: Biden and Feinstein, etc.

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CREATOR:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [ UNKNOWN ] )
CREATION DATE/TIME:30-JUL-2002 12:30:10.00
SUBJECT:: Re[2]: Biden and Feinstein, etc.
TO:"Willett; Don" <Don.Willett@usdoj.gov> ( "Willett; Don" <Don.Willett@usdoj.gov> [
UNKNOWN ] )
READ:UNKNOWN
TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )
READ:UNKNOWN
###### End Original ARMS Header ######

Let me meet with Don and give him some info, then the three of us can speak
later. Don, can we do it at 12:30

_____Reply Separator_____
Subject: Re: Biden and Feinstein, etc.
Author: Brett_M._Kavanaugh@who.eop.gov
Date: 7/30/2002 11:05 AM

I cannot make it at 12:15. Can the three of us get on the phone
instead?
I definitely want to talk to both of you. Thanks.


Received: from mailsims1.senate.gov ([156.33.203.10]) by
mailexch.senate.gov
with SMTP
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with SMTP id <0H02003KEI0IET@mailsims1.senate.gov> for
manuel_miranda@judiciary.senate.gov; Tue, 30 Jul 2002 11:07:35 -0400 (EDT)
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id <01KKPCE2J4Y89OFJXI@EOP.GOV> for manuel_miranda@judiciary.senate.gov;
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30 Jul 2002 11:06:29 -0400 (EDT)
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id 85256C06.0052EE1D ; Tue, 30 Jul 2002 11:05:49 -0400
Date: Tue, 30 Jul 2002 11:05:42 -0400
From: Brett_M._Kavanaugh@who.eop.gov
Subject: Re: Biden and Feinstein, etc.
To: "Willett, Don" <Don.Willett@usdoj.gov>
Cc: "'manuel_miranda@judiciary.senate.gov'"
<manuel_miranda@judiciary.senate.gov>
Message-id: <85256C06.0052EC72.00@sgeop03.eop.gov>
MIME-version: 1.0
Content-type: text/plain; charset=us-ascii
Content-disposition: inline
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X-Lotus-FromDomain: EOP

From: Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN]
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>;Willett; Don <Don.Willett@usdoj.gov>
Sent: 8/13/2002 2:45:08 PM
Subject: : Sept 5th

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###### Begin Original ARMS Header ######
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [ UNKNOWN ] )
CREATION DATE/TIME:13-AUG-2002 18:45:08.00
SUBJECT:: Sept 5th
TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )
READ:UNKNOWN
TO:"Willett; Don" <Don.Willett@usdoj.gov> ( "Willett; Don" <Don.Willett@usdoj.gov> [
UNKNOWN ] )
READ:UNKNOWN
###### End Original ARMS Header ######

Two things about Sept 5th. My info is that it is a go unless, according
to the Leahy staff, there is a problem with the Dem vote count. This
means that, as of today, they are not certain about their count.
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From: Sales, Nathan <Nathan.Sales@usdoj.gov>
To: 'Manuel_Miranda@frist.senate.gov' <Manuel_Miranda@frist.senate.gov>;Benczkowski, Brian A <Brian.A.Benczkowski@usdoj.gov>
CC: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
Sent: 2/14/2003 3:06:24 PM
Subject: : Re: Estrada event on Tuesday

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###### Begin Original ARMS Header ######
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:"Sales, Nathan" <Nathan.Sales@usdoj.gov> ( "Sales, Nathan" <Nathan.Sales@usdoj.gov>
[ UNKNOWN ] )
CREATION DATE/TIME:14-FEB-2003 20:06:24.00
SUBJECT:: Re: Estrada event on Tuesday
TO:"'Manuel_Miranda@frist.senate.gov'" <Manuel_Miranda@frist.senate.gov> (
"'Manuel_Miranda@frist.senate.gov'" <Manuel_Miranda@frist.senate.gov> [ UNKNOWN ] )
READ:UNKNOWN
TO:"Benczkowski, Brian A" <Brian.A.Benczkowski@usdoj.gov> ( "Benczkowski, Brian A"
<Brian.A.Benczkowski@usdoj.gov> [ UNKNOWN ] )
READ:UNKNOWN
CC:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )
READ:UNKNOWN
###### End Original ARMS Header ######

I have no way of guessing. Several thousand pages, I would think, but
short of sitting down and counting, there's no way to know for sure. Also,
my connections with law firms aren't the greatest, since I've never worked
at one, so I'm not going to be much help there either.


-----Original Message-----
From: Miranda, Manuel (Frist) <Manuel_Miranda@frist.senate.gov>
To: Benczkowski, Brian A <Brian.A.Benczkowski@USDOJ.gov>; Sales, Nathan
<Nathan.Sales@USDOJ.gov>
CC: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
Sent: Fri Feb 14 19:17:42 2003
Subject: RE: Estrada event on Tuesday

Can one of you price it for us? Figure out how many pages will need to
be copied 49 times?

That is necessary to push it on a firm. Of course it would be great if
a law firm took the job on an emergency basis to copy the 49 sets. Any
chance?

-----Original Message-----
From: Sales, Nathan [mailto:Nathan.Sales@usdoj.gov]
Sent: Friday, February 14, 2003 7:05 PM
To: Benczkowski, Brian A; Miranda, Manuel (Frist)
Subject: Re: Estrada event on Tuesday

Leonard Leo will know. We probably don't want the fed soc paying for
it, but he might know some generous donor.

Would Gibson Dunn pay?


-----Original Message-----
From: Benczkowski, Brian A <Brian.A.Benczkowski@USDOJ.gov>
To: 'Manuel_Miranda@frist.senate.gov' <Manuel_Miranda@frist.senate.gov>
CC: Sales, Nathan <Nathan.Sales@USDOJ.gov>
Sent: Fri Feb 14 19:00:56 2003
Subject: Re: Estrada event on Tuesday

Tough. Can the WH pony up for 49 boxes of goodies?
```

-----Original Message-----
From: Miranda, Manuel (Frist) <Manuel_Miranda@frist.senate.gov>
To: Benczkowski, Brian A <Brian.A.Benczkowski@USDOJ.gov>
CC: Sales, Nathan <Nathan.Sales@USDOJ.gov>
Sent: Fri Feb 14 18:32:56 2003
Subject: RE: Estrada event on Tuesday

The trouble is we need to copy that 49 times. We need an outside group or law firm to pay for it. Any thoughts?

I have not spoken to Boyden about the cost yet and may not make contact until Tuesday unless he returns the call.

And we will need to have it by 2 pm on Tuesday!!!!

My cell is 262-7789, over the weekend, and I will also be at my desk most of that time. 224-3749

-----Original Message-----
From: Benczkowski, Brian A [mailto:Brian.A.Benczkowski@usdoj.gov]
Sent: Friday, February 14, 2003 6:27 PM
To: Miranda, Manuel (Frist)
Cc: Sales, Nathan
Subject: Re: Estrada event on Tuesday

Manny-

We have assembled a litigation box full of Miguel's record, which I thought had been sent up to you. In addition to the info in the binders we sent up, the box has every brief Miguel has ever authored, plus other stuff. Nathan has the box. This might be the best set of docs for you guys to use. Let me know what you want us to do with it.

BAB

-----Original Message-----
From: Miranda, Manuel (Frist) <Manuel_Miranda@frist.senate.gov>
To: Benczkowski, Brian A <Brian.A.Benczkowski@USDOJ.gov>; Keys, Elizabeth (Republican-Conf) <Elizabeth_Keys@src.senate.gov>; Ledeen, Barbara (Republican-Conf) <Barbara_Ledeen@src.senate.gov>; wgrubbs@who.eop.gov <wgrubbs@who.eop.gov>; Comisac, RenaJohnson (Judiciary)
</DDV=Rena_Johnson_Comisac@Judiciary.senate.gov/DDT=RFC-822/O=INETGW/P=GOV+DOJ/A=TELEMAIL/C=US/>
CC: Brown, Jamie E (OLA) <Jamie.E.Brown@USDOJ.gov>; krdaly@aol.com <krdaly@aol.com>; Leonard_B._Rodriguez@who.eop.gov <Leonard_B._Rodriguez@who.eop.gov>
Sent: Fri Feb 14 18:12:16 2003
Subject: RE: Estrada event on Tuesday

See attached

-----Original Message-----
From: Keys, Elizabeth (Republican-Conf)
Sent: Friday, February 14, 2003 6:04 PM
To: Miranda, Manuel (Frist); Ledeen, Barbara (Republican-Conf); wgrubbs@who.eop.gov; Comisac, RenaJohnson (Judiciary); Benczkowski, Brian A
Cc: Jamie.E.Brown@usdoj.gov; krdaly@aol.com; Leonard_B._Rodriguez@who.eop.gov
Subject: RE: Estrada event on Tuesday

I have requested for set-up 30 chairs theatre style with a row in the middle, podium, mike/mult and next to the podium a long table with tablecloth for the documents.
-Elizabeth

-----Original Message-----
From: Miranda, Manuel (Frist)
Sent: Friday, February 14, 2003 5:58 PM
To: Ledeen, Barbara (Republican-Conf); Keys, Elizabeth (Republican-Conf); wgrubbs@who.eop.gov; Comisac, RenaJohnson (Judiciary); Benczkowski, Brian A
Cc: Jamie.E.Brown@usdoj.gov; krdaly@aol.com; Leonard_B._Rodriguez@who.eop.gov
Subject: Estrada event on Tuesday

I have called Boyden and Brigitta. I will also call Carlos Iturriagui from Hispanic bar. I am copying Kay

We also have to start thinking about who will produce the copies and assemble interns with boxes.

Rena, I assume we can copy the binder that DOJ recently sent us and place the copies in boxes. We do not need the expense of binders.

We will have to make these copies off campus and the expense carried/shared by an outside group. Barbara/ Kay?

Rena and Barbara, we need you to provide interns.

Leonard, can you provide bodies? Also send us a schedule of Hispanic events for the next two weeks.

-----Original Message-----
From: Ledeen, Barbara (Republican-Conf)
Sent: Friday, February 14, 2003 5:24 PM
To: Miranda, Manuel (Frist); Keys, Elizabeth (Republican-Conf); Comisac, RenaJohnson (Judiciary); Dinh, Viet; Brown, Jamie E (OLA); Benczkowski, Brian A; Brett_M._Kavanaugh@who.eop.gov; Delrahim, Makan (Judiciary); wgrubbs@who.eop.gov
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: RE: Estrada event

yes but you have to clear with boyden because he has that federalist society debate too.

-----Original Message-----
From: Miranda, Manuel (Frist)
Sent: Friday, February 14, 2003 5:16 PM
To: Keys, Elizabeth (Republican-Conf); Comisac, RenaJohnson (Judiciary); Dinh, Viet; Brown, Jamie E (OLA); Benczkowski, Brian A; Brett_M._Kavanaugh@who.eop.gov; Delrahim, Makan (Judiciary); Ledeen, Barbara (Republican-Conf); wgrubbs@who.eop.gov
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: RE: Estrada event

Brigitta Benitez from Republican National Lawyers Assoc and Carlos Iturriagui from the Hispanic Bar Association,...and then Boyden and Kay.

Does that work?

-----Original Message-----
From: Miranda, Manuel (Frist)
Sent: Friday, February 14, 2003 4:22 PM
To: Comisac, RenaJohnson (Judiciary); Dinh, Viet; Brown, Jamie E (OLA); Benczkowski, Brian A; Brett_M._Kavanaugh@who.eop.gov; Delrahim, Makan (Judiciary); Ledeen, Barbara (Republican-Conf); Keys, Elizabeth (Republican-Conf); wgrubbs@who.eop.gov
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: RE: Estrada event

We are looking at Boyden and Kay Daly and maybe Tom Jipping. It is developing that these boxes will come from concerned citizens that see that the Senate Democrats need help.

-----Original Message-----
From: Comisac, RenaJohnson (Judiciary)
Sent: Friday, February 14, 2003 3:29 PM
To: Dinh, Viet; Brown, Jamie E (OLA); Benczkowski, Brian A; Miranda, Manuel (Frist); Brett_M._Kavanaugh@who.eop.gov; Delrahim, Makan (Judiciary); Ledeen, Barbara (Republican-Conf); Keys, Elizabeth (Republican-Conf); wgrubbs@who.eop.gov
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: RE: Estrada event

Who is going to speak at this press conference?

-----Original Message-----
From: Dinh, Viet [mailto:Viet.Dinh@usdoj.gov]
Sent: Friday, February 14, 2003 3:22 PM
To: Brown, Jamie E (OLA); Benczkowski, Brian A; Miranda, Manuel (Frist); 'Brett_M._Kavanaugh@who.eop.gov'; Delrahim, Makan (Judiciary); Comisac, RenaJohnson (Judiciary); Ledeen, Barbara (Republican-Conf); Keys, Elizabeth (Republican-Conf); 'wgrubbs@who.eop.gov'
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: RE: Estrada event

Sounds good to me; we have the copies ready to transmit.

-----Original Message-----
From: Miranda, Manuel (Frist) [mailto:Manuel_Miranda@frist.senate.gov]
Sent: Friday, February 14, 2003 3:12 PM
To: Brown, Jamie E (OLA); Benczkowski, Brian A; Dinh, Viet; Brett_M._Kavanaugh@who.eop.gov; Delrahim, Makan (Judiciary); Comisac, RenaJohnson (Judiciary); Ledeen, Barbara (Republican-Conf); Keys, Elizabeth (Republican-Conf); wgrubbs@who.eop.gov
Cc: Vogel, Alex (Frist); Jacobson, Paul (Frist); Stevenson, Bob (Frist)
Subject: Estrada event

Folks,

We would like your input on the idea that Heather first floated that we would like to work on for Tuesday implementation. Some of you may already be in the loop.

The idea is to have a press event to provide a visual and keep whatever little attention we can on the Estrada nomination over Recess.

We would announce an Estrada press conference at 2 pm on Tuesday in Mansfield (SRConf to do) and start the event by having 10 interns walk in with boxes containing 49 copies of all Estrada Supreme Court filings.

We would separately also communicate to Dem staffs to drop by Mansfield at 2 pm to Pick up the Estrada writings. And we tell the press that we did

A possible drawback is that Dems will spin this as "they are only doing this now." But rather, we would announce that these writings are publicly available and have been available for review for over two years, and many were delivered already to the JC, and we are going to the trouble of making sure every Democrat Senator and staff has them to read over the whole Recess week...so we can vote when we return.

Ideas?

Manny

REV_00368981

From: Miranda, Manuel (Frist) <Manuel_Miranda@frist.senate.gov>
BCC: Brett M. Kavanaugh (Brett M. Kavanaugh/WHO/EOP [WHO])
Sent: 3/18/2003 10:53:29 AM
Subject: : For use and not distribution.
Attachments: P_2CBSE003_WHO.TXT_1.html

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:"Miranda, Manuel (Frist)" <Manuel_Miranda@frist.senate.gov> ("Miranda, Manuel (Frist)" <Manuel_Miranda@frist.senate.gov> [UNKNOWN])
CREATION DATE/TIME:18-MAR-2003 15:53:29.00
SUBJECT:: For use and not distribution.
BCC:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

Please see information below. Also, Kennedy speech about the precedent for legal memos from the Kleindeinst nomination. Also, precedent based on a Robert Jackson quote from 1941 and Kuhl's memos regarding Bob Jones University which were disclosed by the Justice Department to the Finance Committee in the 1980s.

In response to this morning's letter, Dem staffers say that they have confidential information that you all have reviewed the files.

Points they make:

- Rather than face the facts of past precedent and begin a process of negotiating the terms of the release to the Senate of the memos written by Miguel Estrada, Republicans insist on asserting, without any factual basis, that the appeal memos written by attorneys to the Solicitor General were stolen or leaked. This claim defies the facts and is very, very misleading. They alternatively claim that only a few memos have been disclosed but only in narrow circumstances related to claims of criminal misconduct or malfeasance. Again, that is false. Now the Justice Department claims that not even it has reviewed Estrada's memos, implying that this is how sensitive such documents are. Past Justice Department acted much more responsibly and responsively. Here are just a few examples.

- Here are just five examples that clearly refute the Republicans' incorrect claims. Correspondence from the Senate Judiciary Committee clearly shows that memos by attorneys have been requested and provided by prior Administrations that were far more cooperative with the Senate in nominations.

- Past examples include the nominations of Robert Bork to the Supreme Court, William Rehnquist to the Supreme Court, Bradford Reynolds to a term-appointment as Associate Attorney General, Stephen Trott to the Ninth Circuit, and Ben Civiletti to be Attorney General.

First, it is clear that the Reagan Justice Department provided numerous memos to the Senate in the Bork nomination regarding school desegregation cases.

In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos. Included in this request was what was identified as request number 9. That request asked for the Justice Department to provide to the Senate, and I will quote that paragraph in its entirety:

"All documents constituting, describing, referring or relating in whole

or in part to Robert H. Bork ans any study or consideration during the period 1969-1977 by the Executive Branch of the United States Government or any agency or component thereof of school desegregation remedies. (In addition to responsive documents from the entities described at the beginning of this request, please provide any responsive documents in the possession, custody or control of the U.S. Department of Education or its predecessor agency, or any agency, component of document depository thereof.)"

- I think we can all agree that this was a very exhaustive request for all documents on school desegregation cases and deliberations for an 8-year period from 1969 to 1977. It is also apparent that there was no allegation of wrongdoing or malfeasance as the predicate of this request.

? The request for these memos was merely an effort to understand the Department's position on these important issues and Bork's involvement in suggesting or taking litigation positions on this issue in response to recommendations by Department attorneys as well as information from the client agency in school desegregation cases, what was then known as the Health, Education, and Welfare Department (known as HEW).

? What was the Reagan Administration's response?

? Did they say -like this Administration does-- we have never given you such documents in the past? No, because that was not true.

? Did they claim that past document disclosures were based on a claim of wrongdoing? No, because that was not true.

? Did they assert that this would chill Justice Department and HEW attorneys from candidly discussing cases? No.

? Did they assert that the request was too broad or some sort of fishing expedition that it wanted to ignore? No.

? Did they claim that they could not even look at those sensitive legal memos? No!

? Well, what did they say then? They said in a letter of August 24, 1987, "the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below [related to the objections of President Nixon's lawyer to some Watergate documents], completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents."

? That is already far more cooperation than this Senate has received from this Administration.

? Here is what the Justice Department said specifically about the request for information about school desegregation cases, and I will quote it in its entirety so that there can be no mistake:

"Our search for documents responsive to request number 9 has been time-consuming and very difficult, and is not at this time entirely complete. In order to conduct as broad a search as possible, we requested the files of every case handled by the Civil Rights Division or Civil Division, between 1969 and 1977, which concerned desegregation of public education. Although most of these case files have been retrieved, several remain unaccounted for and perhaps have been lost. We expect to have accounted for the remaining files (which may or may not contain responsive documents) in the next few days. We have also assembled responsive documents obtained from other Department files.

The Department of Education is nearing completion of its search of its files, and those of its predecessor agency, HEW."

? So, the Reagan Justice Department conducted an exhaustive review of its litigation files and assembled the documents responsive to the Senate's request. This stands in marked contrast to the stonewalling of the current Justice Department.

? What happened next to the boxes of school desegregation memos assembled by the Reagan Justice Department?

? On September 2, 1987, nine days after reporting to the Senate on its efforts to locate and assemble documents responsive to the Senate's request, the Department of Justice sent Chairman Biden a letter, stating:
"Attached is one set of copies of documents assembled by the Department in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork. . . ."

? So, it is clear that the Justice Department transmitted all of the documents not objected to (specifically, not a handful of Watergate documents objected to be Nixon's lawyer).

? What were those school desegregation documents? I have in my hand a sample of the documents provided by the Justice Department to the Senate during the Bork nomination regarding school desegregation.

? For example, there is a memo from Assistant Solicitor General Frank Easterbrook (then acting in the same capacity as Mr. Estrada, now a judge on the Seventh Circuit). In this memo, Easterbrook analyzes school desegregation efforts in Philadelphia. In this memo to the Solicitor General, Robert Bork, Easterbrook states: "The Civil Rights Division and I recommend AMICUS PARTICIPATION in support of petitioner."

? Easterbrook suggested that the Third Circuit's decision in Vorcheimer v. School District of Philadephia, that the local schools were "separate but equal" in this case involving a female student seeking entry could adversely affect the enforcement of Title IX and amendments prohibiting sex discrimination in education. In the memo, one can see Easterbrook's analysis of whether discrimination based on sex should be reviewed under a strict scrutiny standard or the lowest level of review, which is known as rational basis review.

? Attached to that memo is the memoranda of the Acting Assistant Attorney General for the Civil Rights Division, Stanley Pottinger.

? Another example of a school desegregation memo to the Solicitor General disclosed in the Bork nomination involves the desegregation of Nebraska schools in the case of United States v. School District of Omaha. In that case, the memo to Solicitor General Bork argued that the Civil Rights Division should be permitted to appeal an adverse decision by the district court in Nebraska that found erroneously that the school district's segregation was not based on intent to segregate. That memos analyzes why the decision below was wrong and why the law should be corrected to reflect a better understanding of the standards for finding unlawful segregation based on race.

? Specifically, the author of that memo argues that "We believe that an appeal of the district court's decision in this case is essential in order to develop the law on the issue of proof necessary to establish a showing of intent to segregate in a northern school system."

? We believe Mr. Estrada's memos contain similar suggestions about how the law should be developed, which reflect his unscripted views of the state of the law and its direction.

? Yet another memo disclosed in the Bork nomination involves the case of Lee and United States v. Demopolis City School System, relating to desegregation in Alabama. That memo to Solicitor General Robert Bork requests authority to appeal a lower court decision refusing to desegregate elementary schools, one white and one African American, as well as dismantling of the segregation state-wide.

? These are just a few of the memos provided to the Senate by the Justice Department during the Bork nomination relating to school desegregation (with all of those busing cases between 1969 and 1977 enforcing Brown v. Board). They were clearly provided as part of the Justice Department's submission of memos requested by the Senate in document request number 9, which I read in full earlier.

? One would think this would be enough evidence to refute the groundless claims of Republicans that memos from lower level attorneys written to the Solicitor General have never been provided in past nominations or that the above memos were stolen(!), but there is even more evidence.

? A second example also comes from the Bork nomination.

? In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos.

? Included in this request was what was identified as request number 10. That request asked for the Justice Department to provide to the Senate, numerous "documents constituting, describing, referring in whole or in part to the participation of Solicitor General Robert H. Bork in the formulation of the position of the United States . . . ."
? In the Solicitor General's office, line attorneys (Assistant Solicitors General, in the same role as Estrada) write the recommendations to the Solicitor General analyzing what the law is or should be and whether the case would help move the law in one direction or another.

? In those appeals, a lower level attorney would write a memo making the recommendation, that memo would be reviewed by a direct supervisor and then submitted to the Solicitor General who would then make an oral decision whether to accept the recommendation to appeal (or intervene as amicus) or not. Upon reviewing those attorney memos, a Senate staffer would then examine whether the Solicitor General accepted the recommendation and, if so, whether they took the same position in the publicly filed briefs on appeal as amicus.

? If the recommendation were accepted and appeal or amicus were authorized, then the lower attorney would be asked to write briefs (or even lower, like the Civil Division) consistent with the decision of the SG. Those briefs would be edited by direct supervisors (not the SG) and then would be reviewed by a head of the office (for example, the SG if the brief were going to the Supreme Court, or a Deputy in the Civil Division if the case were going to a circuit court, such as the 9th Circuit).

? Many of the memos relating to appeal requested and provided in Bork's nomination were written to Bork, not by Bork.

? What was the Reagan Administration's response to the request of memos by line attorneys to Solicitor General Bork?

? Did they say -like this Administration does-- we have never given you such documents in the past? No, because that was not true.

? Did they claim that past document disclosures were based on a claim of wrongdoing? No, because that was not true.

? Did they assert that the request was some sort of fishing expedition that it wanted to ignore? No.

? Did they assert that they could not even look at the attorney memos to the Solicitor General? Of course not.

? Well, what did they say then?

? On August 20, 1987, Chairman Biden's staff noted that the Justice Department had created three categories of documents. First, those which they would not release due to executive privilege claims [by Nixon's counsel related to some Watergate documents]. Second, those they would release with limited access by staff, and, third, those to which the Senate would have unlimited access. The current administration has made no such overture to this Senate.

? The Reagan Justice Department also said in a letter of August 24, 1987, "the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below [related to the objections of President Nixon's lawyer to some Watergate documents], completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents."

? Again, that is already far more cooperation than this Senate has received from this Administration.

? Here is what the Justice Department said specifically about request number 10: "We have assembled case files for the cases referred to in question 10, with the exception of Hill v. Stone, for which there is no file." The also said "A few general searches of certain front office files are still underway, and we expect those searches to be concluded in the next few days. We will promptly notify you should any further responsive documents come into our possession."

? Again, this is far more cooperation than this Justice Department has provided.

? The Justice Department did, however, express some concerns about internal deliberations, but it still provided the informationrequested.

? Here is the complete statement of the Reagan Justice Department on the issue of providing memos involving internal deliberations:
"As you know, the vast majority of the documents you have requested reflect of disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch. The disclosure of such sensitive and confidential documents seriously impairs the deliberative process within the Executive Branch, our ability to represent the government in litigation and our relationship with other entities."

? According to that letter, "For these reasons, the Justice Department and other executive agencies have consistently taken the position, in Freedom of Information Act [which, as an aside-from Lisa, expressly does not apply to Congress nor limit Congress' authority to seek information from the Executive Branch in any way whatsoever. 5 U.S.C. 552(d) (stating expressly that FOIA "is not authority to withhold information from Congress")] and other request, that it is not at liberty to disclose materials that would compromise the confidentiality of any such deliberative or otherwise privileged communications."

? Immediately after stating this, the Reagan Justice Department stated:
"On the other hand, we also wish to cooperate to the fullest

extent possible with the Committee and to expedite Judge Bork's confirmation process."

? The Justice Department then indicated that it was providing the documents requested except those specifically objected to (relating to documents regarding Watergate objected to by Nixon's lawyer).
? Then on September 2, 1987, the Justice Department sent the Senate a letter stating here "is one set of copies of documents assembled in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork."

? Then, the next year, the Justice Department asked for the Senate to return the documents requested. Specifically, the Justice Department in a letter by Thomas Boyd on May 10, 1988, reiterated that the documents it provided "reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch." The Justice Department indicated that it provided those memos "to respond fully to the Committee's request and to expedite the confirmation process." The Department then asked for the return of all documents that except those "that are clearly part of the public record (e.g., briefs and judicial opinions) or that were specifically made part of the record of the hearing."

? Let's contrast that with the position of this Justice Department. In a letter dated June 5, 2002, the Bush Justice Department stated that "the Department has a longstanding policy-which has endured across Administrations of both parties-of declining to release publicly or make available to Congress the kinds of documents you have requested."

? In fact, the opposite is true. The long-standing practice of the Justice Department has been to follow a "policy of accommodation." Senator Schumer put a statement of that policy from the Clinton Administration into the hearing record. That policy provides that it is well established that the Department and the Senate typically work together to find an accommodation to avoid an impasse.

? In fact, the D.C. Circuit has noted that: "The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute . . . . The Constitution contemplates such accommodation." United States v. AT&T, 576 U.S. 121, 127, 130 (D.C. Cir. 1977).
? In fact, in 1982, President Reagan issued a memo to Department heads explaining the policy of accomodation:
"The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with constitutional and statutory obligations of the Executive Branch . .. . . Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving the conflicts between the Branches."

? This is what the current administration is denying and ignoring. This was the policy and practice dating from the Carter Administration (which disclosed the legal memos to and from Benjamin Civiletti to the Senate in the course of his nomination to be Attorney General) through the Reagan Administration (which disclosed the legal memos to the Solicitor General and others in the nomination of Brad Reynolds to be Associate AG, the appeal memos to Bork and other memos by Bork in his nomination).

? The Reagan Administration also provided numerous legal memos to and by William Rehnquist about the broad issues "civil rights and civil liberties," and the first Bush Administration also disclosed internal legal memos related to the special prosecutor decisions in

connection with Stephen Trott's nomination to the Ninth Circuit. The Clinton Administration disclosed a broad range on memos in the oversight process. [In addition, the Justice Department encouraged its nominees to be responsive to every request no matter how intrusive, such as the request for how Margaret Morrow voted in the ballot box on California Referenda and how Marsha Berzon voted on ACLU board meeting issues, among others.]

? A third example, also stems from the Bork nomination.

? In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos, including all memos from 1973 to 1977 relating to Bork's analysis of the President's pocket veto power, in addition to the memos relating to appealing or petitioning for certiorari in pocket veto cases.

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? A fourth example comes from the Rehnquist nomination. On July 23, 1986 (before the Department shared the memos requested in the Bork nomination), then-Ranking Member Biden asked Chairman Strom Thurmond to provide copies of "all memoranda, correspondence, and other materials prepared by Mr. Rehnquist or by his staff, for his approval, or on which his name or initials appear" from 1969 to 1971 related to "civil rights," "civil liberties," "national security," "domestic surveillance," "wiretapping," "anti-war demonstrators," "executive privilege," and other issues.

? What was the Reagan Administration's response?

? Did they claim that sharing those documents with the Senate would chill deliberations by attorneys about legal policy in these areas? No.

? Did they claim the request was a fishing expedition? No.

? Did they claim that disclosure of documents was only predicated on wrongdoing? No.

? Did these Justice Department officials claim that they did not and could not look at those sensitive legal memos of the Department? Of course not.

? Instead, they accommodated the Senate's request. In a letter dated August 6, 1986, Senator Biden said:
"I wish to express my appreciation for the manner in which we were able to resolve the issue of access to documents which we requested in connection with Justice Rehnquist's confirmation proceedings. I am delighted that we were able to work out a mutually acceptable accommodation of our respective responsibilities."

? Biden then noted that in reviewing the memos provided, "several of the items refer to other materials, most of which appear to be incoming communications" to Rehnquist. Biden then attaches a list of the 14 additional memos.

? That attachment makes clear that voluminous materials were already provided, and it seeks memos from a number of people like Alexander Haig, John Dean, and William Ruckshaus.

? The very next day, the Justice Department responded to Biden's request noting that it had gone "far beyond its routine process to ensure the comprehensiveness of its response." Based on that review, the Justice Department found three other memos related to May Day arrests prepared by Justice Department attorneys as well as another memo. As noted in that letter, "the staff of the Office of Legal Counsel went to extraordinary lengths to ensure that all responsive materials were located, putting literally hundreds of hours into this request."

? The current administration has made no such efforts.

? Yet a fifth example stems from the Reynolds nomination to a short-term appointment to be Associate Attorney General. In that nomination, the Senate requested a wide range of memos, including appeal memos to the Solicitor General (Rex Lee) relating to civil rights. In fact, some of these memos appear in the hearing record.

? For example, Senators placed a memo to the Solicitor General relating to seeking to intervene as amicus in an employment discrimination case called Hishon v. King & Spaulding (involving a gender discrimination claim) as well as memos relating to redistricting cases. None of the Senators present or Mr. Reynolds claimed that such memos were protected or were stolen or leaked as the current administration has claimed about our document request memos.

? In addition, some memos written by Bork himself to President Nixon about broader legal issues were provided, for example, legal memos assessing the pocket veto power, the scope of executive privilege, and how to structure a special prosecutor or independent prosecutor process.

? As noted earlier, in the case of the pocket veto, the Senate received and reviewed both Bork's memo describing his views on the pocket veto power, as well as memos from Assistant SGs or lower level attorneys recommending for or against appeal in litigation challenging the President Nixon's use of pocket veto.

? As you can see, none of these memos related to allegations of malfeasance or criminal misconduct by Bork or others. They simply reflect a desire of Senators to know how Bork approached those (controversial) issues and whether his views influenced litigation moving the law in one direction or another. (SG memos were also provided in Reynolds nomination (to a short-term appointment as Associate AG-not even a lifetime appointment) about the impact of his views on appealing civil rights cases (discrimination cases and school prayers cases for example). A sample of such memos written to the SG was actually published in the hearing transcript. In addition, legal memos written to or from Rehnquist in the Office of Legal Counsel were also provided in his nomination. These are just a few examples.)

- att1.htm
ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_2CBSE003_WHO.TXT_1>

Please see information below. Also, Kennedy speech about the precedent for legal memos from the Kleindeinst nomination. Also, precedent based on a Robert Jackson quote from 1941 and Kuhl's memos regarding Bob Jones University which were disclosed by the Justice Department to the Finance Committee in the 1980s.

In response to this morning's letter , Dem staffers say that they have confidential information that you all have reviewed the files.

Points they make:

--Rather than face the facts of past precedent and begin a process of negotiating the terms of the release to the Senate of the memos written by Miguel Estrada, Republicans insist on asserting, without any factual basis, that the appeal memos written by attorneys to the Solicitor General were stolen or leaked. This claim defies the facts and is very, very misleading. They alternatively claim that only a few memos have been disclosed but only in narrow circumstances related to claims of criminal misconduct or malfeasance. Again, that is false. Now the Justice Department claims that not even it has reviewed Estrada's memos, implying that this is how sensitive such documents are. Past Justice Department acted much more responsibly and responsively. Here are just a few examples.

--Here are just five examples that clearly refute the Republicans' incorrect claims. Correspondence from the Senate Judiciary Committee clearly shows that memos by attorneys have been requested and provided by prior Administrations that were far more cooperative with the Senate in nominations.

--Past examples include the nominations of Robert Bork to the Supreme Court, William Rehnquist to the Supreme Court, Bradford Reynolds to a term appointment as Associate Attorney General, Stephen Trott to the Ninth Circuit, and Ben Civiletti to be Attorney General.

First, it is clear that the Reagan Justice Department provided numerous memos to the Senate in the Bork nomination regarding school desegregation cases.

In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos. Included in this request was what was identified as request number 9. That request asked for the Justice Department to provide to the Senate, and I will quote that paragraph in its entirety:

"All documents constituting, describing, referring or relating in whole or in part to Robert H. Bork ans any study or consideration during the period 1969-1977 by the Executive Branch of the United States Government or any agency or component thereof of school desegregation remedies. (In addition to responsive documents from the entities described at the beginning of this request, please provide any responsive documents in the possession, custody or control of the U.S. Department of Education or its predecessor agency, or any agency, component of document depository thereof.)"

-I think we can all agree that this was a very exhaustive request for all documents on school desegregation cases and deliberations for an 8-year period from 1969 to 1977. It is also apparent that there was no allegation of wrongdoing or malfeasance as the predicate of this request.</o:p>

?---: The request for these memos was merely an effort to understand the Department's position on these important issues and Bork's involvement in suggesting or taking litigation positions on this issue in response to recommendations by Department attorneys as well as information from the client agency in school desegregation cases, what was then known as the Health, Education, and Welfare Department (known as HEW).

?---: What was the Reagan Administration's response?

? ; Did they say –like this Administration does– we have never given you such documents in the past? No, because that was not true.

? ; Did they claim that past document disclosures were based on a claim of wrongdoing?< span style='mso-spacerun:yes'> No, because that was not true.

? ; Did they assert that this would chill Justice Department and HEW attorneys from candidly discussing cases? No.

? ; Did they assert that the request was too broad or some sort of fishing expedition that it wanted to ignore? No.</o:p>

? ; Did they claim that they could not even look at those sensitive legal memos? No!

? ; Well, what did they say then? They said in a letter of August 24, 1987, "the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below [related to the objections of President Nixon's lawyer to some Watergate documents], completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents."

? ; That is already far more cooperation than this Senate has received from this Administration.

? ; Here is what the Justice Department said specifically about the request for information about school desegregation cases, and I will quote it in its entirety so that there can be no mistake:

"Our search for documents responsive to request number 9 has been time-consuming and very difficult, and is not at this time entirely complete. In order to conduct as broad a search as possible, we requested the files of every case handled by the Civil Rights Division or Civil Division, between 1969 and 1977, which concerned desegregatio n of public education. Although most of these case files have been retrieved, several remain unaccounted for and perhaps have been lost. We expect to have accounted for the remaining files (which may or may not contain responsive documents) in the next few days. We have also assembled responsive documents obtained from other Department files. The Department of Education is nearing completion of its search of its files, and those of its predecessor agency, HEW."

? ; So, the Reagan Justice Department conducted an exhaustive review of its litigation files and assembled the documents responsive to the Senate's request. This stands in marked contrast to the stonewalling of the current Justice Department.

? ; What happened next to the boxes of school desegregation memos assembled by the Reagan Justice Department?

? ; On September 2, 1987, nine days after reporting to the Senate on its efforts to locate and assemble documents responsive to the Senate's request, the Department of Justice sent Chairman Biden a letter, stating:

"Attached is one set of copies of documents assembled by the Department in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork. . . ."

? ; So, it is clear that the Justice Department transmitted all of the documents not objected to (specifically, not a handful of Watergate documents objected to be Nixon's lawyer).

? ; What were those school desegregation documents? I have in my hand a sample of the documents provided by the Justice Department to the Senate during the Bork nomination regarding school desegregation.

? ; For example, there is a memo from Assistant Solicitor General Frank Easterbrook (then acting in the same capacity as Mr. Estrada, now a judge on the Seventh Circuit). In this memo, Easterbrook analyzes school desegregation efforts in Philadelph ia. In this memo to the Solicitor General, Robert Bork, Easterbrook states: "The Civil Rights Division and I recommend AMICUS PARTICIPATION in support of petitioner."

? ; Easterbrook suggested that the Third Circuit's decision in Vorcheimer v. School District of Philadephia, that the local schools were "separate but equal" in this case involving a female student seeking entry could adversely affect the enforcement of Title IX and amendments prohibiting sex discrimination in education. In the memo, one can see Easterbrook's analysis of whether discrimination based on sex should be reviewed under a strict scrutiny standard or the lowest level of review, which is known as rational basis review.

? ; Attached to that memo is the memoranda of the Acting Assistant Attorney General for the Civil Rights Division, Stanley Pottinger.

? ; Another example of a school desegregation memo to the Solicitor General disclosed in the Bork nomination involves the desegregation of Nebraska schools in the case of United States v. <font>School District of Omaha. In that case, the memo to Solicitor General Bork argued that the Civil Rights Division should be permitted to appeal an adverse decision by the district court in Nebraska that found erroneously that the school district's segregation was not based on intent to segregate. That memos analyzes why the decision below was wrong and why the law should be corrected to reflect a better understanding of the standards for finding unlawful segregation based on race.

? ; Specifically, the author of that memo argues that "We believe that an appeal of the district court's decision in this case is essential in order to develop the law on the issue of proof necessary to establish a showing of intent to segregate in a northern school system."
? ; We believe Mr. Estrada's memos contain similar suggestions about how the law should be developed, which reflect his unscripted views of the state of the law and its direction.

? ; Yet another memo disclosed in the Bork nomination involves the case of Lee and United States v. Demopolis City School System, relating to desegregation in Alabama. That memo to Solicitor General Robert Bork requests authority to appeal a lower court decision refusing to desegregate elementary schools, one white and one African American, as well as dismantling of the segregation state-wide.

? ; These are just a few of the memos provided to the Senate by the Justice Department during the Bork nomination relating to school desegregation (with all of those busing cases between 1969 and 1977 enforcing Brown v. Board). They were clearly provided as part of the Justice Department's submission of memos requested by the Senate in document request number 9, which I read in full earlier.

? ; One would think this would be enough evidence to refute the groundless claims of Republicans that memos from lower level attorneys written to the Solicitor General have never been provided in past nominations or that the above memos were stolen(!), but there is even more evidence.

? ; A second example also comes from the Bork nomination.

? ; In a letter dated August 10, 1987, then Chairman Biden wrote to the Justice Department and requested numerous memos.

? ; Included in this request was what was identified as request number 10. That request asked for the Justice Department to provide to the Senate, numerous "documents constituting, describing, referring in whole or in part to the participation of Solicitor General Robert H. Bork in the formulation of the position of the United States

? ... In the Solicitor General's office, line attorneys (Assistant Solicitors General, in the same role as Estrada) write the recommendations to the Solicitor General analyzing what the law is or should be and whether the case would help move the law in one direction or another.

? ... In those appeals, a lower level attorney would write a memo making the recommendation, that memo would be reviewed by a direct supervisor and then submitted to the Solicitor General who would then make an oral decision whether to accept the recommendation to appeal (or intervene as amicus) or not. Upon reviewing those attorney memos, a Senate staffer would then examine whether the Solicitor General accepted the recommendation and, if so, whether they took the same position in the publicly filed briefs on appeal as amicus.

? ... If the recommendation were accepted and appeal or amicus were authorized, then the lower attorney would be asked to write briefs (or even lower, like the Civil Division) consistent with the decision of the SG. Those briefs would be edited by direct supervisors (not the SG) and then would be reviewed by a head of the office (for example, the SG if the brief were going to the Supreme Court, or a Deputy in the Civil Division if the case were going to a circuit court, such as the 9th Circuit).

? ... Many of the memos relating to appeal requested and provided in Bork's nomination were written to Bork, not by Bork.

? ... What was the Reagan Administration's response to the request of memos by line attorneys to Solicitor General Bork?

? ... Did they say –like this Administration does– we have never given you such documents in the past? No, because that was not true.

? ... Did they claim that past document disclosures were based on a claim of wrongdoing? No, because that was not true.

? ... Did they assert that the request was some sort of fishing expedition that it wanted to ignore? No.

? ... Did they assert that they could not even look at the attorney memos to the Solicitor General? Of course not. <o:p>

? ... Well, what did they say then?

? ... On August 29, 1987, Chairman Biden's staff noted that the Justice Department had created three categories of documents. "First, those which they would not release due to executive privilege claims [by Nixon's counsel related to some Watergate documents]. Second, those they would release with limited access by staff, and, third, those to which the Senate would have unlimited access. The current administration has made no such overture to this Senate.

? ... The Reagan Justice Department also said in a letter of August 24, 1987, "the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below [related to the objections of President Nixon's lawyer to some Watergate documents], completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents."

? ... Again, that is already far more cooperation than this Senate has received from this Administration.

? ... Here is what the Justice Department said specifically about request number 10: "We have assembled case files for the cases referred to in question 10, with the exception of Hill v. Stone, for which there is no file." The also said "A few general searches of certain front office files are still underway, and we expect those searches to be concluded in the next few days. We will promptly notify you should any further responsive documents come into our possession."

? ... Again, this is far more cooperation than this Justice Department has provided.

? ..... ; ..... The Justice Department did, however, express some concerns about internal deliberations, but it still provided the information requested.

? ..... ; ..... Here is the complete statement of the Reagan Justice Department on the issue of providing memos involving internal deliberations:

..... "As you know, the vast majority of the documents you have requested reflect of disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch. The disclosure of such sensitive and confidential documents seriously impairs the deliberative process within the Executive Branch, our ability to represent the government in litigation and our relationship with other entities."

? ..... ; ..... According to that letter, "For these reasons, the Justice Department and other executive agencies have consistently taken the position, in Freedom of Information Act [which, as an aside from Lisa, expressly does not apply to Congress nor limit Congress' authority to seek information from the Executive Branch in any way whatsoever, 5 U.S.C. 552(d) (stating expressly that FOIA "is not authority to withhold information from Congress")] and other request, that it is not at liberty to disclose materials that would compromise the confidentiality of any such deliberative or otherwise privileged communications."

? ..... ; ..... Immediately after stating this, the Reagan Justice Department stated:

..... "On the other hand, we also wish to cooperate to the fullest extent possible with the Committee and to expedite Judge Bork's confirmation process."

? ..... ; ..... The Justice Department then indicated that it was providing the documents requested except those specifically objected to (relating to documents regarding Watergate objected to by Nixon's lawyer).

? ..... ; ..... Then on September 2, 1987< /span>, the Justice Department sent the Senate a letter stating here "is one set of copies of documents assembled in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork."

? ..... ; ..... Then, the next year, the Justice Department asked for the Senate to return the documents requested. Specifically, the Justice Department in a letter by Thomas Boyd on May 10, 1988, reiterated that the documents it provided "reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch." The Justice Department indicated that it provided those memos "to respond fully to the Committee's request and to expedite the confirmation process." The Department then asked for the return of all documents that except those "that are clearly part of the public record (e.g., briefs and judicial opinions) or that were specifically made part of the record of the hearing."

? ..... ; ..... Let's contrast that with the position of this Justice Department. In a letter dated June 5, 2002, the Bush Justice Department stated that "the Department has a longstanding policy which has endured across Administrations of both parties of declining to release publicly or make available to Congress the kinds of documents you have requested."

? ..... ; ..... In fact, the opposite is true. The long standing practice of the Justice Department has been to follow a "policy of accommodation." Senator Schumer put a statement of that policy from the Clinton Administration into the hearing record. That policy provides that it is well established that the Department and the Senate typically work together to find an accommodation to avoid an impasse. </p>

? ..... ; ..... In fact, the D.C. Circuit has noted that: "The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute . . . . . The Constitution contemplates such accommodation." United States v. AT&T, 578 U.S. 121, 127, 130 (D.C. Cir. 1977).

? ..... ; ..... In fact, in 1982, President Reagan issued a memo to Department heads explaining the policy of accomodation:

..... "The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with constitutional and statutory obligations of the Executive Branch . . . . . Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving the conflicts between the Branches."

? ; This is what the current administration is denying and ignoring. This was the policy and practice dating from the Carter Administration (which disclosed the legal memos to and from Benjamin Civiletti to the Senate in the course of his nomination to be Attorney General) through the Reagan Administration (which disclosed the legal memos to the Solicitor General and others in the nomination of Brad Reynolds to be Associate AG, the appeal memos to Bork and other memos by Bork in his nomination).

? ; The Reagan Administration also provided numerous legal memos to and by William Rehnquist about the broad issues "civil rights and civil liberties," and the first Bush Administration also disclosed internal legal memos related to the special prosecutor decisions in connection with Stephen Trott's nomination to the Ninth Circuit. The Clinton Administration disclosed a broad range on memos in the oversight process. [In addition, the Justice Department encouraged its nominees to be responsive to every request no matter how intrusive, such as the request for how Margaret Morrow voted in the ballot box on California Referenda and how Marsha Berzon voted on ACLU board meeting issues, among others.]

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From: Ho, James (Judiciary) <James_Ho@Judiciary.senate.gov>
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
CC: Ledeen, Barbara (Republican-Conf) <Barbara_Ledeen@src.senate.gov>
Sent: 3/24/2003 7:15:36 AM
Subject: : RE: Pro-choice op-eds in support of Justice Owen?

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:"Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov> ("Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov> [UNKNOWN])
CREATION DATE/TIME:24-MAR-2003 12:15:36.00
SUBJECT:: RE: Pro-choice op-eds in support of Justice Owen?
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
CC:"Ledeen, Barbara (Republican-Conf)" <Barbara_Ledeen@src.senate.gov> ("Ledeen, Barbara (Republican-Conf)" <Barbara_Ledeen@src.senate.gov> [UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

Great points all -- I was struggling with trying to figure out what she would say (as opposed to what I would say). The Souter comparison, for example, is what Stone said last year. But I will be sure to incorporate all of your other suggestions. Thanks!

James C. Ho
Chief Counsel
Senate Subcommittee on the Constitution, Civil Rights & Property Rights
Chairman, Senator John Cornyn
James_Ho@judiciary.senate.gov
(202) 224-9614 (direct line)
(202) 224-2934 (general office number)

PRA 6

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, March 24, 2003 11:39 AM
To: Ho, James (Judiciary)
Cc: Ledeen, Barbara (Republican-Conf)
Subject: RE: Pro-choice op-eds in support of Justice Owen?

On substance, I had a few thoughts.
-- I think it very odd to compare Owen to Souter and thereby imply that she
is another Souter or would be another Souter on the US Supreme Court.
-- I am not sure the women appointee point works all that well, and I
actually doubt that is the D's "real motivation" here as you say in last
paragraph. Indeed, that strikes me as odd given that Clement, Raggi, and others
were confirmed without a problem (and the King being a Republican point seems
quite obscure). It seems to me that double standard is a better theme and to
compare her to McConnell.
-- I am not sure that all legal scholars refer to Roe as the settled law of
the land at the Supreme Court level since Court can always overrule its
precedent, and three current Justices on the Court would do so. The point there
is in the inferior court point.
-- It is hundreds not thousands, I believe, who have obtained bypasses.

My 2 cents. Thanks.

(Embedded
image moved "Ho, James (Judiciary)"
to file: <James_Ho@Judiciary.senate.gov>
pic12126.pcx) 03/24/2003 10:14:55 AM

Record Type: Record

To: "Ledeen, Barbara (Republican-Conf)"
<Barbara_Ledeen@src.senate.gov>, Brett
M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: Pro-choice op-eds in support of Justice Owen?

Thanks, Brett. I assume that you didn't find anything substantively
problematic
with the op-ed draft, then? I don't expect any problems, but just
wanted to
make absolutely certain in case you had a chance to read it.

Barbara, I called you earlier this morning and left a message. If I
don't hear
back from you soon, I will just go ahead and contact Ann Stone. I won't
proceed
on the others, however. Let's talk whenever you get the chance.
Thanks!

James C. Ho
Chief Counsel
Senate Subcommittee on the Constitution, Civil Rights & Property Rights
Chairman, Senator John Cornyn
James_Ho@judiciary.senate.gov
(202) 224-9614 (direct line)
(202) 224-2934 (general office number)
PRA 6

Brett_M._Kavanaugh@who.eop.gov wrote:
> Her e-mail is PRA 6 I alerted her this morning that someone
may
contact
> her about activity this week. I am good with her doing an op-ed.
>
>
> Record Type: Record
> To: Brett M. Kavanaugh/WHO/EOP@EOP
> cc: barbara_ledeen@src.senate.gov
> Subject: Re: Pro-choice op-eds in support of Justice Owen?
>
> I have a one page press release from Ann Stone, dated 7/23/2002, and
her
> two-page letter to Leahy and Hatch. Manny Miranda confirmed that
neither
was

> submitted into the committee record, so at a minimum we should do
that.
>
> Barbara, should the three of us coordinate this morning on how to
proceed
on
> getting Stone to do the op-ed?
>
> James C. Ho
> 901 North Wayne Street #302
> Arlington, VA 22201
> (202) 224-9614 (direct line)
> (202) 224-2934 (general office line)
>
>
> <JamesCHo@stanfordalumni.org>
>
> At 08:28 a.m. 3/24/2003, Brett_M._Kavanaugh@who.eop.gov wrote:
> >Do you have the letter from last summer? Barbara, have you talked to
Ann?
I
> am
> >happy to do so again if need be, but you all may have done so.
> >
> > (Embedded
> > image moved "James C. Ho" <JamesCHo@stanfordalumni.org>
> > to file: 03/23/2003 01:20:29 PM
> > pic07668.pcx)
> >
> >Record Type: Record
> >To: See the distribution list at the bottom of this message
> >cc:
> >Subject: Re: Pro-choice op-eds in support of Justice Owen?
> >
> >I have a copy of that, which I'd be happy to provide to anyone who's
> interested.
> >I don't know if it was in the committee record last time, but we
should
> >certainly put it in (again) this time.
> >
> >At 12:15 p.m. 3/23/2003, Brett_M._Kavanaugh@who.eop.gov wrote:
> >>Ann Stone was helpful and did letter/release last summer that should
be
in
> >>committee record and can be used thursday.
> >>
> >>.
> >>
> >>----- Original Message -----
> >>From:<JamesCHo@stanfordalumni.org>
> >>To:Makan_Delrahim@Judiciary.senate.gov,
> >> Rena_Johnson_Comisac@Judiciary.senate.gov,
> >> Alex_Dahl@Judiciary.senate.gov,
> >> Manuel_Miranda@frist.senate.gov,
> >> Barbara_Ledeen@src.senate.gov,
> >> viet.dinh@usdoj.gov,
> >> Steve.Koebele@usdoj.gov,
> >> Kristi.L.Remington@usdoj.gov,
> >> Jamie.E.Brown@usdoj.gov,
> >> Brett M. Kavanaugh/WHO/EOP@EOP,
> >> Wendy J. Grubbs/WHO/EOP@EOP
> >>Cc:
> >>Date: 03/22/2003 08:55:30 PM
> >>Subject: Pro-choice op-eds in support of Justice Owen?
> >>
> >>I learned late Friday that, although high-profile, pro-choice women
such
as

PRA 6

> Ann
> >>Stone, Victoria Toensing, and former members of Congress Susan
Molinari
and
> >>Tillie Fowler may be willing to publish op-eds supporting Justice
Owen's
> >>confirmation, apparently no one has yet signed up to help write
them.
> >>
> >>I presume that such op-eds would be very helpful as this Thursday's
executive
> >>business meeting on Justice Owen approaches. Accordingly, please
find
below
> >two
> >>op-eds I drafted *relatively quickly*. The first draft is a more
political
> >>piece perhaps more appropriate to someone like Toensing, Molinari,
or
Fowler;
> >>the second draft is geared more specifically for someone like Ann
Stone.
> >>
> >>In order to ensure proper coordination, I don't plan to do anything
with
these
> >>until Monday morning. If, however, there are no expressions of
concern
or
> >>objection by Monday morning, I will work with Barbara Ledeen on
Monday to
try
> >to
> >>get these to appropriate authors to get them placed in time for
Thursday.
> >>
> >>Thanks, everyone!
> >>
> >>-----
> >>
> >>DRAFT #1
> >>
> >>Democrats Talk About Diversity, But Practice Only Obstruction
> >>
> >> President Bush named two of the nation's top jurists to the
federal
> courts
> >>of appeals, when he announced the nominations of D.C. attorney
Miguel
Estrada
> >>and Texas Supreme Court Justice Priscilla Owen nearly two years ago.
> >>Unfortunately, however, both nominees still await confirmation by
the
United
> >>States Senate.
> >>
> >> Amazingly, Senate Democrats, who repeatedly claimed the mantle
of
> >diversity
> >>when President Clinton was in the White House, have seen fit to
obstruct
both
> >>nominees. They have done so even though, if confirmed, Estrada
would be
the
> >>first Hispanic ever to serve on the D.C. Circuit, while Owen would
increase
> the

> >>diversity on the Fifth Circuit, which represents Texas, Mississippi
and
> >>Louisiana.
> >>
> >> The reason for the Democrats' apparent reversal is simple, if
> disturbingly
> >>crass and partisan. As the Dallas Morning News recently noted,
"Democrats
> >don't
> >>relish giving President Bush one more thing to brag about when he
goes
into
> >>Hispanic neighborhoods during his re-election campaign next year."
Nor
do
> >>Democrats want to give President Bush credit for placing his second
woman
on
> >the
> >>Fifth Circuit.
> >>
> >> Owen's confirmation would give that court four female judges -
all
of
> whom
> >>happen to be Republican or appointed by Republican Presidents.
[FYI:
King, a
> >>Republican, was appointed by Carter.] By contrast, President
Clinton,
who
> >>appointed four judges to the Fifth Circuit, didn't nominate a single
woman
to
> >>that court - a notable record for a party that claims to emphasize
diversity.
> >>
> >> In light of this record, Democrats simply cannot afford to see
President
> >>Bush succeed in confirming Estrada and Owen, for that would
significantly
> >>discredit their claims that the Democratic Party is for some reason
the
party
> >of
> >>women and minorities.
> >>
> >> Of course, Senate Democrats do not, and cannot, admit that this
is
their
> >>real reason for objecting to Estrada and Owen. Yet they have no
real
grounds
> >on
> >>which to object to either candidate. Both are exceptionally
talented and
> >>deserving of confirmation. Indeed, the ABA unanimously rated both
candidates
> >>well-qualified, its highest rating, and what some Senate Democrats
used
to
> call
> >>the "gold standard."
> >>
> >> Thus, instead of arguing the merits of either nominee,
Democrats
have
> >>concocted reasons to object to their confirmation. With respect to

Estrada,
> >for
> >>example, Democrats complain that Estrada has no prior judicial
experience,
> even
> >>though that describes a majority of the current court for which he
has
been
> >>nominated.
> >>
> >> The invented charge against Owen is similarly groundless. Some
Democrats
> >>claim that confirming Owen would somehow threaten a woman's right to
choose an
> >>abortion. As a fervently pro-choice woman who has studied the law
and
Owen's
> >>nine-year record on the Texas Supreme Court, I find the claim
patently
absurd.
> >>
> >> First of all, it is widely understood accepted by legal
scholars
across
> >the
> >>board that Roe v. Wade and its progeny are the settled law of the
land.
> >>Moreover, federal courts of appeals, which are inferior to the
Supreme
Court,
> >>have no power to overturn Supreme Court precedents like Roe v. Wade.
That's
> >why
> >>the Democrat-controlled Senate last year confirmed Professor Michael
McConnell
> >>to the federal court of appeals with unanimous consent, even though
McConnell
> >>(unlike either Owen or Estrada, and like numerous liberal law
professors
and
> >>commentators) has publicly stated that Roe v. Wade was incorrectly
decided.
> >>
> >> Second of all, there is no evidence that Owen is in fact
opposed to
Roe
> v.
> >>Wade. Quite the contrary, she has cited and applied Roe v. Wade and
its
> >progeny
> >>on a number of occasions as a sitting justice of the Texas Supreme
Court.
> >>
> >> The only thing that Owen's opponents have been able to cite, in
their
> >>reckless crusade to transform Justice Owen from a scholarly and
dispassionate
> >>jurist to a lawless, pro-life zealot, are a series of Texas Supreme
Court
> >>decisions involving that state's parental notification statute. But
here
is
> >the
> >>truth about that statute and those rulings:
> >>
> >>
> >>
> >

> >
>

> ----------
> Attachment:

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Ashley Snee/WHO/EOP@Exchange@EOP [WHO] <Ashley Snee>;David G. Leitch/WHO /EOP@Exchange@EOP [WHO] <David G. Leitch>;Wendy J. Grubbs/WHO /EOP@Exchange@EOP [WHO] <Wendy J. Grubbs>;Tim Goeglein/WHO/EOP@EOP [WHO] <Tim Goeglein>;Alberto R. Gonzales/WHO/EOP@Exchange@EOP [WHO] <Alberto R. Gonzales>
Sent: 6/5/2003 1:55:10 PM
Subject: : SCt -- interest groups intel

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME: 5-JUN-2003 17:55:10.00
SUBJECT:: SCt -- interest groups intel
TO:Ashley Snee (CN=Ashley Snee/OU=WHO/O=EOP@Exchange@EOP [WHO])
READ:UNKNOWN
TO:David G. Leitch (CN=David G. Leitch/OU=WHO/O=EOP@Exchange@EOP [WHO])
READ:UNKNOWN
TO:Wendy J. Grubbs (CN=Wendy J. Grubbs/OU=WHO/O=EOP@Exchange@EOP [WHO])
READ:UNKNOWN
TO:Tim Goeglein (CN=Tim Goeglein/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
TO:Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@Exchange@EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

interesting Ledeen email . . .

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 06/05/2003 05:50 PM ----------

"Ledeen, Barbara (Republican-Conf)" <Barbara_Ledeen@src.senate.gov>
06/05/2003 05:49:08 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP, "Matt Schlapp (E-mail)" <mschlapp@georgewbush.com>, "Rodgers, Mark (Republican-Conf)" <Mark_Rodgers@src.senate.gov>
cc:
Subject: spying

I have a friend who is a mole for us on the left. "It" just called to tell me the following news: The Group of 9 (called the G9) which is composed of 9 prochoice groups (Planned Parenthood and NARAL among them) just formed the Joint Emergency Campaign Fund which is solely for the Supreme Court battle. They have put an initial $ THREE MILLION into it which is to be used just for media.

This is separate from the TWENTY MILLION DOLLARS just given Planned Parenthood anonymously-- but it is from Warren Buffet-- for the multiple things but a big chunk of which is for Judges.

They just had a meeting with the Dem staff of the Judiciary Committee and my friend is reporting that neither the democratic judiciary staff nor the groups have done any research the likely presumed nominees.

Therefore, it is important to note that IF we have a nominee, we need to ZIP THAT PERSON RIGHT THROUGH THE PROCESS.....WE CANNOT BEAT 20 MILLION DOLLARS.

Barbara Ledeen

Director of Coalitions
Senate Republican Conference
202-224-2763

Editorial: A good and decent choice for Supreme Court justice

richmond.com/zzstyling/view-editorial/editorial-a-good-and-decent-choice-for-supreme-court-justice/article_4f4c173c-e145-5dbc-a5fa-595c6e80caec.html

July 11, 2018

If one were to create an ideal résumé for the position of Supreme Court justice, it would not look terribly different from Brett Michael Kavanaugh's curriculum vitae. President Trump's nominee to replace Justice Anthony Kennedy is more than qualified for the job. The 53-year-old Yale Law School graduate has spent more than a decade on the U.S. Court of Appeals. He held top posts in President George W. Bush's administration and is a former law clerk to retiring Justice Kennedy. He has taught at Harvard, Yale, and Georgetown law schools.

Kavanaugh has written more than 300 opinions and sent 41 of his own law clerks to fill positions at the high court. "There is no one in America more qualified for this position," said President Trump as he introduced the judge and his family to a packed East Room at the White House.

Speaking after Trump's introduction, Kavanaugh said, "My judicial philosophy is straightforward. A judge must be independent and must interpret the law, not make the law. A judge must interpret statutes as written. And a judge must interpret the Constitution as written, informed by history and tradition and precedent. For the past 11 years, I've taught hundreds of students, primarily at Harvard Law School. I teach that the Constitution's separation of powers protects individual liberty, and I remain grateful to the dean who hired me, Justice Elena Kagan."

Indeed, Kavanaugh's qualifications are impeccable — unfortunately, that won't stop him from being lambasted by opposition on the left concerned about his conservative values.

Virginia's two Democratic senators have issued statements expressing their concerns. Both Tim Kaine and Mark Warner say they are worried about whether Kavanaugh will respect prior Supreme Court rulings that have upheld the Affordable Care Act, women's reproductive freedom, and civil rights issues.

Kavanaugh began meeting with Senate members yesterday. Monday night, he said that he would tell each senator "that I revere the Constitution. I believe that an independent judiciary is the crown jewel of our constitutional republic. If confirmed by the Senate, I will keep an open mind in every case, and I will always strive to preserve the Constitution of the United States and the American rule of law."

Brett Kavanaugh is a good and decent man who promises to uphold the rule of law rather than attempting to legislate from the bench. We applaud the president's choice.

"KAVANAUGH AND THE GINSBURG STANDARD"
BY DAVID B. RIVKIN, JR., AND ANDREW M. GROSSMAN

Kavanaugh and the Ginsburg Standard

WSJ wsj.com/articles/kavanaugh-and-the-ginsburg-standard-1536010512

September 3, 2018

Sept. 3, 2018 5:35 p.m. ET

Don't blame Brett Kavanaugh when he demurs at his confirmation hearing from answering questions on legal issues that might come before the Supreme Court. It's the senators who will be in the wrong, for demanding commitments that no judicious nominee could provide. To answer "direct questions on stare decisis on many other matters, including *Roe* and health care"—as Minority Leader Chuck Schumer has called for—would itself be disqualifying.

That principle has come to be called the Ginsburg Standard, after Justice Ruth Bader Ginsburg. As she explained in the opening statement of her 1993 confirmation hearing: "A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case—it would display disdain for the entire judicial process." Or, as she later responded to a question about constitutional protections against discrimination based on sexual orientation: "No hints, no forecasts, no previews."

It would be a mistake to associate the rule too closely with Justice Ginsburg, who honored it inconsistently at her hearing, or to view it as driven only by policy considerations. In fact, the standard has deep roots in the law and history.

Begin with the Constitution. The Appointments Clause provides that judges, including Supreme Court justices, are appointed by the president "with the Advice and Consent of the Senate." From the nomination of John Jay as the first chief justice in 1789 through the mid-1950s, public confirmation hearings were rare. Few nominees attended them when they did occur, and only a handful testified. Senators had no occasion to grandstand by demanding that a nominee declare his stance on legal controversies.

Since hearings became the norm, the number of questions asked of nominees has exploded, with recent nominees facing more than 700 apiece. Yet two aspects of the process haven't changed. The first is the refusal of nominees to opine on actual or hypothetical cases that may come before the high court. The second is senators' griping in response. At a 1968 hearing, Sen. Sam Ervin (D., N.C.) bemoaned that the nominee, Judge Homer Thornberry, had "virtually created a new right not found in the Constitution, which might well be designated as the judicial appointee's right to refrain from self-incrimination."

Ervin was wrong. Judges are appointed to exercise the "judicial power." As per the Constitution, this involves deciding specific "cases" or "controversies"—that is, concrete disputes involving real facts, as opposed to abstract questions of law. Judging, in turn, entails the application of law to the facts of a particular case. The facts matter greatly: The way in

which the circumstances of a given case can be distinguished from one in the past or one in the future is often what creates the basis for a legal rule, because it is that distinction that becomes legally material.

Judges don't decide cases in a vacuum or through divine inspiration. They do it in the crucible of adversarial testing. Appellate judges read the parties' briefs. They hear the lawyers' arguments. They review the precedents and the factual record. Then they piece it all together, rendering a decision that, in Justice Ginsburg's formulation, "should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives present." Opining on a legal question divorced from the context of a particular case is not judging at all. It is speculation, a guess as to what the right rule might be.

In that sense, a senatorial demand that a nominee take one side or the other on a given "issue" is futile. Who is to say which of any number of possible factual circumstances might be relevant when, because there is no case, there are no facts? How can anyone judge the correctness of an argument when, because there are no parties, no one has argued for or against it? Answering at all would be deceptive.

It also would run up against another constitutional guidepost, the Fifth Amendment's guarantee of due process of law. Litigants are entitled to a "fair trial in a fair tribunal," including a judge who is impartial and whose mind is not implacably closed to persuasion. A nominee's advance commitment to decide a question a certain way is incompatible with the appearance of fairness and impartiality that gives the law its legitimacy. It also compromises the independence of the judicial branch, a crucial check on overreaching by the political branches. Even a judge who has a decided an issue in an earlier case remains open to the prospect of going the other way in a later case, on different facts or different arguments. A judge who exchanges a commitment for a confirmation vote—or merely appears to do so—will forever be tainted.

All this holds true for issues already decided by the court, given that what constitutes "settled law" on the Supreme Court is in the eyes of the beholder. Nearly any issue may arise again, and the justices, unlike their counterparts on lower courts, are free to reconsider high-court precedent.

This week senators would do well to stick to more illuminating lines of inquiry: the more than 300 written opinions Judge Kavanaugh issued over his 12 years on the bench, his speeches and articles, his judicial philosophy, his character. There is no legitimate reason to demand hints, forecasts and previews that Judge Kavanaugh is duty-bound to deny.

Messrs. Rivkin and Grossman practice appellate and constitutional law in Washington. Mr. Rivkin served at the Justice Department and the White House Counsel's Office. Mr. Grossman is an adjunct scholar at the Cato Institute.

"DOES BRETT KAVANAUGH THINK THE PRESIDENT IS IMMUNE FROM CRIMINAL CHARGES?" BY SALVADOR RIZZO

Does Brett Kavanaugh think the president is immune from criminal charges?

washingtonpost.com/news/fact-checker/wp/2018/07/11/does-brett-kavanaugh-think-the-president-is-immune-from-criminal-charges/

July 11

"Kavanaugh ... says sitting POTUS can't be indicted"
— Brian Fallon, executive director of Demand Justice and former press secretary to Hillary Clinton, on Twitter, July 9, 2018

"Kavanaugh, who could be presiding over a case should the Pres be indicted, thinks that the Pres can't stand trial. Trump has nominated a get-out-of-jail free card."
— Rep. Carolyn B. Maloney (D-N.Y.), on Twitter, July 9, 2018

"The fact that #ScotusPick Kavanuaugh (sic) believes that a President cannot be indicted is an automatic disqualification from Supreme Court consideration. Plain and simple."
— Alexandria Ocasio-Cortez (N.Y.), Democratic nominee for the House, on Twitter, July 9, 2018

Does Brett M. Kavanaugh, President Trump's nominee to the Supreme Court, believe a sitting president can't be indicted?

As we've reported, this is a gray area of the law. Two opinions from the Department of Justice's Office of Legal Counsel say the president is immune from being indicted while in office. But the Supreme Court has never ruled on this directly, and only the justices can settle this constitutional debate for good.

Because a presidential indictment is one of several possible outcomes of special counsel Robert S. Mueller III's investigation, it's natural to ask how Kavanaugh might vote on this question if confirmed.

Kavanaugh, a judge on the U.S. Court of Appeals for the District of Columbia Circuit and a former staff secretary to President George W. Bush, has left a long paper trail to sift for clues. An article he published in the Minnesota Law Review in 2009 makes several sweeping recommendations regarding the presidency and Congress. Some Democrats argue that Kavanaugh showed his hand in this article: he thinks the president can't be indicted.

While it's possible that Kavanaugh does hold this belief, the 2009 article doesn't go so far as to say that. Let's take a look.

The Facts

Kavanaugh helped investigate President Bill Clinton as part of independent counsel Kenneth W. Starr's team in the 1990s. Looking back, Kavanaugh wrote in his 2009 article, "the nation certainly would have been better off if President Clinton could have focused on Osama bin Laden without being distracted by the Paula Jones sexual harassment case and its criminal investigation offshoots."

His argument was that the president these days has many weighty responsibilities — wars, economic crises, the threat of terrorist attacks — and shouldn't be encumbered by criminal investigations or charges, or civil lawsuits, while in office.

"I believe that the President should be excused from some of the burdens of ordinary citizenship while serving in office," Kavanaugh wrote in 2009, three years after Bush appointed him to the D.C. Circuit. "This is not something I necessarily thought in the 1980s or 1990s. Like many Americans at that time, I believed that the President should be required to shoulder the same obligations that we all carry. But in retrospect, that seems a mistake."

In his 12 years on the bench, Kavanaugh has written nearly 300 opinions, often supporting presidential power and urging restraint of government bureaucracy, as The Washington Post's Michael Kranish and Ann E. Marimow reported.

"He is a staunch defender of executive prerogative," Stephen Vladeck, professor of constitutional law at the University of Texas School of Law, previously told The Post. "The question is just how far he would go in cases really testing whether there is any limit to that theory."

Kavanaugh makes other recommendations in the 2009 article, arguing that the president should have more authority over some independent agencies; that "the Senate should consider a rule ensuring that every judicial nominee receives a vote by the Senate within 180 days of being nominated by the President"; that the president should defer to Congress on some issues involving war, and that it's worth considering a switch to a single, six-year term for presidents instead of a four-year term with the possibility of reelection.

But the top recommendation is for Congress to pass legislation that defers civil lawsuits and criminal charges and investigations until after the president leaves office. Kavanaugh wrote that this would require an extension of the statute of limitations, to ensure the president can face any pending legal proceedings after leaving office.

If the president did something "dastardly" during his term, there's always impeachment, Kavanaugh added.

Kavanaugh's position in this article is different from saying the president can't be indicted under existing law. If he thinks the law already bars an indictment of the sitting president, as some Democrats claim he does, why would he call on Congress to pass a law that shields the president from criminal charges?

A representative for Maloney pointed out a footnote in Kavanaugh's article, which says, "Even in the absence of congressionally conferred immunity, a serious constitutional question exists regarding whether a President can be criminally indicted and tried while in office."

That's a mainstream view. As we noted, the Justice Department Office of Legal Counsel has written two memos (in 1973 and 2000) saying the president can't be indicted — but the Supreme Court has never ruled on this question, so it's up in the air.

In an earlier article published in the Georgetown Law Journal in 1998, Kavanaugh wrote, "The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office." In the same article, Kavanaugh wrote later on, "Whether the Constitution *allows* indictment of a sitting President is debatable." (Emphasis his.)

In 1997, the Supreme Court ruled in *Clinton v. Jones* that a sitting president could be sued for his conduct while he was not in office. Clinton as president could not claim immunity from a lawsuit alleging he committed sexual harassment while he was governor of Arkansas, the court ruled. Kavanaugh wrote in his 2009 article that "the Supreme Court may well have been entirely correct." He argued that government lawyers investigating Clinton, and judges ruling on those cases, had followed the law throughout. The problem, Kavanaugh wrote, was "the law as it existed."

"I worked for Judge Starr and believe he performed his difficult legal assignment diligently and properly under a badly flawed statutory regime," Kavanaugh wrote in a footnote.

Here are the key passages from his 2009 article:

> "With that in mind, it would be appropriate for Congress to enact a statute providing that any personal civil suits against presidents, like certain members of the military, be deferred while the President is in office. The result the Supreme Court reached in *Clinton v. Jones* — that presidents are not constitutionally entitled to deferral of civil suits — may well have been entirely correct; that is beyond the scope of this inquiry. But the Court in *Jones* stated that Congress is free to provide a temporary deferral of civil suits while the President is in office. Congress may be wise to do so, just as it has done for certain members of the military. Deferral would allow the President to focus on the vital duties he was elected to perform.
>
> "Congress should consider doing the same, moreover, with respect to criminal investigations and prosecutions of the President. In particular, Congress might consider a law exempting a President — while in office — from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel. Criminal investigations targeted at or revolving around a President are inevitably politicized by both their supporters and critics. As I have written before, 'no Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated — whether in favor of the President or against him, depending on the individual leading the investigation and its results.' The indictment and trial of a sitting President, moreover, would cripple the federal government, rendering it unable to function with credibility in either the international or domestic arenas. Such an outcome would ill serve the public interest, especially in times of financial or national security crisis."

Notice this is couched in terms of things Congress "should" do. Noah Feldman, a Harvard Law School professor, wrote that Kavanaugh might be saying "the president *can* be investigated and maybe even indicted unless Congress passes a law saying he can't." (Emphasis ours.)

Feldman wrote that "from a legal and constitutional perspective, Kavanaugh wasn't saying that the courts should find that the president shouldn't be investigated or indicted." "To the contrary," he wrote. "He was saying that Congress should pass a law ensuring that result, because without it, the president was open to being investigated — and maybe even indicted."

Some Democrats acknowledge this aspect of Kavanaugh's writings, and say it shows he's predisposed to protect Trump from Mueller. "Kavanaugh has written extensively on his beliefs that a sitting president shouldn't be subject to criminal investigations or civil lawsuits — this all

but assures he would work to shield Trump from any litigation or criminal proceeding related to the special counsel's investigation," Sen. Cory Booker (D-N.J.) tweeted.

> Kavanaugh has written extensively on his beliefs that a sitting president shouldn't be subject to criminal investigations or civil lawsuits—this all but assures he would work to shield Trump from any litigation or criminal proceeding related to the special counsel's investigation
>
> — Sen. Cory Booker (@SenBooker) July 10, 2018

Senate Minority Leader Charles E. Schumer (D-N.Y.) said at a news conference Tuesday that Trump "chose the candidate who he thought would best protect him from the Mueller investigation."

"He's even argued that sitting presidents shouldn't face criminal investigation — no investigation of a president," Schumer said. "Is it any wonder that President Trump chose Kavanaugh from the list of 25 [candidates] when we know he's obsessed with this investigation?"

In *Nixon v. Fitzgerald*, a 1982 decision, the Supreme Court ruled that the president had immunity from civil lawsuits arising from his official actions. This doesn't apply in criminal proceedings or investigations, or in cases involving conduct before or after a president's term of office.

Messages left for Fallon and Ocasio-Cortez were not returned. The White House declined to comment.

The Pinocchio Test

A judge who says the law should bar the indictment of a sitting president easily might rule in line with that belief. Kavanaugh supports a strong executive branch, and he's held different views at different times on whether the sitting president should be made to face legal proceedings. When it was a Democrat in the White House, he thought it was fair game. After working for a Republican president, it was out of bounds. This is all important to keep in mind.

But Kavanaugh's articles from 1998 and 2009 are no smoking-gun evidence that he would vote to dismiss an indictment against Trump, should one ever be filed. Although he clearly believes it's a bad idea to indict a sitting president, Kavanaugh never states his view whether the Constitution allows it. In fact, he says Congress should pass legislation to ensure the president is immune from civil and criminal proceedings while in office. As Feldman writes, Kavanaugh's 2009 article can be read as a signal that he might *uphold* a presidential indictment unless Congress changes the law.

We don't mean to split hairs by analyzing whether Kavanaugh believes something "can't" or "shouldn't" happen, but in the legal arena, this distinction matters. Kavanaugh's stated views on this question don't go as far as Fallon, Maloney and Ocasio-Cortez claimed. Their tweets merit Two Pinocchios, although we considered giving Three. To say Kavanaugh is Trump's "get-out-of-jail free card" is an extreme distortion of what he's written.

Update (1:45 p.m.): Fallon pointed out that Kavanaugh, during a Georgetown Law School panel in February 1998, raised his hand when the moderator asked, "How many of you believe, as a matter of law, that a sitting president cannot be indicted during the term of office?" (Politico dug up the video of this panel after we published this fact-check.)

This is relevant to how he might rule on the Supreme Court. However, Kavanaugh wrote several months after this panel, in an article published July 1998, that it was "debatable" whether the Constitution allows an indictment of the sitting president. In 2009, he wrote that he had revised his earlier views on subjecting the president to court proceedings. It's still premature to say he would toss out an indictment of the president based on this mixed record, but Fallon is correct to note that the picture is more complex than what we first described. This shifts our ruling closer to Two Pinocchios rather than Three.

Two Pinocchios

Washington Post Rating:
Two Pinocchios

The Roberts Five: Advancing Right-Wing and Corporate Interests 92% of the Time

A review of the Supreme Court's jurisprudence during the Roberts Era reveals that in the most controversial and salient civil cases – those decided by bare 5-4 or 5-3 majorities – when the right wing of the Court has voted *en bloc* to form the majority, they do so to advance far-right and corporate interests a striking **92% of the time**. In those cases, the "Roberts Five" – Chief Justice John Roberts, Justice Samuel Alito, Justice Clarence Thomas, Justice Anthony Kennedy, and Justice Antonin Scalia (replaced last year by Justice Neil Gorsuch) – have reliably voted in lockstep to help Republicans win elections, to protect corporations from liability, to take away civil rights, and to advance the far right social agenda.

Methodology:

- We identified 212 5-4 and 5-3 cases since Chief Justice Roberts joined the Court in 2006.
- Of these 212 cases, the Roberts Five formed a bare majority in 79 civil cases.
- 73 **(92%)** of these 79 5-4 and 5-3 civil cases advance Republican and/or corporate interests, falling into the following four categories:
    - Helping Republicans Win Elections: Dark Money, Voter Suppression & Union-Busting
    - Protecting Corporations from Liability: Letting Polluters Pollute & Making It Harder for Americans to Have Their Day in Court.
    - Taking Away Civil Rights and Condoning Discrimination
    - Advancing the Far-Right Social Agenda: Religion, Guns & Abortion

Helping Republicans Win Elections: Dark Money, Voter Suppression & Union-Busting

1. League of Latin American Citizens v. Perry (2006)
   - Upheld aggressive racial and partisan gerrymandering that burdened the rights of minority voters in Texas.
2. FEC v. Wisconsin Right to Life (2007)
   - Allowed corporations to pour unlimited money into electioneering communications.
3. Davis v. FEC (2008)
   - Eliminated the "Millionaire's Amendment" to the Bipartisan Campaign Reform Act, increasing the influence of wealth as a criterion for public office.
4. Bartlett v. Strickland (2009)
   - Made it more difficult for minority voters in racially concentrated districts to challenge their districts.
5. Citizens United v. FEC (2010)
   - Opened the door to special interests and lobbyists influencing American politics through unlimited corporate spending.
6. Arizona Free Enterprise Club's Freedom Club PAC v. Bennett (2011)
   - Allowed PACs and dark money sources to fund political candidates without limit.
7. American Tradition Partnership v. Bullock (2012)
   - Reemphasized the Supreme Court's open-door policy for special interests and lobbyists to influence American politics through money.
8. Shelby County v. Holder (2013)
   - Gutted the Voting Rights Act, making it far easier for states with a history of racial discrimination to pass discriminatory voting laws.
9. McCutcheon v. FEC (2014)
   - Created a loophole that allows a single individual to donate millions of dollars to a political party or campaign.
10. Harris v. Quinn (2014)
    - Weakened public sector unions and took a major step toward overturning public sector fee collection from all non-union members in another 5-4 decision, *Janus v. AFSCME*.
11. Abbott v. Perez (2018)
    - Burdened the rights of minority voters in Texas by allowing the use of electoral maps that a lower court determined were drawn with discriminatory intent.
12. Husted v. A. Phillip Randolph Institute (2018)
    - Allowed Ohio to purge voter rolls in a way that disproportionately disqualifies minority voters.
13. Janus v. AFSCME (2018)
    - Overturned a 40 year old precedent and disrupted thousands of contracts involving millions of employees, potentially crippling public sector unions, a chief opponent of the corporate right.

Protecting Corporations from Liability: Letting Polluters Pollute & Making It Harder for Americans to Have Their Day in Court.

14. Rapanos v. United States (2006)
- Narrowed the interpretation of the phrase "waters of the United States" in the Clean Water Act, making it easier to pollute and destroy these wetlands.

15. Leegin Creative Leather Products v. PSKS (2007)
- Allowed manufacturers, distributors, and retailors to raise the prices of goods at retail through vertical price restraints.

16. National Association of Home Builders v. Defenders of Wildlife (2007)
- Limited the reach of the Endangered Species Act and eliminated a major regulatory hurdle for developers.

17. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta (2008)*
- Restricted liability for secondary actors, such as lawyers and accountants, under federal securities law.

18. Winter v. Natural Resources Defense Council (2008)
- Invalidated an injunction to halt Naval training exercise despite irreparable harm to marine life, furthering the right's anti-environment, anti-regulatory agenda.

19. 14 Penn Plaza v. Pyett (2009)
- Diminished employees' access to the federal courts and skewed employment agreements in favor of employers through mandatory arbitration.

20. Ashcroft v. Iqbal (2009)
- Heightened the civil pleading standard, making it significantly more difficult for plaintiffs to sue in federal court.

21. Summers v. Earth Island Institute (2009)
- Restricted the right of environmental groups to sue over environmental violations.

22. Entergy v. Riverkeeper (2009)
- Ignored the Clean Water Act's mandate that power plants use the "Best Technology Available" to protect fish and aquatic life, allowing them to use less-costly, less-effective devices.

23. Conkright v. Frommert (2010)*
- Allowed retirement plan administrators to construct the terms of a plan in favor of employers.

24. Stolt-Nielsen S.A. v. AnimalFeeds International Corp. (2010)*
- Restricted plaintiffs from using class arbitration (similar to a class action lawsuit) unless all parties specifically agree to it.

25. Rent-A-Center, West, Inc. v. Jackson (2010)
- Diminished employees' access to the federal courts and skewed arbitration agreements in favor of employers over employees.

26. Perdue v. Kenny A (2010)
- Dramatically heightened the standards for civil rights plaintiffs' attorneys to receive compensation for their services.

27. Schindler Elevator Corp. v. U.S. ex rel. Kirk (2011)*
- Limited the ability of plaintiffs to bring suit as whistleblowers on behalf of the government.

28. AT&T v. Concepcion (2011)
- Reduced consumers' ability to bring class-action claims against corporations for low-dollar, high-volume frauds.

29. Janus Capital Group v. First Derivative Traders (2011)
- Shielded corporate advisors from liability and limited the rights of individual investors.

30. Wal-Mart Stores v. Dukes (2011)
- Threw out a class action lawsuit brought by 1.6 million women in a discrimination case, making it more difficult for individuals who have been injured to bring class-action claims and hold corporate wrongdoers accountable.

31. Pliva v. Mensing (2011)
- Immunized from suit generic drug makers who failed to warn consumers about dangerous side effects.

32. F.A.A. v. Cooper (2012)*
- Made it more difficult for plaintiffs to recover for intangible harms caused by government privacy violations.

33. Coleman v. Court of Appeals of Maryland (2012)
- Limited plaintiffs from bringing suits for damages under the Family Medical Leave Act.

34. Christopher v. SmithKline Beecham (2012)
- Expanded pro-corporate fair wage exemptions under Fair Labor Standards Act exemptions and deprived workers of statutory fair pay protections.

35. American Exp. Co. v. Italian Colors Restaurant (2013)*
- Diminished employees' access to the federal courts and skewed employment agreements in favor of employers.

36. Comcast v. Behrend (2013)
- Made class action certification more difficult and limited suits against corporations for low-dollar, high-volume antitrust violations.

37. Genesis Healthcare v. Symczk (2013)
- Limited plaintiffs' ability to bring collective action claims under the Fair Labor Standards Act.

38. Mutual Pharmaceutical v. Bartlett (2013)
- Prevented states from warning consumers about risky drugs.

39. Koontz v. St. Johns River Water Management District (2013)
- Deprived local and state governments of the flexibility they needed to ensure environmentally sound and economically productive development.

40. Michigan v. EPA (2015)
- Rolled back the EPA's autonomy and promoted environmental deregulation.

41. California Public Employees' Retirement System v. Anz Securities (2017)
- Made it harder for individual investors to protect their rights via class action lawsuits.

42. Epic Systems v. Lewis (2018)
- Blocked workers from banding together to redress workplace violations including sexual harassment, racial discrimination, and wage theft.

43. Jesner v. Arab Bank (2018)

- Held that foreign corporations may not be sued under the Alien Tort Statute, protecting foreign corporations from liability for human rights abuses.

44. Encino Motorcars v. Navarro (2018)
- Expanded pro-corporate exemptions from the Fair Labor Standards Act and deprived workers of statutory fair pay protections.

45. Wisconsin Central Ltd. v. United States (2018)
- Ruled that railroad executives are exempt from federal employment taxes on stock-based compensation.

46. Ohio v. American Express (2018)
- Stifled price competition and hurt consumers.

Taking Away Civil Rights and Condoning Discrimination

47. Garcetti v. Ceballos (2006)
- Narrowed speech protections for public employees.

48. Ledbetter v. Goodyear Tire (2007)
- Made Title VII claims more difficult to bring and ignored the realities of wage discrimination.

49. Morse v. Frederick (2007)
- Limited both the speech rights of high school students and the available civil remedies for constitutional violations.

50. Parents Involved in Community Schools v. Seattle School District No. 1 (2007)
- Limited the ability of primary and secondary public schools to use affirmative action programs that promote diversity.

51. Plains Commerce Bank v. Long Family Land and Cattle Co. (2008)
- Made it more difficult for Native American plaintiffs to challenge discriminatory conduct by banks.

52. Gross v. FBL Financial Services (2009)
- Heightened the standard for age discrimination claims and made relief for victims more difficult.

53. District Attorney's Office for the Third Judicial District v. Osborne (2009)
- Limited the ability of plaintiffs to bring suit in federal court for government violations of their constitutional rights.

54. Horne v. Flores (2009)
- Diminished minority students' access to English as a Second Language programs, making it harder for them to overcome language barriers in their education.

55. Ricci v. Destefano (2009)
- Distorted federal civil rights law to promote the disproportionate exclusion of minority groups from career advancement.

56. Chamber of Commerce of U.S. v. Whiting (2011)*
- Allowed states to pass laws that target immigrant workers.

57. Connick v. Thompson (2011)
- Made it harder to hold prosecutor's offices liable for the illegal misconduct of their prosecutors.

58. Florence v. Board of Chosen Freeholders of County of Burlington (2012)
- Allowed strip searches of inmates without reasonable suspicion, reducing the Fourth Amendment protections of arrestees.

59. Vance v. Ball State University (2013)
- Made it harder for plaintiffs to bring workplace harassment claims.

60. University of Texas Southwestern Medical Center v. Nassar (2013)
- Increased the standard of proof for employer retaliation claims, making these claims more difficult to bring.

61. Glossip v. Gross (2015)
- Made challenging execution methods more difficult and thus limited prisoners' Eighth Amendment rights.

62. Jennings v. Rodriguez (2018)*
- Allowed for immigrants to be detained for prolonged periods of time without a bail hearing.

63. Murphy v. Smith (2018)
- Reduced compensation for prisoners when government officials violate their constitutional rights.

64. Trump v. Hawaii (2018)
- Allowed the discriminatory Muslim ban to go into effect and restricted immigration from eight, mostly Muslim-majority, countries.

Advancing the Far-Right Social Agenda: Religion, Guns & Abortion

65. Hein v. Freedom From Religion Foundation (2007)
- Restricted the ability of citizens to sue the government under the First Amendment for entangling church and state.

66. Gonzalez v. Carhart (2007)
- Made it harder for women to exercise their reproductive rights.

67. District of Columbia v. Heller (2008)
- Drastically expanded the scope of the Second Amendment and limited commonsense gun regulation.

68. Salazar v. Buono (2010)
- Allowed a cross to stay on federal property, chipping away at the separation of church and state.

69. McDonald v. Chicago (2010)
- Continued the expansion of Second Amendment rights and made it more difficult for states to implement gun regulations.

70. Arizona Christian School Tuition Organization v. Winn (2011)
- Made it harder for plaintiffs to challenge Establishment Clause violations in court, chipping away at the separation of church and state.

71. Town of Greece v. Galloway (2014)
- Allowed legislative prayer even when a town fails to represent a variety of religions in its meetings.

72. Burwell v. Hobby Lobby Stores (2014)
- Permitted corporations to deny contraception based on objections to facially neutral, non-discriminatory laws.

73. NIFLA v. Becerra (2018)
- Reduced the amount of information available to pregnant women, potentially deceiving women into believing that anti-abortion pregnancy centers are medical clinics.

Ideologically Neutral Cases

74. F.C.C. v. Fox Television Stations, Inc. (2009)
- Upheld a Federal Communications Commission regulation that bans "fleeting expletives" on television broadcast.

75. Free Enterprise Fund v. Public Co. Accounting Oversight Board (2010)
- Struck down the dual layer of "for cause" protection against presidential removal for PCAOB members.

76. Stern v. Marshall (2011)
- Held that bankruptcy courts lack the constitutional authority under Article III to enter a final judgement on a state law counterclaim.

77. Clapper v. Amnesty International (2013)
- Ruled that plaintiffs lack standing to bring suit even if they claim a reasonable likelihood that their communications will be intercepted by the government under FISA surveillance.

78. Kerry v. Din (2015)
- Held that the government is not required to give an explanation for denying an alien's visa based on terrorism-related grounds under the Immigration and Nationality Act.

79. SAS Institute v. Iancu (2018)
- Held that when the United States Patent and Trademark Office institutes a review to reconsider an already-issued patent, it must rule on the patentability of all claims the petitioner challenges.

The Roberts Five: Siding with Conservative Amici Curiae 92% of the Time

Prepared by Paul M. Collins, Jr., Ph.D., Judicial Analytics LLC

An examination of the Roberts Court's 5-4 decisions reveals that, when the Roberts Five (Chief Justice Roberts, Justice Alito, Justice Kennedy, Justice Scalia/Gorsuch, and Justice Thomas) forms the Court's majority, they agree with conservative amici curiae ("friends of the court") 92% of the time. Further, in these cases, the Roberts Five has aligned with the positions advanced by the high-profile conservative groups the Chamber of Commerce, the Criminal Justice Legal Foundation, and the Washington Legal Foundation 100% of the time. In its 5-4 decisions, the Roberts Five have opened up the doors for dark money to flood the political system, rolled back important voting rights and environmental protections, and made it easier for employers to discriminate against their employees.

Methodology

- All 5-4 and 4-3 cases during the Roberts Court era were identified, with special attention paid to those decisions in which the Roberts Five (Chief Justice Roberts, Justice Alito, Justice Kennedy, Justice Scalia/Gorsuch, and Justice Thomas) formed the Court's majority.
- More than 2,500 amicus curiae briefs were filed in the Roberts Court's 5-4 and 4-3 decisions.
- The Court's opinions and the amicus curiae briefs were coded according to their ideological direction based on a well-established methodology in the social scientific study of the law.[1]
- The Roberts five supported amici curiae advocating for conservative positions 92% of the time, compared to only 7% of the time for amici curiae advocating for liberal positions.
- In cases where they formed the majority, the Roberts Five agreed with the positions advanced in the amicus curiae briefs filed by the United States Chamber of Commerce, Washington Legal Foundation, and Criminal Justice Legal Foundation 100% of the time.

[1] Spaeth, Harold J., Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2018. *The Supreme Court Database.* http://scdb.wustl.edu/documentation.php?var=decisionDirection.

Kavanaugh's Exercise of Discretion

theatlantic.com/ideas/archive/2018/07/kavanaughs-discretion/564878/

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Perhaps the best way to tell something about judges is by looking at what they do when they have discretion to act. Their exercise of judgment involves two distinct decisions—when and in what circumstances they have discretion to exercise in the first place, and what they do with that discretion once they think they have it. It's a reasonably fair generalization to say that liberal judges see more discretion in the law and use it more to ameliorate perceived injustices, while conservatives prefer to avoid the prospect of discretion wherever they can, thinking that it gives unelected judges too much power over citizens.

Thousands of words, if not hundreds of thousands, have already been written about President Donald Trump's Supreme Court nominee, Brett Kavanaugh. Scholars will opine on his judicial philosophy and review his judicial opinions—more than 300 of them—for hints about how he might rule. His classmates, law professors, and colleagues will all be asked their thoughts and his law-review articles will be scrutinized.

But the one way to truly know a judge is to watch him in action. I first met Judge Kavanaugh more than 20 years ago, when we both worked for Independent Counsel Ken Starr, but a more recent experience is more germane. I was appointed by the United States Court of Appeals for the District of Columbia Circuit to represent a client who had lost his case while representing himself in federal district court, and then tried to file an appeal.

The main issue was at once abstract and vital: How does a losing party start an appeal? Normally, the answer is pretty simple: The losing party files a single page known as a "notice of appeal."

But that's not the case for everyone. As in my client's case, a convicted criminal seeking a second (or third) review of a case requires permission to appeal from the district court. This permission is called a "certificate of appealability" and it is, in essence, a certification from the district judge to the appeals court that the case isn't frivolous. Of course, having just lost, the issuance of permission doesn't mean the appellant will win. Rather, it certifies that the issue in the case is one about which reasonable minds can disagree and thus that the appeals court should hear the case.

My client duly requested his certificate of appealability and it was issued to him. But the district court's letter of notification never made it into his hands. This is actually a fairly common occurrence with the Bureau of Prisons, particularly when an inmate is moving from one prison to the next. Unfortunately, while he waited patiently for an answer to his request, time ran out for him to file the required notice of appeal.

And so, the question before the appeals court was fairly simple: Could they treat my client's request for a certificate of appeal as if it were an actual notice of appeal, and then hear the merits of his case despite the fact that, as a procedural matter, his time had run out?

And that's where the discretion came in. For a long time, courts have said that the notice of appeal is a merely a formality, which is to say it's necessary only to inform the other side that an appeal is forthcoming and, in some cases, what the topic of the appeal will be.

One can be a formalist and say that only a notice of appeal can start an appeal. Or one can be pragmatic and invoke discretion to say that any filing that fulfills the function of a notice is sufficient, even if it isn't exactly a notice of appeal.

And that is precisely what this case was about. Having filed for a certificate of appeal, my client had made clear that he wanted the case elevated to a higher court. And the district court had granted the certificate, saying that one issue in his case in particular (whether or not his trial lawyer had been ineffective) was worthy of review. We argued that that was enough to give the U.S. government sufficient notice of the grounds for appeal. The government argued, perhaps unsurprisingly, that in the absence of a formal notice of appeal being filed, no appeal was possible.

Kavanaugh happened to be on the panel that heard the case. The essence of what he said to the government's lawyer from the bench sticks with me, even if the specific wording does not: *Give me a hard-and-fast rule and I'll apply it, but here I have discretion. Why shouldn't we let him have the appeal and turn to the merits?*

And that's what happened. Exercising their discretion, the judges on the panel decided that enough had been done to make my client's appeal effective, and they agreed to hear the merits of the case. He lost on the merits (which I'm sure he still feels aggrieved about) but at least he had the satisfaction of having his day in court.

The Kavanaugh I know is likely to be reluctant to find discretion in the law. He will see hard-and-fast rules that bind him. But where he does see discretion? At least in this one instance, he was generous and open to the appeal of the little guy. And that, in the end, isn't a bad way to be.

Paul Rosenzweig is a senior fellow at the R Street Institute and a principal at Red Branch Consulting. Twenty years ago he served as a Senior Counsel in the investigation of President Clinton.

Why Supreme Court nominee Brett Kavanaugh may be more independent than you expect

sandiegouniontribune.com/opinion/editorials/sd-supreme-court-nominee-brett-kavanaugh-20180709-story.html

The San Diego Union-Tribune Editorial Board

In getting to nominate two Supreme Court justices in his first 18 months on the job, President Donald Trump has an opportunity to quickly shape his long-term legacy in a way that many of his predecessors never had. In choosing Brett Kavanaugh — a judge on the Washington, D.C., U.S. Circuit Court of Appeals — to replace retiring Justice Anthony Kennedy, Trump has chosen a deeply experienced nominee with 300 opinions under his belt who appears well within the judicial mainstream.

As Vox observed, Kavanaugh, 53, is "straight out of Supreme Court central casting." Besides serving for 12 years as a judge on the second most important court in the nation, he served as a clerk for Kennedy and two other federal judges. He worked in the solicitor general's office under President George H.W. Bush, on special prosecutor Kenneth Starr's team investigating President Bill Clinton, and as staff secretary to President George W. Bush. A Yale law school graduate, he has taught law students at his alma mater as well as Harvard and Georgetown.

The San Diego Union-Tribune Editorial Board looks forward to coming debates over his history, starting with his opinion in the Seven-Sky v. Holder case, involving the legality of the Affordable Care Act in which Kavanaugh made an unusually specific and reassuring observation. "For judges, there is a natural and understandable inclination to decide these weighty and historic constitutional questions," he wrote. "By waiting, we would respect the bedrock principle of judicial restraint that courts avoid prematurely or unnecessarily deciding constitutional questions." But Kavanaugh also offered the view that a president can choose not to enforce a law he considers unconstitutional even if the courts disagree — a position fraught with problems.

Nevertheless, barring some revelation in coming weeks, this editorial board is strongly inclined to support Kavanaugh's nomination. We have consistently backed qualified high court nominees from both Republican and Democratic presidents. Elections have consequences, and presidents deserve deference in choosing justices, Cabinet members and all senior posts requiring Senate confirmation.

Yet our view about supporting qualified Supreme Court nominees who are within the judicial mainstream is increasingly out of the political mainstream. In 1988, Kennedy became the last nominee to win unanimous Senate support. Even though all were highly qualified, the last five Supreme Court nominees considered by the Senate each received at least 22 no votes. In 2016, this partisanship reached an ugly new peak when Senate Majority Leader Mitch McConnell, R-Kentucky, refused to even hold a vote on federal appeals court Judge Merrick Garland, nominated by President Barack Obama after the death of Justice Antonin Scalia.

This background and emotions over abortion and other legal and social issues make a bitter battle over Kavanaugh certain. He seems likely to prevail because of the GOP's Senate majority and three Democratic senators seeking re-election in states Trump won easily. But for the millions of Americans who don't want the judiciary to be a politicized battlefield akin to a third branch of Congress, Kavanaugh's nomination isn't just about ideology or payback. It's about protecting the court's legitimacy at a moment of heavy political rancor. Kavanaugh's paper trail makes his conservatism indisputable. But we hope he is a conservative more like Kennedy and Chief Justice John Roberts than Scalia.

Kennedy's belief in individual liberties led him to author landmark liberal decisions as the court's swing vote. Roberts' 2012 and 2015 votes upholding the Affordable Care Act on narrow grounds may have inflamed conservatives — especially Scalia — but they reflected a deference to the legislative branch that is in keeping with Kavanaugh's professed belief in judicial restraint and precedent.

We hope this belief is sincere. American politics has all too many score-settling partisans. The last thing this nation needs is one in a judicial robe.

Brett Kavanaugh's Legal Opinions Show He'd Give Donald Trump Unprecedented New Powers

slate.com/news-and-politics/2018/07/brett-kavanaugh-would-give-donald-trump-unprecedented-new-powers.html

July 19, 2018

Jurisprudence

By Jed Shugerman

Does Brett Kavanaugh defer to precedent? The answer to this question could well determine the future of *Roe v. Wade* and reproductive rights in this country. Kavanaugh's speeches and judicial opinions suggest that he would not defer to *Roe* as precedent, and that he would overturn it entirely.

Perhaps more surprisingly, he has hinted that he would essentially overturn the independence of the Federal Reserve and other vital independent agencies by handing control of them over to the president. And perhaps most disturbingly, Kavanaugh's reverence of a Scalia dissent in a critical case about independent prosecutors—and the judge's ideologically driven claims about that case—raises questions about how he treats precedent and whether he views the work of special counsel Robert Mueller's office as appropriate.

It has never been a good idea to centralize the enormous power of the modern administrative state under one person. We are reminded every day how bad an idea that would be. And it is remarkable and extreme that Kavanaugh seems to think it is unconstitutional—under originalism or any theory of constitutional interpretation—to decentralize those massive executive powers, despite all the risks of self-dealing, cronyism, and partisan manipulations.*

It is important to appreciate that Judge Kavanaugh has a remarkably robust record on *Roe* and other major controversies. He's not a stealth nominee. But his candid opinions and speeches played a role in getting the nomination, so it's also fair to scrutinize them. A close reading of some of his major cases in the area of executive power shows a regular willingness to ignore precedent because he favors an ahistorical and extreme theory of presidential power. At the Supreme Court, this view could threaten the special counsel's office and the independence of federal agencies like the Federal Reserve and the Federal Trade Commission. Independent agencies have been an important feature of the federal government for almost a century and a half, but Judge Kavanaugh has shown a willingness to jettison precedents that protect these agencies from presidential interference.

Two key features of such agencies are that 1) they are run by multimember bipartisan commissions and 2) the commissioners or officers cannot be fired at will by the president, but only for good cause. This structure is crucial for fostering expertise and long-term planning, insulated from party control and presidential meddling. Imagine if a president could meddle with the Fed to lower interest rates just in time for a re-election campaign, or pressure the Securities and Exchange Commission to benefit cronies and special interests. Independent

agencies are designed to reduce presidential or partisan influence over currency and banking, Wall Street, trade policy, nuclear safety, and workplace and product safety, to name a few vital areas.

Even if Judge Kavanaugh is on the record signaling his opposition to major precedents like *Roe*, would he still respect precedent and set those leanings aside? Based on a reading of one of his most significant opinions and his answers in an American Enterprise Institute forum in 2016, Kavanaugh appears to not be particularly deferential to precedents, even canonical ones. For an ostensible originalist, Kavanaugh's understanding of Anglo-American legal history is also flawed. He appears to have a further blind spot: a preference for centralized executive power and a deference to Scalia opinions, even if precedent and history do not support such conclusions.

On Wednesday, this revealing audio exchange from an AEI talk in 2016 with Judge Kavanaugh emerged:

> Q: Can you think of a case that deserves to be overturned?
>
> Judge Kavanaugh: Yes. (Laughter).
>
> Q: Would you volunteer one?
>
> Judge Kavanaugh: No. (More laughter, long pause). Actually, I am going to say one: *Morrison v. Olson*. It has been effectively overruled, but I would put the final nail in.

Morrison v. Olson was a 7–1 Supreme Court decision, written by Chief Justice William Rehnquist in 1988, upholding the Office of Independent Counsel as constitutional. *In dissent, Justice Antonin* Scalia embraced the "unitary executive" theory, which asserts that the president has full control over the executive branch, especially in terms of the power to remove executive officers for any reason. Scalia believed the independent counsel was unconstitutional because judges selected the officer and the president did not have the power to remove that officer.

There was a reason Scalia was all alone in that dissent, though: He was wrong, and his historical assumptions were demonstrably wrong. Further, *Morrison* has not been "effectively overruled" as a judicial question, even if it has many critics and even if the Supreme Court has rarely relied on it since 1988.

Kavanaugh seems to go further and subscribe to a more extreme version of the unitary-executive theory, which would end the notion of independence in any government agencies. Trump defenders have used such a theory to argue that Trump could have fired FBI Director James Comey for *any* reason without it having constituted obstruction of justice. This version would also enable Trump to remove special counsel Robert Mueller, regardless of regulations protecting the special counsel's office from at-will removal by the president or attorney general.

To see how far Kavanaugh might go with his unitary-executive theory, it's important to examine his own rulings. Kavanaugh relied heavily on Justice Scalia's lone dissent in *Morrison v. Olson* in a set of decisions on the Consumer Fraud Protection Bureau between 2016 and 2018. In *PHH v. CFPB*, Kavanaugh ruled (in my opinion, correctly) that the structure of the federal consumer watchdog violated the Constitution by saying the director could not be fired by the president, even for good cause. Even if he got the decision right, though, the breadth of his opinions is troubling. Kavanaugh questions the very existence of *any* job-security protections in independent agencies such as the CFPB.

Overturning this precedent would mean an end to the political independence of agencies in banking, finance, trade, nuclear security, andmore.

In ruling against the CFPB's structure, Kavanaugh cited Scalia's lone dissenting opinion in *Morrison v. Olson* eight times in the initial panel decision and six times in his *en banc* dissent. As I've previously written, the *Morrison* dissent, which claimed government investigations and prosecutions were a "quintessentially" executive function, was starkly ahistorical. Among other things, it ignored the heavy role private prosecutions played in Anglo-American criminal law until the late 19th century as well as the role of Congress' inherent contempt powers to prosecute nonmembers. As Asha Rangappa and I have pointed out, congressional Republicans have recently threatened to use subpoenas and contempt of Congress against the Department of Justice, underscoring how Scalia's view of the unitary-executive theory in *Morrison* continues to be wrong.

Founding-era practices further undercut Scalia's assumptions. Colonial prosecutors were often appointed by judges—not by executive officials—and many early state constitutions listed the prosecutors in the judiciary sections. Some of these constitutions gave legislatures or judges the power to appoint law enforcement officials. Virginia's 1776 Constitution, drafted by James Madison, George Mason, and other founders, delegated to the legislature the power to appoint the attorney general and gave judges the power to appoint sheriffs, coroners, and constables. The Judiciary Act of 1789, meanwhile, gave federal judges the power to remove deputy marshals. Congress' first draft of the Judiciary Act would have empowered the Supreme Court to appoint the attorney general, and district judges to appoint district attorneys. Congress deleted these provisions without explanation, but the draft showed that it wasn't obvious to the founders that prosecution had to be an executive function.

So Scalia's oversimplified history in *Morrison* was wrong. For Kavanaugh, it should be a problem that someone who claims to be an originalist has relied on demonstrably wrong historical assumptions. Even worse, Kavanaugh added this whopper in his footnotes:

> Recall, moreover, that the independent counsel experiment ended with nearly universal consensus that the experiment had been a mistake and that Justice Scalia had been right back in 1988 to view the independent counsel system as an unwise and unconstitutional departure from historical practice and a serious threat to individual liberty.

Nearly universal consensus? There isn't even a nearly universal consensus in the Federalist Society that Scalia was right. This is an exaggeration that further suggests Kavanaugh lives in an ideological bubble of highly motivated reasoning. Kavanaugh's willingness to exaggerate in service of presidential power raises reasonable questions about his views of Mueller's office, even if the special counsel's office is more constitutionally defensible compared to the original Office of Independent Counsel.

As discussed, Kavanaugh's indications that he'd go even further than Scalia's dissent are even more unsettling. Critically, the judge has signaled that he'd overturn *Humphrey's Executor*, an 83-year old canonical precedent that is a foundation for the modern administrative state. Overturning this precedent would mean an end to the political independence of agencies in banking, finance, trade, nuclear security, and more.

In *Humphrey's*, the court ruled on President Franklin D. Roosevelt's attempts to fire Federal Trade Commission Chairman William Humphrey because the president wanted to change course on trade and antitrust policy. But the FTC was designed as an "independent agency," and by statute, the president could remove an FTC chair only for "inefficiency, neglect of duty, or malfeasance in office." In other words, Roosevelt could remove Humphrey only for good cause, not because of policy differences. The Supreme Court ruled that Roosevelt could not remove Humphrey. This decision allowed Congress to protect agency officials from at-will removal if those officials have quasi-legislative or quasi-judicial roles, rather than solely executive roles.

Judge Kavanaugh is not fond of *Humphrey's*, to say the least. In 2011, Kavanaugh wrote a concurrence in a D.C. Circuit ruling over a nuclear-waste controversy at Yucca Mountain. For 12 pages, Kavanaugh lambasted *Humphrey's* specifically and independent agencies generally. He wrote that the *Humphrey's* regime was undemocratic:

> Because of *Humphrey's Executor*, the President to this day lacks day-to-day control over large swaths of regulatory policy and enforcement in the Executive Branch. … Those and many other independent agencies have huge policymaking and enforcement authority and greatly affect the lives and liberties of the American people. Yet those independent agencies are democratically unaccountable—neither elected by the people nor supervised in their day-to-day activities by the elected President.

Kavanaugh went on to question the principle that agencies need independence to follow expertise "in an apolitical way." He quoted a legal scholar trashing this critical precedent:"*Humphrey's Executor*, as commentators have noted, is one of the more egregious opinions to be found on pages of the United States Supreme Court Reports." He noted that the other cases checking presidential power decided around the same time "have long since been discarded as relics of an overly activist anti-New Deal Supreme Court." Kavanaugh then argued that *Humphrey's* is in tension with more recent Supreme Court precedent.

Ultimately, Kavanaugh shifted tone at the end of this extended sweeping critique:

> All of that said, *Humphrey's Executor* is an entrenched Supreme Court precedent, protected by stare decisis. The point of explaining its history and continuing repercussions here is not to suggest that the case should be overturned.

Considering the previous 12-page critique, including the quote about "one of the more egregious opinions" on the books, though,one might be forgiven for inferring that Kavanaugh thinks the Supreme Court *should* overturn *Humphrey's* directly. Of course, a circuit judge needs to back down and acknowledge stare decisis after such a scorching of a Supreme Court precedent. But a justice would be unconstrained to take the next big step.

Kavanaugh also returned to his critique of *Humphrey's* in the CFPB case. In a footnote in his 2016 decision and another footnote in his 2018 dissent, Kavanaugh cited critics of *Humphrey's* and cast further doubt on the validity of independent agencies. He even addressed the potential effects of overturning *Humphrey's*.

If Kavanaugh was simply offering the plaintiffs a potential route to preserve an unlikely claim with these footnotes, he could have simply dropped a single sentence. But instead, Kavanaugh wrote a short essay on the plausibility of ending the long-settled and vital 130-year institution of independent agencies.*

There is ambiguity in this noncommittal footnote, but if Kavanaugh is seriously considering striking down the structure of independent agencies in the Trump era—as his writings imply—he needs to explain this position and acknowledge the dramatic consequences. It would be an unpredictable and disruptive change in the executive branch, in banking, markets, energy, and major other areas of regulation. And the effect would be suddenly to give the president—President Donald Trump—a lot more power over all of these areas of modern life. Imagine if Trump decided to start firing the Fed Reserve board members or Federal Trade commissioners, then installing his loyalists. What if he fired Mueller? Where would Kavanaugh stand?

Interestingly, Kavanaugh cited a particularly colorful passage from Scalia's *Morrison* dissent a few times over the course of his *Morrison*-heavy opinions. Here's that full passage:

> Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

Kavanaugh doesn't come as a wolf, but he puts a lot of wolves in his citations and footnotes. To mix classic Scalia metaphors, he puts wolves in mouseholes. All of these citations force the question: How much would a Justice Kavanaugh really adhere to precedent? When Kavanaugh casually entertains overturning a nearly century-old canonical case with chaotic ramifications, he's telling us, "Not much at all." When he gives Scalia's dissent more weight than the *Morrison* majority and plays with the idea of uprooting *Humphrey's Executor* and 130 years of independent governmental agencies, we have to ask: What does that mean for *Roe v. Wade,* Mueller, the Fed—and other foundations of modern American life?*

Correction, July 19, 2018: Due to an editing error, this piece originally said that Judge Kavanaugh seems to think centralizing executive powers is unconstitutional. This article also originally described independent agencies as being 150 years old, not 130 years old, which is the correct age.

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Original Articles

Delay in disclosure of childhood rape: results from a national survey ☆

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Abstract

Objective: This study sought to gather representative data regarding the length of time women who were raped before age 18 delayed prior to disclosing such rapes, whom they disclosed to, and variables that predicted disclosure within 1 month.

Method: Data were gathered from 3,220 Wave II respondents from the National Women's Study (Resnick, Kilpatrick, Dansky, Saunders, & Best, 1993), a nationally representative telephone survey of women's experiences with trauma and mental health. Of these, 288 retrospectively reported at least one rape prior to their 18th birthday. Details of rape experiences were analyzed to identify predictors of disclosure within 1 month.

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Close friends were the most common confidants. Younger age at the time of rape, family relationship with the perpetrator, and experiencing a series of rapes were associated with disclosure latencies longer than 1 month; shorter delays were associated with stranger rapes. Logistic regression revealed that age at rape and knowing the perpetrator were independently predictive of delayed disclosure.

Conclusions: Delayed disclosure of childhood rape was very common, and long delays were typical. Few variables were identified that successfully predicted disclosure behavior, but older age and rape by a stranger were associated with more rapid disclosure. This suggests that the likelihood of disclosure in a given case is difficult to estimate, and predictions based on single variables are unwarranted.

Previous Next

Keywords

Child rape; Disclosure; Child sexual abuse

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Research data for this article

Interuniversity Consortium for Political and Social Research ICPSR
Social and behavioral science research data
Data associated with the article:
National Women's Study, 1975

National Women's Study, 1975

Version 1

About research data

☆ Preparation of this article was partially supported by National Institute of Drug Abuse Grant DA 05220–01A2, Dean G. Kilpatrick, principal investigator. Work on this research was begun while the first two authors were

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The Forensic Experiential Trauma Interview (FETI)

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Independent Consultants

Traumatized individuals often undergo a process many professionals and victims do not commonly understand. Many professionals inside and outside law enforcement have been trained to believe when an individual experiences an event, to include a trauma event, the cognitive (prefrontal cortex) brain usually records the vast majority of the event including the who, what where, why, when and how and peripheral vs. central information. This approach often ignores the role of bottom-up attention of the more primitive portion of the brain during highly stressful or traumatic event. Therefore, when the criminal justice system responds to the report of a crime most professionals are trained to obtain this type of peripheral and higher level thinking and processing information often discounting the enhancement of memory traces – for what was attended, via bottom-up mechanisms and norepinephine and glucocorticoid effects on the amygdala and hippocampus. Sadly, collecting information about the event in this manner while overlooking the manner in which the memory and trauma shapes the memory may actually inhibit traumatic or highly stressful or fear producing memory and the accuracy of the details provided. Trauma victims/witnesses do not generally experience trauma in the in the same way most of us experience a non-traumatic event. The body and brain react to and record trauma in a different way then we have traditionally been led to believe. When trauma occurs, the prefrontal cortex will frequently shut down leaving the less primitive portions of the brain to experience and record the event. The more primitive areas of the brain do a great job recording experiential and sensory information but don't do very well recording the information many professionals have been trained to obtain. Most interview techniques have been developed to interview the more advance portion of the brain (prefrontal cortex) and obtain specific detail/peripheral information such as the color of shirt,

When trauma occurs, the prefrontal cortex will frequently shut down leaving the less primitive portions of the brain to experience and record the event.

description of the suspect, time frame, and other important information. Some victims are in fact capable of providing this information in a limited fashion. Most trauma victims however are not only unable to accurately provide this type of information, but when asked to do so often inadvertenly provide inaccurate information and details which frequently causes the fact finder to become suspicious of the information provided. Stress and trauma routinely interrupt the memory process thereby changing the memory in ways most people do not accurately appreciate. One of the mantras within the criminal justice system is "inconsistent statements equal a lie". Nothing could be further from the truth when stress and trauma impact memory, research shows.

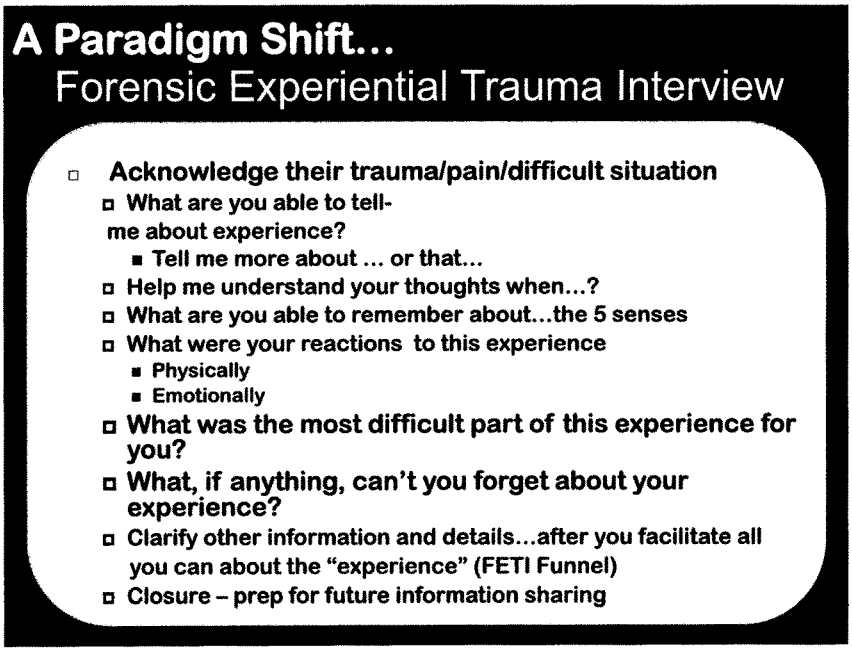
In fact, good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma. In addition, what many in the criminal justice field have been educated to believe people do when they lie (e.g., changes in body language, affect, ah-filled pauses, lack of eye contact, etc.) actually occur naturally when human beings are highly stressed or traumatized. Science of memory and psychological trauma must be applied to interview approaches and techniques.

Since the vast majority of traditional training and experience has caused many to focus on the higher functioning portons of the brain and research clearly shows these portions of the brain is not generally involved in experiencing, reacting to or recording the experience, the FETI process was developed and implemented as proven methods to properly interview the more primitive portions of the brain. This technique not only reduces the innacuarcy of the information provided but will greatly enhance understanding of the the experience, thereby increasing the likelyhood of a better understanding of the totality of the event. FETI is highly effective technique for victim, witness and some suspect/subject interviews. FETI entails the adaptation of the principles used in critical incident stress debriefing and defusing (impact of the event including emotional and physical responses) as well as principles and techniques developed for forensic child interviews (open-ended non-leading questions, soft interview room and empathy) as well as neurobiology of memory and psychological trauma (initially tapping into the lower functioning portion of the brain to understand the experience as well as the meaning of the experience in a non-threatening, non-suggestive manner). This concept and approach of this technique can be described as a *forensic* psycho*physiological investigation* - an opportunity for the victim to describe the *experience* of the sexual assault or other traumatic and/or fear producing event, physically and emotionally. This method has resulted in reports of better victim interviews by those who have

used it. More importantly, the FETI interview process obtains significantly more information about the experience, enhances a trauma victim's ability to recall, reduces the potential for false information, and allows the interviewee to recount the experience in the manner in which the trauma was experienced. The FETI interview enhances the investigative process by taking a one-dimensional traditional investigation and turning it into a three-dimensional offense-centric investigation including subjective experiences indicative of trauma-based brain states. Traumatic memories are often encoded and retrieved differently than non-traumatic memories, so they have that dimension of the experience, and then presenting the fullness – and limitations – of the victim's memories, including the fragmented sensations and emotions, lack of narrative and sequencing, etc., which are then critical facts of their own.

This technique significantly enhances the quality and quantity of testimonial and psychophysiological evidence obtained. This method has also been shown to drastically reduce victim recantations, increase victim cooperation and participation and significantly improves chances for successful investigations and prosecutions.

The forensic experiential trauma interview includes using interview techniques described below:



3

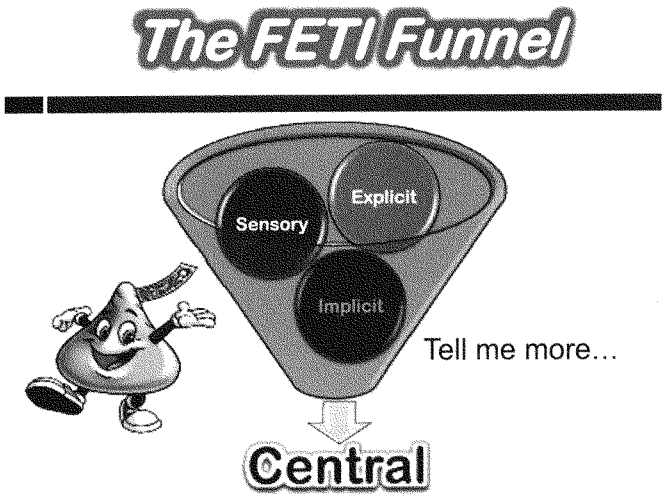
a. **Acknowledge the victim's trauma and/or pain.** This will assist you, the listener, to demonstrate genuine concern and empathy towards the interviewee in an attempt to provide a sense of psychological and physical safety during the interview process. It may be difficult to establish trust with someone whose trust may have ben horribly violated by another human being they may have trusted. Every effort should be made by you to demonstrate genuine empathy, patience and understanding towards the person with whom you are facilitating a disclosure of their experience. You may need to spend additional time establishing this your sincere empathy and caring concern to be invited into their traumatic and/or painful experience. One of the greatest needs of anyone who has experienced or is experiencing high stress and/or trauma is the need to be safe, trust is central to that need. The interviewer must take responsibility to build trust in the most effective and appropriate way. Once trust is established, the interviewer may be invited into what can be termed as "the trauma bubble". The trauma bubble is where much of the most important psychophysiological evidence may reside. It is vitally important for the interviewer to demonstrate patience, understanding, and empathy in a non-judgmental manner throughout the interview process.

One of the greatest needs of anyone who has experienced or is experiencing high stress and/or trauma is the need to be safe, trust is central to that need.

b. **Ask the victim/witness what they are able to remember about their experience.** Two key words in this question are "able" and "experience". Not all victims are able to recall all significant information about something that happened to them initially or even after a period of time. Using the word "able" has been proven to relieve some pressures on the trauma victim thereby increasing the information they are able to provide. Using the term "experience" encourages the victim to describe their actual experience relieving the pressure on the interviewee to try to figure out what is important to the interviewee in the context of a criminal investigation. As the victim/witness describes their experience, the Interviewer can better understand what happened as they are provided a recounting of the events that are generally extremely rich in details. Following the initial open-ended prompt, employ active listening techniques allowing the interviewee to free-flow their description of what they remember about their experience. The Interviewer

will enhance this description by adding additional open-ended prompts such as "tell me more about that" or "tell me more about ____". This technique will allow the interviewee to provide even more significant information about their experience by prompting their memory in a more natural way. Open-ended prompts should include the interviewee's emotional and physical experiences, before, during, and after the reported incident. Do not tell the interviewee to start at the beginning. This technique often inhibits trauma memory recall. Providing an opportunity for the victim to communicate his/her experience in the manner in which he/she recalls what happened is much more effective than initially requiring the victim to provide a chronological narrative. A sequential narrative may come to the victim later.

FETI Funnel – this term is used to describe the method to use clarifying questions to better understand both explicit and implicit memories. The use of "tell me more" questions are the most effective type of question to take an explicit memory such as "the rape", "the man", "the car", "drinking", "taking a shower", etc. and better understand the context and impact of the particular remembrance. The interviewer should focus the interviewees thoughts on these particular topics to identify senses, thoughts, and feelings along with implicit memories. For example, if the interviewee states something along the lines of "and then he raped me.", the interviewer should respond with "tell me more about the rape". The interviewee may then respond by saying "he held me down and forced his penis into me." The interviewer may then respond by saying "tell me more about him forcing his penis into you." A follow-up question may then be "tell me what it felt like when...", or what were you thinking when...", or what did it smell like when..."



c. **Ask the victim/witness about their thought process at particular points during their experience.** What was he/she thinking and how was he/she processing his/her experiences. This will assist the interviewer to better understand the actions/inactions and behaviors of the victim before, during, and after the assault. This will also reduce or even eliminate the need for the Interviewer to ask the victim/witness why they did or did not do something such as fight back, kick, scream, run, etc. Why questions of this nature have been proven to re-victimize victims, close them down, increase false information, and destroy or damage fragile trauma memories. By asking what their thought process was not only provides additional understanding of the victim/witness reaction and behaviors, but also increases their ability to recall additional psychophysiological evidence. For example, if the victim was sexually assaulted and during the sexual assault they may have "frozen" due to tonic immobility, asking them what they were thinking at the time they were being assaulted will often prompt will often solicit responses such as "I though he was going to kill me", "I couldn't move or scream", "I couldn't understand what was happening at that moment". This type of information not only assists the Interviewer in determining a better understanding of why the victim/witness did or did not do something, but also identifies significant forensic physiological evidence that will assist in proving or disproving and or corroborating the reported offense. ,

d. **Ask about tactile memories such as sounds, sights, smells, and feelings before, during, and after the incident.** This is one of the most important aspects of the FETI process and a central theme. Because the primitive portion of the brain is optimized to collect, store, and recount this information far more efficiently than peripheral information or details, this is crucial evidence to collect as well. It is also believed that tactile and sensory details may block some memories and negatively impact on the victim's ability to disclose additional information. Asking about sensory information has been shown to increase the victim's ability to relate to the experience in a way that produces significantly more information. Sensory information also assists fact-finders and juries to better relate to the experience of the victim as well. Asking about sights, sounds, smells, feelings (physical and emotional), and tastes throughout the interview about specific memories related by the interview is extremely beneficial for the interviewer to better understand the experience and assist the interviewee in remembering and

relating essential memories including central details (those details most important to the interviewee) and peripheral details (those details judged not important to the interviewee). For example, during the interview of an experienced police officer who witnessed a woman shooting herself in the head (specifically – "blew her brains out" as related by the officer) following an attempt to talk her out of shooting herself, this officer provided details of the events surrounding this experience. Following open-ended questions about this officer's experience, the officer concluded he recounted all the details he could recall. This officer was then asked what, if anything he was able to remember about what it smelled like after the woman "blew her brains out". This officer appeared to reel back in his chair, his nose started to twitch and he appeared to become emotional following this question. The officer then recounted in a very animated manner that he smelled "honeysuckle". Following his disclosure about the honeysuckle, this officer became even more animated and disclosed, and demonstrated, that this woman's hand was shaking and she was breathing deeply after she shot herself. This officer then added that her blood flowed from her open head "like motor oil". This officer had not remembered these specific details during previous traditional interviews and was surprised by the amount of detail he was able to recall following the sensory cue provided by the FETI interviewer. This is but one example of many in which victims and witnesses of trauma can be assisted to recall specific sensory memories, which often assist them in remembering not only explicit memories, but implicit memories as well. Sensory information is often at the core of central details for most individuals. Therefore, asking specific questions about the various senses throughout the FETI process greatly enhances the likelihood of obtaining accurate experiential information increasing the ability of the interviewee to recall essential central details of the experience. Some individuals will recall certain senses better than others, so it is important to ask about all senses separately while obtain specific memories during specific aspects of the experience before, during and after the traumatic event.

e. **Ask the interviewee how this experience affected them physically and emotionally.** This is extremely important to understand because the effects of the assault will increase the Interviewer's understanding the context of the experience, as well as provide evidence and insights about the trauma in ways that will further an in-depth conception of the impact of the assault on the victim. How the victim felt before, during, and after the event under investigation is fundamentally important for the Interviewer to understand and collect. During fear producing and traumatic events the sympathetic and parasympathetic system of the human body react to the fear stimulus in significant ways. The victim/witness may experience the emotional feelings of fear, shock, anger, rage, sadness, etc. The

victim/witness may also experience physiological reactions to the trauma including the emotional feelings combined with the physical manifestations of stress, crisis, and trauma such as shortness of breath, increased heart rate, dilated pupils, muscle rigidity and/or pain, light-headedness and or headache, tonic immobility, dissociation, etc. Identifying and properly documenting these reactions to their experience are essential pieces of information that can greatly assist the Interviewer in understanding the context of the experience and provide significant forensic psychophysiological evidence.

f. **Ask the victim/witness what the most difficult part of the experience was for them.** Trauma victims/witnesses will often intentionally or unintentionally repress extremely difficult to handle information about their experiences. A sensitive inquiry about the most difficult part of their experience may provide significant evidence of the trauma experience and/or crime and will in many cases increase understanding of the totality of circumstanced in reference to the victim/witness experience. Additionally, the most difficult part of the interviewees experience is more often than not the "key" central detail that may have not only framed the manner in which the trauma was experienced and remembered, but may also be fundamentally important aspect for investigators to better understand the context of that experience and subsequent reactions/behaviors of the interviewee following that experience.

g. **The interview should inquire what, of anything can't the interviewee forget about their experience.** This question may assist the interviewer and interviewee to better understand another critical "central detail" and a better understanding of the interviewee's perception and response to the trauma. This question also may obtain additional psychophysiological evidence. For example, a victim of a robbery in which the victim was brutally beaten by two assailants with hammers, was initially interviewed by a responding police officer utilizing traditional who, what, where, why, when, and how police questions in an attempt to obtain a chronological narrative immediately following the event. This particular victim became increasingly frustrated during the interview because he could not remember and did not know the answers to the majority of the questions the police officer was asking the robbery victim. Questions such as "what time did the incident occur", "how many times did they hit you", "how long did they hit you", "what did they look like", how tall were they", what were they wearing", "why didn't you let them take your watch" (the victim continued to hold his arm on which he was wearing the watch during the attack – possible tonic immobility). As these questions, and many others, were being asked, the victim continued to become more frustrated and agitated because he felt he should know the answers simply because

the police officer was asking them. This line of questioning was potentially increasing the victims stress level, increasing stress hormones, decreasing the ability of the victim to answer the questions and possibly increasing the possibility that the victim, with a desire to assist the officer, to provide inaccurate information. During a subsequent FETI interview of this same victim, the victim was initially unable to provide any additional experiential information. This victim was then asked, "what, if anything, can't you forget about your experience?" Following this question, the interviewee began to hit his head stating "the hammers hitting my skull, the hammers hitting my skull, I can't get that sound out of my mind, I can't sleep well, I can't concentrate, the hammers hitting my skull". After this disclosure, this victim was able to remember significant details about the robbery including other sensory information, what happened before, during and after the robbery, and other significant information about this experience.

Memory encoding during a traumatic event is diminished and sometimes inaccurate, and due to bottom-up attention processes focused only on central details perceived as essential to survival and self-defense many aspects of the event, including those deemed by investigators as essential facts of the crime, may not be encoded strongly or at all.

h. **The interviewer should clarify other information and details (e.g. who, what, where, when, and how) *after* facilitation and collection of the forensic psychophysiological experiential evidence.** Although the primitive portions of the brain collect, store, and recall information pertaining to the experience, the cognitive brain may have collected or is able to retrieve from other portions of the brain information pertaining to the who, what, where, when, and how types of information. Interviewers should be careful about asking specific questions pertaining to length of time and elements of distance due to the fact that fear and trauma often distorts time and distance. The Interviewer should explore the additional central/peripheral information and who, what, where, when, and how type of information in a sensitive and empathetic manner taking great care not to inhibit or change already fragile testimonial trauma evidence.

i. **The interviewer should remember to close the interview as empathically as it began.** The interviewee should be allowed to control the length and breadth of the interview. Upon termination of the interview the interviewer should provide reassurance to the interviewee that it is normal after the interview for them to remember additional elements of their experience. In large part this is due to the way in which the brain continues to process through a traumatic experience. Further there may be elements of their day to day activities that will cause particular remembrances. This is commonly known as triggers, such as sights,

sounds smells, tastes, feelings, and body sensations. These triggers are often caused by these sensations and/or explicit memories triggering the implicit memories. The interviewee should be encouraged to make note of these remembrances and the interviewer should encourage them to share that information as it may prove critical and noteworthy to the investigation and potential prosecution. Finally the interviewer should address any concerns/questions the interviewee has at that time and close by thanking the interviewee for their participation and willingness to trust the interviewer with the disclosure. Also, it is important to remember, if done effectively, there may be a trauma related bond between the interviewer and interviewee. Provide some time for closure and normalization prior to the final completion of the interview. Ensure the interviewee has follow-on resources available, as needed, such as a victim advocate or other helping professional.

Victims should not be treated as witnesses to their own crime – they have an experience we have a duty to facilitate a disclosure, document and present in a three dimensional manner

The FETI interview methodology is specifically designed to provide an opportunity for the Interviewer to obtain significantly more psychophysiological evidence than traditional interview techniques. Psychophysiological evidence is defined as "evidence which tends to prove or disprove the matter under investigation based on psychological and physical reactions to the criminal conduct the person experienced or witnessed. Examples would include, but are not limited to: nausea, flashbacks, muscle rigidity, trembling, terror, memory gaps, etc." In addition, these techniques provide the victim a better avenue for disclosure, reducing the potential for defensive feelings and uncooperative behavior, which can limit the information/evidence provided to an Interviewer.

Memory encoding during a traumatic event is diminished and sometimes inaccurate, and due to bottom-up attention processes focused only on central details perceived as essential to survival and self-defense, many aspects of the event, including those deemed by investigators as essential facts of the crime, may not be encoded strongly or at all. But the assault's psychophysiological impact is registered with much greater accuracy and strength in the brain's circuitries of fear and stress, and remembered with far more precision. The impact of the psychophysiological experience also continues to produce potential psychophysiological evidence long after the event. Indeed, psychophysiological evidence is often the only evidence available to distinguish between consent/non-consent and levels of incapacitation. It is also extremely beneficial in demonstrating the 'three dimensional' assault experience and subsequent victim reactions and behaviors.

Actions by Chairman Grassley and the Senate Judiciary Committee related to allegations made and disputed regarding Judge Brett Kavanaugh:

A 38-year member of the Senate Judiciary Committee, Chairman Grassley has worked to secure a thorough, credible and effective committee process as the U.S. Senate meets its constitutional duty of advice and consent in considering the nomination of Judge Brett Kavanaugh to serve on the U.S. Supreme Court. Grassley reopened the hearing after four days and 32 hours of testimony from the nominee during the week of September 4, including a closed session available to all Judiciary Committee members to scrutinize any issues or concerns about the nominee that involve confidentiality. The supplemental hearing took place on September 27, and it provided a fair and professional forum for Dr. Christine Blasey Ford to share allegations she made about the nominee, and for the nominee to respond to questions and address those allegations.

In addition, Chairman Grassley has conducted extensive review and investigation of the allegations made by Dr. Ford and comments and statements made by others both in news media reports and in messages to other senators that have been given to the Judiciary Committee. A description of those efforts is provided here.

July 9	• President Trump announces Judge Kavanaugh's nomination to become an Associate Justice on the Supreme Court of the United States.
July 30	• Dr. Ford drafts letter to Sen. Feinstein.
July 30 – August 7	• Dr. Ford consults with Sen. Feinstein, who recommended Dr. Ford retain Debra Katz and her firm.
August 7	• Dr. Ford, represented by Debra Katz, takes a polygraph on Katz's advice.
August 20	• Sen. Feinstein meets with Brett Kavanaugh, knowing of Dr. Ford's allegations, and that she has retained Katz as counsel. She mentions neither to Kavanaugh during the meeting.
September 4-7	• Committee conducts a four day hearing on the nomination of Judge Kavanaugh, including a closed door session on September 6, which Sen. Feinstein did not attend.
September 7-10	• Judge Kavanaugh receives and responds to 1,287 "Questions for the Record" none of which address Dr. Ford's allegations.
Wednesday September 12	• Sen. Feinstein transmits Dr. Ford's letter to the FBI. • Debra Katz leaves Capitol Hill shortly after the *Intercept* published an article with vague allegations against Judge Kavanaugh.
Thursday, September 13	• Sen. Feinstein tells Sen. Grassley of the existence of Dr. Ford's letter after the Committee Executive Business Meeting to hold over the

	nomination of Judge Kavanaugh to be Associate Justice of the Supreme Court. • Contents of letter leak to media.
Friday, September 14	• *New Yorker* publishes substance of Dr. Ford's allegations, but does not identify her by name. • Mark Judge interviews with *Weekly Standard* and denies Dr. Ford's allegations.
Sunday September 16	• *Washington Post* publishes article containing Dr. Ford's allegations and her identity. Dr. Ford names Judge Kavanaugh and Mark Judge as perpetrators and identifies two other individuals at party who are unnamed in *Washington Post* article. *Washington Post* says that four boys and Dr. Ford attended the party. • Sen. Grassley learns Dr. Ford's identity from *Washington Post* report. • Sen. Grassley instructs staff to begin investigation.
Monday September 17	• Dr. Ford's counsel appears on morning shows saying her client wants public hearing to tell her story. • Sen. Grassley invites Sen. Feinstein's staff to join the staff interview of Judge Kavanaugh, Dr. Ford and other witnesses in a member-level phone call. Sen. Feinstein declined to have her staff participate in the routine follow-up calls when new information is provided to the Committee from the FBI for the nominee's background file. • CNN publishes redacted version of letter originally sent by Dr. Ford to Ranking Member. • Committee notices hearing for following Monday, September 24 and invites Dr. Ford and Judge Kavanaugh to testify. • Committee investigative staff sent three emails to Dr. Ford's lawyers with no response. • Committee investigative staff requests interviews with Dr. Ford and Judge Kavanaugh with Republican and Democratic investigators. • Judge Kavanaugh submits to interview with Republican staff. Democratic staff refuses to participate in interview. Judge Kavanaugh asks for a hearing as soon as possible. • Dr. Ford does not submit to interview.
Tuesday September 18	• Committee investigative staff sent an additional email and placed two additional phone calls to Dr. Ford's lawyers with no response. • Committee investigative staff contacts Mark Judge and requests an interview. • Committee investigative staff learns identity of two witnesses identified by Dr. Ford but not named in *Washington Post* article—Patrick J. Smyth and Leland Ingham Keyser—and requests interviews.

	• Counsel for Mark Judge submits statement from Mark Judge in which he denies knowledge of party described by Dr. Ford and states he "never saw Brett act in the manner described by Dr. Ford." He further states he has no other information to offer the Committee and does not wish to speak publicly regarding the allegations. • Counsel for Mr. Smyth submits statement from Mr. Smyth in which he denies any knowledge of the party described by Dr. Ford or of the allegations of improper conduct. He also states he "never witnessed any improper conduct by Brett Kavanaugh towards women." He asks that the Committee accept the statement in response to any inquiry it has. • As far as we know, Democratic staff did not reach out to these witnesses. • At 7:57 p.m. Sen. Grassley hears from Dr. Ford's attorney for the first time. Dr. Ford's attorney submits letter to Sen. Grassley asking for a delay in the hearing. She does not address Committee's request for interview with investigative staff. • Contemporaneously with the release of the letter, Dr. Ford's attorney appears on a cable news show asking for hearing to be delayed.
Wednesday September 19	• Sen. Grassley sends letter to Dr. Ford's attorney that offers Dr. Ford the opportunity for a public or private hearing. • Sen. Grassley reiterates request that Dr. Ford agree to an interview with Committee investigative staff. Dr. Ford's attorneys do not respond to request.
Thursday September 20	• Committee staff has phone call with Dr. Ford's attorneys regarding the conditions under which she would testify before the Committee. Committee staff offers a public hearing, a private hearing, a public staff interview, or a private staff interview. • Sen. Feinstein's staff gives unredacted copy of Dr. Ford's letter to Sen. Grassley's staff after Sen. Grassley requested access and had yet to see unredacted version of the July 30 letter.
Friday September 21	• Committee staff reiterates request that Dr. Ford agree to an interview with Committee investigative staff. Committee staff offers to fly to California to obtain testimony. Dr. Ford's attorneys do not respond to request. • Committee staff again reaches out to Ms. Keyser requesting an opportunity to conduct an interview regarding Dr. Ford's allegations. • Dr. Ford's attorneys asked on Thursday call with staff that their 10 a.m. deadline for accepting the Judiciary Committee's invitation to testify at the September 24 hearing be extended. Sen. Grassley accommodated their request and extends to Friday at 5 p.m. • Sen. Grassley again extends Dr. Ford's invitation to the hearing to 10 p.m. Friday.

	• Sen. Grassley responds to Dr. Ford's attorney's "modest proposal" for an additional day and extends the deadline to accept Dr. Ford's invitation for the hearing by 2:30 p.m. on Saturday. This was the third extension to accommodate Dr. Ford's decision to appear before the Committee.
Saturday September 22	• Counsel for Ms. Keyser—the fourth witness named by Dr. Ford and her "lifelong friend"—submits statement from Ms. Keyser in which she denies any knowledge of the party described by Dr. Ford. She further states she doesn't know Judge Kavanaugh and doesn't recall ever being at a party with him. • Dr. Ford accepts invitation to appear before the Committee, but pending further negotiations.
Sunday September 23	• Dr. Ford's attorneys agree that Dr. Ford will appear at a public hearing on Thursday, September 27. • Committee staff sends to Dr. Ford's and Judge Kavanaugh's lawyers requests for the submission of relevant evidence in advance of the hearing. • Michael Avenatti tweets that he has a client with allegations and evidence implicating Judge Kavanaugh. • Within minutes, Committee staff reaches out to Mr. Avenatti to request client's allegations and evidence. Mr. Avenatti declines to provide any allegations or evidence. • *New Yorker* publishes article containing allegations made by Deborah Ramirez that Judge Kavanaugh exposed himself to her during a college party. • Committee staff reaches out to Ms. Ramirez's attorney within hours of the article's publication and requests an interview with Ms. Ramirez.
Monday September 24	• Committee staff makes three more requests for any statement, testimony, or evidence from Ms. Ramirez. Ms. Ramirez's attorneys decline to submit such materials. • Two Senate offices refer additional allegations to Committee staff. The first is an anonymous allegation in a letter given to the Chairman by Senator Gardner, posted from Denver. The letter claims that Judge Kavanaugh once forcefully and "sexually" shoved a woman he was dating into a wall at a bar in 1998. The second is an allegation from a man (whose name Senator Whitehouse has demanded we keep from the public) in Rhode Island relayed to Committee staff by Senator Whitehouse's staff. The Rhode Island man claims that two men named "Brett and Mark" raped a woman on a boat in Newport in 1985, after which the man making the allegation claims he and a friend beat up "Brett and Mark." • Committee staff request an interview with Judge Kavanaugh to question him regarding the allegations raised by Ms. Ramirez, Mr. Avenatti, the anonymous Denver letter, and the Rhode Island man.

	• Committee staff again requests Mr. Avenatti shares his client's allegations and evidence. Mr. Avenatti declines to provide any allegations or evidence. • Committee staff have first interview with a man who believes he, not Judge Kavanaugh, had an encounter with Dr. Ford in 1982 that is the basis of her complaint. He describes the encounter as consensual. He submitted a written statement earlier in the day.
Tuesday September 25	• Committee investigative staff interview Judge Kavanaugh for approximately 90 minutes regarding Ms. Ramirez's allegations in the *New Yorker* and the allegations received by two Senate offices. For the first time, Democratic staff attended the call, but expressly declined to ask Judge Kavanaugh any questions. Judge Kavanaugh denies each allegation. • Committee staff makes three more requests for any statement, testimony, or evidence from Ms. Ramirez. Ms. Ramirez's attorneys decline to to submit such materials. • The Committee receives from Senator Harris an anonymous letter, postmarked 9/19 and signed "Jane Doe, Oceanside CA," alleging that Judge Kavanaugh and others raped the author in the backseat of a car. The letter does not identify place, date, or the identity of the alleged accomplices. • Committee staff have a second interview with a man who believes he, not Judge Kavanaugh, had an encounter with Dr. Ford in the summer of 1982 that is the basis of her allegation. He described his recollection of their interaction in some detail, and described the encounter as consensual. • Committee staff interviewed a former Georgetown Prep student who was familiar with "party houses" in the Columbia Country Club area during the time in question and knew Judge Kavanaugh. He spoke in support of Kavanaugh's good character. • After that interview, Committee staff interviewed that man again along with another person who knew Judge Kavanaugh in the 80s and was familiar with the houses at which Georgetown Prep students partied during the 1980s. Both spoke in favor of Kavanaugh and to his strength of character. Committee staff requested to speak to another person they suggested contacting. • Committee staff received a statement from another classmate of Kavanaugh at Georgetown Prep who provided information about the captions in the yearbooks. • Committee investigative staff also have received additional information, including regarding the characters of Dr. Ford and Judge Kavanaugh, have followed up on each one, and will continue to do so.
Wednesday, September 26	• Committee staff receives statement from Julie Swetnick, represented by Mr. Avenatti.

	• Committee staff responds asking that Ms. Swetnick be made available for an interview with committee staff. Mr. Avenatti returns an email, but does not respond to this request. • Committee staff follows up with Mr. Avenatti twice more asking that Ms. Swetnick be made available for an interview. • Committee investigative staff questions Judge Kavanaugh a third time this week on the allegations contained in the statement provided by Mr. Avenatti, along with an anonymous allegations made by a purported resident of San Diego. Judge Kavanaugh unequivocally denies both allegations. Democratic staff was present, but refused to ask questions. • Committee investigators learned of a woman who dated Kavanaugh in 1998, the same time as the anonymous allegation to Sen. Gardner's office. That girlfriend, Judge Friedrich of the District Court of the District of Columbia, wrote a letter to the Committee, strongly denying she was at the incident in question, and testifying that Judge Kavanaugh never acted that way around that time, or ever. • Committee investigative staff spoke with a friend of Ms. Swetnick about her allegations and any related information. The friend indicated that Ms. Swetnick had never previously mentioned either Judge Kavanaugh or this alleged incident. • Committee staff receives a more in-depth written statement from the man interviewed twice previously who believes he, not Judge Kavanuagh, had an encounter with Dr. Ford. He described the encounter as consensual. • Committee investigative staff spoke via phone with another man who believes he, not Judge Kavanuagh, had an encounter with Dr. Ford in 1982 that is the basis of her allegation. He explained his recollection of the details of the encounter, and described the encounter as consensual. • Committee investigative staff spoke via phone with a former classmate who provided information about the captions in the yearbooks, explaining they were innocuous but sometimes insensitive inside jokes. • Committee investigators contacted four people with knowledge of the individuals making allegations against Judge Kavanaugh. These interviews, all under penalty of felony, yielded information about the credibility of Ms. Swetnick, Judge Kavanaugh's lack of interactions with Dr. Ford in high school, and Dr. Ford's credibility. • Committee investigative staff interview a friend of Judge Kavanaugh who attests to his character. • Committee investigative staff interview an individual that had a dozen interactions with Ms. Swetnick over a period of four years, who has a negative view of Ms. Swetnick. • Senate investigators speak to a man with personal knowledge of Ford, says Ford assisted her friend in passing a polygragh exam.
Thursday, September 27	• Committee conducts hearing to solicit testimony from Dr. Ford and Judge Kavanaugh regarding Dr. Ford's allegations.

	• Committee receives letter from attorneys for Elizabeth Rasor, who claims to be the former girlfriend of Mark Judge. Rasor states that the *New Yorker* article accurately stated her recollections. • Committee receives anonymous letter claiming responsibility for the incident with Dr. Ford. • Committee investigative staff again interviewed a friend of Judge Kavanaugh who attests to his character.
Friday, September 28	• Committee investigative staff interview a friend of Ramirez, and determine she has no firsthand knowledge of the misconduct alleged. • Committee investigative staff interview an ex-boyfriend of Swetnick. • Committee investigative staff receives message from Senator Daines regarding a text from a women who attended Yale with Judge Kavanaugh and resided in the same dormitory. • Committee investigative staff receives an anonymous message claiming the allegations that Judge Kavanaugh pushed a woman against a wall in 1998 were false. • Committee investigative staff attempts to contact a woman who gave no last name and who called Chairman Grassley's office and claimed that she has important information related to Judge Kavanaugh. • Senator Blumenthal refers to the Committee several screenshots of a text message conversation regarding the Ramirez allegation. • Senate requests that the White House order the FBI to investigate all "current credible allegations" against Judge Kavanaugh. • Senate investigators speak again to a man with personal knowledge of Ford, says Ford assisted her friend in passing a polygraph exam.
Saturday, September 29	• Committee staff investigates email from a former Yale student related to Ramirez's allegations. • Committee staff investigates email from another former Yale student regarding Ramirez's allegation. He identified a classmate of Kavanaugh's at Yale who was known for exposing himself at parties. • Committee referred for criminal investigation a Rhode Island man's apparent false statements alleging misconduct by Kavanaugh.
Sunday, September 30	• Committee distributes memorandum from Rachel Mitchell outlining her views on the Ford allegations.
Monday, October 1	• Committee staff investigates email from an individual with knowledge about Georgetown Prep academics and uniforms related to allegations by Ramirez and Swetnick. • Committee staff investigates email from an attorney for an individual who was a classmate at Georgetown Prep claiming to have information relating to Renate.

	• Committee staff investigates email from character witness regarding Ramirez. • Committee staff speaks with two employees at a company where Ms. Swetnick worked, regarding her activities and credibility. • Committee staff speak with an attorney for an ex-boyfriend of Ms. Swetnick. • Committee staff spoke with an individual that went to Yale and shared information that cast doubt on Ramirez's story.
October 2, 2018	• Committee staff receives statement containing reports from multiple classmates of Dr. Ford regarding her character in high school. • Committee staff receives letter from a classmate of Brett Kavanaugh's in high school discussing his character as it relates to the Ford and Swetnick allegations. • Committee staff speaks with a college classmate of Ramirez and who knew Kavanaugh while he was in law school regarding Kavanaugh's character. • Committee staff reached out to associates of Dr. Ford and spoke with one of them. • Committee staff receives statement from Dr. Ford's ex-boyfriend stating that she had previously coached someone on a polygraph, contradicting her testimony, and had no claustrophobia or flying issues in the 1990s. • Committee staff talked to three individuals that knew Ms. Swetnick when she was in junior high and some years after and all three shared negative views about her character. • Committee staff spoke with an individual that met Ms. Swetnick at a business meeting. • Committee staff receives statement from Swetnick's ex-boyfriend regarding her character.
October 3, 2018	• Committee staff talked to a Holton Arms mother regarding her knowledge of, and interaction with Dr. Ford, and the Blasey family. • Committee staff talked to an attendee of the July 1st event from Judge Kavanaugh's calendar regarding that event, devil's triangle, FFFFFFF, and other topics. • Committee staff talked to the General Manager of the Columbia Country Club regarding its records. • Committee staff talked to the attorney for a Georgetown Prep student who submitted a statement regarding Kavanaugh's character. • Committee staff again reached out to two associates of Dr. Ford, who were unwilling to provide information. • Committee staff contacted two classmates of Judge Kavanaugh at Georgetown Prep, including one who may have interacted with Dr. Ford while in high school.

	• Committee staff received a signed statement from an associate of Ms. Swetnick. • Committee staff again spoke with a college associate of Dr. Ford. • Committee received statement from Yale classmate of Brett Kavanaugh and Deborah Ramirez • Committee again received and reviewed correspondence from Kerry Berchem; conducted phone interview with Kerry Berchem
October 4, 2018	• Committee staff receive five statements: three from Judge Kavanaugh's Georgetown Prep classmates regarding the meaning of various yearbook entries, one from Swetnick's ex-boyfriend regarding her character, and one from college students who learned of the drinking game Devil's Triangle from Judge Kavanaugh and his friends. • Committee staff again spoke with an individual who has multiple social connections to Dr. Ford's family. • Committee staff spoke with two Georgetown Prep classmates of Judge Kavanaugh. • Committee staff spoke with two UNC-Chapel Hill classmates of Dr. Ford. • Committee staff spoke with two Yale classmates of Judge Kavanaugh and Ramirez, and the attorney for another Yale classmate of Ramirez.
October 5, 2018	• Committee staff spoke to an individual, for the third time, who has multiple social connections to Dr. Ford's family. • Committee staff spoke to an attorney for a Yale classmate of Ramirez and Kavanaugh for the second time. • Committee staff received a statement from a UNC classmate of Dr. Ford. • A Yale classmate of Ramirez notified the Committee that he is unwilling to be interviewed.

We asked the witnesses to submit to interviews. But we can't force them to interview without a subpoena. Witnesses provided categorical, unequivocal statements denying any memory of events matching Dr. Ford's allegations. Lying in those statements is punishable under the same federal law as lying in an interview.

The only remaining option would be to subpoena the witnesses. But that process takes a long time. Given that the witnesses' statements were categorical, an interview or deposition is unlikely to reveal any new information and therefore not worth the substantial cost and time needed to obtain and enforce the subpoenas. Of note, the Democrats have not joined our requests for witness interviews.

Background of Secret Evidence

On July 9, 2018, the President announced Judge Kavanaugh's nomination to serve on the Supreme Court of the United States. Judge Kavanaugh has served on the most important federal appellate court in the country for the last 12 years. Before that, he held some of the most sensitive positions

in the federal government. The President added Judge Kavanaugh to his short list for the Supreme Court more than 10 months ago – on November 17, 2017. As part of Judge Kavanaugh's nomination to the Supreme Court, the FBI conducted its sixth full-field background investigation of Judge Kavanaugh since 1993 – 25 years ago. As part of these 6 prior FBI investigations, the FBI interviewed nearly 150 different people who know Judge Kavanaugh personally. Nowhere in any of these six FBI reports, which committee investigators have reviewed on a bipartisan basis, was there ever a whiff of any issue – at all – related in any way to inappropriate sexual behavior or alcohol abuse.

Dr. Ford first raised her allegations in a secret letter to the Ranking Member more than two months ago in July. The Ranking Member took no action. The letter was not shared with the Chairman, his colleagues, or his staff. These allegations could have been investigated in a way that maintained the confidentiality Dr. Ford requested.

Before his hearing, Judge Kavanaugh met privately with 65 senators, including the Ranking Member. But the Ranking Member did not ask Judge Kavanaugh about the allegations when she met with him privately in August. The Senate Judiciary Committee held its 4-day public hearing from September 4 to September 7, 2018. Judge Kavanaugh testified for more than 32 hours in public. The committee held a closed session for members to ask sensitive questions on the last evening, which the Ranking Member did not attend. Judge Kavanaugh answered nearly 1,300 written questions submitted by senators after the hearing – more than all prior Supreme Court nominees combined. Throughout this period, the Chairman did not know about the Ranking Member's secret evidence.

Only at the eleventh hour, on the eve of Judge Kavanaugh's confirmation vote, did the Ranking Member refer the allegations to the FBI. And then the allegations were leaked to the press. This is a shameful way to treat Dr. Ford, who insisted on confidentiality, and Judge Kavanaugh, who has had to address these allegations in the midst of a media circus.

When the Chairman received Dr. Ford's letter on September 13, he and his staff recognized the seriousness of these allegations and immediately began the Committee's investigation, consistent with the way the Committee has handled such allegations in the past. Every step of the way, the Democrat side refused to participate in what should have been a bipartisan investigation.

At Dr. Ford's and Judge Kavanaugh's requests, the Chairman re-opened Judge Kavanaugh's confirmation hearing for a 5th day last Thursday, to provide a safe, comfortable, and dignified forum to hear Dr. Ford's and Judge Kavanaugh's testimony.

Following a bipartisan recommendation, the Committee hired Rachel Mitchell, who has served for nearly 25 years as a career prosecutor of sex-related and other crimes in Arizona, to question the witnesses. The goal was to de-politicize the process and get to the truth, instead of grandstanding and giving senators an opportunity to launch their presidential campaigns. Mitchell came to the following conclusion in this memo:

A "he said, she said" case is incredibly difficult to prove. But this case is even weaker than that. Dr. Ford identified other witnesses to the event, and those witnesses either refuted her

allegations or failed to corroborate them. For the reasons discussed below, I do not think that a reasonable prosecutor would bring this case based on the evidence before the Committee. Nor do I believe that this evidence is sufficient to satisfy the preponderance-of-the-evidence standard.

Several other accusers, some named and some anonymous, have made allegations against Judge Kavanaugh since Dr. Ford's allegations became public.

Attached are summaries of the Committee's investigations of these various allegations.

The Committee favorably reported (voted) Judge Kavanaugh's nomination to the Senate floor on September 28, with the understanding the FBI would conduct a supplemental FBI background investigation into current credible allegations against the nominee and which must be completed no later than on October 5.

Here are Chairman Chuck Grassley's public statements and releases: https://www.judiciary.senate.gov/press/majority

Summary of Senate Judiciary Committee Investigation

(as of October 4, 2018)

The Senate Judiciary Committee has engaged in a thorough and robust investigation of allegations raised against Judge Kavanaugh.

- Throughout the last month, Committee staff members have collected statements, letters, and calls from individuals around the country.
    - The reports range from substantive allegations of sexual misconduct, to short messages to senators passing along internet rumors and theories.
- Committee staff continue to work tirelessly to pursue any and all substantive leads. In the course of the continuing investigation, staff members have spoken with 35 individuals, a task that requires extensive work during nights and weekends. More than 20 Committee staffers have contributed to the investigative efforts.
- The Committee has not received any evidence that would corroborate the claims made by Dr. Ford, Ms. Ramirez, Ms. Swetnick, or anybody else.

Ford Allegations

- In response to Dr. Ford's allegations, Committee staff repeatedly requested an opportunity to interview Dr. Ford, but her lawyers repeatedly refused. Committee staff offered to fly to California or any other location to interview Dr. Ford. But as Dr. Ford explained at her hearing, she was not clear that this offer had been made.
- The Committee thus reopened the hearing on Judge Kavanaugh's nomination.
    - During the additional hearing day (Day 5), the Committee solicited more than 8 total hours of public testimony under oath from Dr. Ford and Judge Kavanaugh.
    - In connection with the hearing, the Committee collected 24 pages of evidence from Dr. Ford in two productions. The Committee also received Judge Kavanaugh's calendars.
- The Committee also received a statement, submitted under penalty of felony, from Dr. Ford's ex-boyfriend, who cast serious doubt on the credibility of some of Dr. Ford's testimony before the Committee.
    - Notably, he stated that he had not known her to have any fear of flying or related claustrophobia and that she had previously provided advice to someone on how to successfully take a polygraph, directly contradicting her hearing testimony.
    - Despite repeated requests by the Chairman, Dr. Ford still has not supplied several key items, including the charts from her polygraph examination, any recording of her polygraph examination, and the therapy notes that she claimed corroborated her story. Dr. Ford has not provided these therapy notes to the Committee, even though she shared these same notes with the media.
- In addition to conducting the hearing, the Committee obtained statements from the three individuals who Dr. Ford identified as being present at the 1982 gathering: PJ Smyth, Leland Ingham Keyser, and Mark Judge (who submitted two statements).

  - Each person denied having any knowledge of the alleged gathering. Ms. Keyser stated that she does not even know Judge Kavanaugh and does not recall ever meeting him. And Mr. Smyth and Mr. Judge each said they had never witnessed Judge Kavanaugh engage in conduct of the kind described by Dr. Ford.
- The Committee contacted a total of 15 former classmates of Judge Kavanaugh and Dr. Ford. The Committee also received several statements, signed under penalty of felony, that support Judge Kavanaugh's explanation of terms in his high school yearbook.
- Finally, prior to Day 5 of the hearing, the Committee staff conducted a transcribed telephone interview with Judge Kavanaugh regarding Dr. Ford's allegations. The Minority staff refused to attend.

Ramirez Allegations

- In response to the allegations from Ms. Ramirez, the Committee contacted Ms. Ramirez's counsel 7 times seeking evidence to support the claims made in *The New Yorker*. Ms. Ramirez produced nothing in response.
- Ms. Ramirez's counsel refused the Committee's request for an interview.
- Committee staff nevertheless pursued the investigation. Staff interviewed 5 witnesses with relevant information.
- Committee staff also investigated the public statements of 3 other individuals and found they had no knowledge of the alleged event.
- Prior to Day 5 of the hearing, Committee staff conducted a transcribed telephone interview with Judge Kavanaugh, subject to penalty of felony. He denied Ms. Ramirez's allegations. Minority staff attended the interview under protest and refused to participate.

Swetnick Allegations

- In response to allegations by Ms. Swetnick, the Committee requested evidence on 6 occasions from her.
- Ms. Swetnick refused the Committee's request for an interview.
- Despite this obstruction, Committee staff attempted to pursue the investigation by interviewing 12 witnesses who claimed to have relevant information.
- Committee staff obtained two sworn statements from individuals with knowledge of Ms. Swetnick's character and allegations.
- Prior to Day 5 of the hearing, Committee staff also interviewed Judge Kavanaugh on these allegations on two separate transcribed telephone interviews, subject to penalty of felony—both before (when Ms. Ramirez's allegations were also discussed) and after Ms. Swetnick was identified by name. Judge Kavanaugh denied Ms. Swetnick's allegations, asserting that he does not even know Ms. Swetnick. Minority staff attended the interview under protest and refused to participate.

Anonymous Allegation from Colorado

- In response to an anonymous allegation claiming Judge Kavanaugh pushed his girlfriend against a wall in a violent and sexual manner in 1998, Committee staff obtained a sworn

statement from the woman dating Judge Kavanaugh at the time. She unequivocally denied that this incident ever took place.

- Committee staff also questioned Judge Kavanaugh on these allegations during a transcribed telephone interview, subject to penalty of felony. Like his then-girlfriend, he denied that the incident ever took place. Minority staff attended but refused to participate in the interview.

Allegations by Others

- The author of one allegation recanted in a public Tweet. The Committee referred the individual to the FBI for possible violations of 18 U.S.C. §§ 1001 (materially false statements) and 1505 (obstruction of congressional-committee proceedings).
    - Committee staff questioned Judge Kavanaugh about the allegation during a transcribed telephone interview, subject to penalty of felony. He unequivocally denied the allegation. Minority staff attended but refused to participate in the interview.
- A second allegation was completely anonymous.
    - Committee staff questioned Judge Kavanaugh about the allegation during a transcribed telephone interview, subject to penalty of felony. He unequivocally denied the allegation. Minority staff attended but refused to participate in the interview.
    - A woman has subsequently begun contacting Senate offices, claiming to be the author of the anonymous letter. Even though there are serious doubts about the authenticity of her claim, Committee staff is investigating.

The Arc
For people with intellectual and developmental disabilities

For Immediate Release
August 15, 2018

Contact: Sarah Bal
[redacted]

The Arc Opposes Appointment of Judge Kavanaugh to the US Supreme Court

Washington, DC - Today, The Arc came out in opposition to Judge Brett Kavanaugh's appointment to the United States Supreme Court. This opposition is based on Judge Kavanaugh's record on cases relating to disability and civil rights.

Of particular concern are his decisions on cases involving self-determination of individuals with intellectual and developmental disabilities (I/DD), education, employment, and his stances on the Affordable Care Act and school choice.

"We did not take lightly the decision to oppose Judge Kavanaugh's appointment to the US Supreme Court, but after a thorough analysis of his record, we cannot idly sit by knowing that he has demonstrated a disregard for the impact of his judicial philosophy on the lives of people with disabilities and their families time and time again. Judge Kavanaugh has written several troubling opinions and dissents on cases related to disability rights and The Arc's constituents, including those pertaining to education, affordable health care, and self-determination.

"Particularly concerning is his opinion in *Doe. V. Tarlow,* a case where women with intellectual disability who resided in the District of Columbia's Forest Haven institution brought a class action lawsuit against the District for violating their due process rights. The District, through its developmental disabilities agency, consented to subject them to non-emergency surgical procedures, including abortions and eye surgeries, without even talking to them and their family members. Judge Kavanaugh's ruling is disturbing in his apparent lack of appreciation for the humanity of individuals with intellectual disability, their basic human rights, and their ability and right to participate in important life decisions even when found legally unable to make decisions by themselves.

"The Arc urges Senators to not confirm Judge Kavanaugh's nomination to our highest court. The Senate should not confirm a Justice to the Supreme Court whose judicial philosophy threatens the autonomy and well-being of people with intellectual and developmental disabilities," said Peter V. Berns, Chief Executive Officer of The Arc.

The Arc advocates for and serves people with intellectual and developmental disabilities (I/DD), including Down syndrome, autism, Fetal Alcohol Spectrum Disorders, cerebral palsy and other

diagnoses. The Arc has a network of nearly 650 chapters across the country promoting and protecting the human rights of people with I/DD and actively supporting their full inclusion and participation in the community throughout their lifetimes and without regard to diagnosis.

Editor's Note: The Arc is not an acronym; always refer to us as The Arc, not The ARC and never ARC. The Arc should be considered as a title or a phrase.

###

TIME'S UP
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Follow

If this moment in time feels strangely familiar, it's because it is. Listen to Christine Blasey Ford. A woman's experience should never be valued less than a man's career.

Full statement below:

Statement on Brett Kavanaugh: There was a time when business as usual could continue amid credible allegations of sexual violence. But that era has ended forever.

A man who could be our next U.S. Supreme Court Justice has been accused of sexual assault. There is no path forward for Brett Kavanaugh's nomination until those credible and serious allegations have been investigated. We demand that the U.S. Senate postpone any vote on Judge Kavanaugh's nomination until a thorough and complete examination has been completed.

If confirmed to the U.S. Supreme Court, Judge Kavanaugh would have tremendous influence over the lives of working women for generations to come. A lifetime appointment to the highest court in the land should not be rushed through without thorough vetting of all critical issues.

If this moment in time feels strangely familiar, it's because it is. Listen to Christine Blasey Ford. A woman's experience should never be valued less than a man's career.

TIME'S UP

11:44 AM - 17 Sep 2018

"THE KAVANAUGH NOMINATION MUST BE PAUSED. AND HE MUST RECUSE HIMSELF"
BY LAURENCE H. TRIBE, TIMOTHY K. LEWIS, AND NORMAN EISEN

The Kavanaugh Nomination Must Be Paused. And He Must Recuse Himself.

politico.com/magazine/story/2018/09/04/kavanaugh-hearings-recuse-himself-supreme-court-219635

Contemporary Supreme Court nomination hearings are always spectacles, but the one that began this week is exceptional. We face a confluence of events unique in our 229-year history: A president who is a named subject of a criminal investigation—and on whom the law may be closing in. And a nominee whose previous writings and commentary suggest he believes a sitting president is not subject to investigation or prosecution—views that in effect place the president above the law, although the nominee insists he doesn't think anyone is beyond its reach.

The confirmation process itself has been rushed and thwarted by the majority, yielding a paltry fractionof the nominee's White House records needed to evaluate him, with over 100,000 pages withheld based on sweeping and unsubstantiated "constitutional privilege" claims made late on the last business day before the hearing began. Then, over 40,000 of the nominee's documents were released to the Senate with no real time for review on the evening before the hearing.

As important as the broken process is this stark fact: Never before has a president made a Supreme Court nomination with so many matters of deep personal importance to that president poised to come before the court. A president facing existential legal jeopardy cannot be permitted to pick his own justice to decide his case—especially a justice whose apparent views of presidential authority are expansive to say the least, who is deeply beholden to that president, and who seems likely to hold the decisive vote. As we explain in a new report out today, applying basic rule-of-law precepts and leading Supreme Court precedents to these unique circumstances identifies a specific range of matters from which the nominee must commit to recuse himself. The hearings must be paused to allow proper production and review of the documentary record followed by full consideration of the relevant facts and controlling law.

The constitutional principles mandating Kavanaugh's recusal were given form in three recent Supreme Court decisions. The first, *Caperton v. A.T. Massey Coal Company, Inc.*, concerned recusal obligations of a newly elected West Virginia state supreme court judge in an appeal of an award of damages against the company of a coal baron. The businessman had provided pivotal support to the judge's campaign while the lawsuit was pending in a lower court. Emphasizing the "significant and disproportionate influence" of the coal baron in placing the judge on the court, the U.S. Supreme Court required recusal based on "serious risk of actual bias" that arises when "a man chooses the judge in his own cause."

Sound familiar? It should. It's eerily similar to the Trump-Kavanaugh nomination, where, to put it mildly, President Donald Trump played a singular role in selecting a judge for a court that likely will have the final word on numerous legal issues in which Trump's personal stake could not be higher, such as whether a president can be criminally indicted, can be charged with obstructing justice or can pardon himself.

A later case went even further. In *Williams-Yulee v. Florida Bar*, the Supreme Court recognized a separate and independent interest in protecting against the perception of bias in our courts. That case stands for the principle that, beyond the rights of the parties to any individual case, the government and the people it represents have a compelling interest in the impartiality of the court.

A third case, *Williams v. Pennsylvania*, found that a judge's work before he took the bench could unconstitutionally compromise his later judgment and require recusal. While that case presented a very different factual posture, its concerns apply here.

How can we adequately protect the compelling interest in impartiality without the full record and sufficient time to evaluate it when those proposing the judge's confirmation persist in hiding vital information about how he might judge the president who named him? Kavanaugh served in high-level White House positions when the Bush administration was pressing to expand executive powers, and records from that period would provide critical information about his potentially decisive views on these matters. The Senate majority has abdicated its oversight responsibilities by rushing the confirmation hearing process before receiving adequate explanation of the president's document privilege claims—and by refusing even to request White House records from the bulk of Kavanaugh's time at the White House.

The right thing to do is to pause the hearings so the Senate can discharge those responsibilities. Perhaps a compromise can be reached on the withheld documents, including explaining why the privilege applies to particular documents, as is commonly done when privileges are asserted. Such a hiatus would allow the tens of thousands of documents that have suddenly been dumped on the Senate's doorstep to be properly studied, the other unprivileged documents produced, and the recusal issues properly addressed.

If the Senate instead pushes forward with the nomination under these circumstances, it will exacerbate the dangers for our democracy already posed by Trump's attacks on the rule of law and on those charged with neutrally implementing it—and by his efforts to politicize law enforcement, demonize the media, and attack our system of checks and balances. The hundred-year battle for democracy on both sides of the Atlantic teaches that democracy rises and falls in just such accumulations of pivotal moments. Even a potent remedy like the impeachment power has its limits as a weapon in that battle. These lessons must be heeded today.

If, as the media is reporting, Kavanaugh will not commit to recuse from all matters relating to the president's personal legal exposure, he will be offending the Constitution's design—as one of us has recently explained—before he ever sets foot on the Supreme Court. Should Congress

insist on proceeding nonetheless, the perception of bias will be extreme.

If the Senate and the president elect that course, they should not expect that the American people will forget who made that choice or lessen their resolve to fight for the rule of law they have long enjoyed. Quite the opposite: Forcing the judge through under these circumstances will only redouble the demand for accountability. As history reminds us, that outcome can be delayed but not denied.

This article tagged under:

No one can use Mueller probe to hold up Supreme Court nominee

thehill.com/opinion/judiciary/395300-no-one-can-use-mueller-probe-to-hold-up-supreme-court-nominee

Jonathan Turley, opinion contributor July 3, 2018

In a city where necessity has long been the mother of invention, the retirement of Associate Justice Anthony Kennedy has unleashed a frenzy of creative arguments of why President Trump should not be able to appoint a second member to the Supreme Court. Panic can lead to many things, but principle is not one of them.

According to Democratic politicians and advocates, there is a longstanding principle that any nomination by Trump at this time would be clearly improper. This convenient discovery was explained by Sen. Cory Booker (D-N.J.) in a judiciary hearing, where he insisted that, as "a subject of an ongoing criminal investigation," any nomination or confirmation must wait "until the Mueller investigation is concluded."

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This suggested barrier for a Trump nomination is both artificial and opportunistic. Initially, Democrats argued that Trump should wait until after the midterm elections given the earlier blocking of a vote by Republicans on Merrick Garland 's nomination at the end of the Obama administration. I was critical of the denial of Garland of a vote, but Republicans have noted that this is not a presidential election year and, more importantly, they have no intention of being "Garlanded."

That has led to this new argument that, somehow, a nomination by Trump would be improper due to special counsel Robert Mueller 's ongoing investigation. It shares the same motivation with the Garland rationale, which is to avoid a vote on the merits of a nomination while claiming that principle, not politics, is guiding the decision.

Even if Trump were an actual target of the investigation, this argument would still be dubious. However, Trump repeatedly has been told that he is not a target but a subject of the special counsel investigation. This position has not changed over the course of two years when former FBI Director James Comey told both Congress and Trump that he was not a target. Moreover, Mueller reportedly told the White House in March that Trump still was not a target but, rather, a subject.

In the U.S. attorney's manual, a "subject" is any "person whose conduct is within the scope of the grand jury's investigation." Nevertheless, the mere fact that conduct is relevant to an investigation is being claimed by Democrats as a barrier to a president carrying out a constitutional duty. So, a president is expected to leave the Supreme Court with just eight members, and likely deadlock votes, until there is no longer even a chance, no matter how remote, that he could be elevated to target status and then elevated to being a defendant.

Worse yet, this same logic applies to both state and federal investigations. In either case, the Supreme Court could be the ultimate deciding body on questions related to such investigations. Thus, hostile state attorneys general or district attorneys could effectively block a nomination or confirmation by launching investigations into a president's conduct.

A special or independent counsel investigation can easily go on for years, so merely starting an investigation into a matter touching on a president's conduct would be enough to strip presidents of their Article II authority of appointments to the highest court. After all, the Whitewater investigation went on for 2,978 days. Trump has roughly 930 days left in his presidency. Mueller was appointed roughly 400 days ago, so even if he moved at twice the pace of Whitewater independent counsel Kenneth Starr, it could be another 1,100 days until Trump would be free to make an appointment, under this theory. That period conveniently would end more than two months into the term of the next presidential term.

If Democrats thought the failure of the Senate to vote on Garland was wrong after roughly 300 days, try a denial of the right of a president to nominate a justice for potentially 10 times that period. Putting such practical considerations aside, the constitutional implications are staggering if a president could be effectively blocked by the mere initiation of a criminal investigation on the state or federal levels.

One of my colleagues, Paul Berman, explained in the New York Times that "people under the cloud of investigation do not get to pick the judges who may preside over their cases. By this logic, President Trump should not be permitted to appoint a new Supreme Court justice until after the special counsel investigation is over, and we know for sure whether there is evidence of wrongdoing." Of course, by this same logic, presidents "under a cloud" should be denied the appointment of judges on lower courts as well as Supreme Court justices.

Nothing in the Constitution or history supports the claim that any "cloud of investigation" over a president is a barrier to the confirmation of a nominee. Indeed, not a single such objection was voiced when President Clinton appointed Stephen Breyer on April 6, 1994, to replace Associate Justice Harry Blackmun, three months after the appointment of the Whitewater independent counsel. During the summer Breyer was confirmed, Congress subpoenaed 29 Clinton administration officials in its own investigation, and the Clinton legal team ramped up for challenges.

Of course, Trump is not Clinton, and that seems precisely the point. Berman argued that Trump's "possible crimes are inextricable from his desire for unilateral control of the federal government" and that he is "a president who refuses to acknowledge any checks on his power as legitimate, whether those checks come from the courts, the legislature, the media, the government bureaucracy or his political opponents. This is the perfect recipe for autocracy. In such a world, the importance of checks and balances has never been greater."

The last point appears to be most important for politicians and advocates alike. The primary check on a president's appointment power is to deny confirmation. This argument offers Democratic senators the pretense of principle in refusing to vote to confirm any nominee of

Trump. The duty of senators is not to refuse to confirm but to insist that a nominee has the intellectual and ethical independence to fulfill the oath of office.

It often seems that both the U.S. criminal code and the Constitution are endlessly flexible when the subject is Trump. However, if necessity is the very mother of invention, consistency is the very meaning of the rule of law. Whoever Trump's nominee may be, it is the nominee, not the nominating president, who should be the focus of a confirmation vote.

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Brett Kavanaugh is a great judge, a good man and great nominee

courier-journal.com/story/opinion/contributors/2018/08/03/brett-kavanaugh-supreme-court-nominee/892806002/

Justin Walker, Opinion contributor Published 8:07 a.m. ET Aug. 3, 2018 | Updated 8:08 a.m. ET Aug. 3, 2018

Brett Kavanaugh, the new Supreme Court nominee, mapped out strategy with Republican leaders Tuesday for what could be a fierce confirmation battle. One analyst explains why Kavanaugh is the 'perfect candidate' for conservatives. (July 10) AP

As a former clerk for Judge Brett Kavanaugh and a native-born Kentuckian, I believe Brett Kavanaugh will be an excellent Supreme Court justice who is right for America and right for Kentucky. He has been a leading voice for individual liberty and presidential accountability, and his qualifications and character are unsurpassed.

On individual liberty, Kavanaugh wrote the roadmap that a unanimous Supreme Court later followed to protect the privacy interests of a criminal defendant against GPS surveillance. That's one of the reasons why the libertarian Cato Institute's Ilya Shapiro recently called Kavanaugh "a big step forward for constitutional liberty." Shapiro also cited Kavanaugh's ruling in favor of a female defendant based on her lawyer's failure to introduce expert testimony that she suffered from battered-woman's syndrome.

On presidential accountability, Kavanaugh believes a judge must stand up to the president when the executive branch is in violation of the law. That's why he called United States v. Nixon, which required disclosure of the Watergate tapes, one of the "greatest moments in judicial history." And it's why, according to progressive Harvard law professor Noah Feldman, Kavanaugh's views support the principle "that the president can be investigated and maybe even indicted unless Congress passes a law saying he can't — which Congress has not done." Analysis by experts like Shapiro and Feldman completely rebut the misleading mudslinging recently published in this paper by Nan Aron.

Of course, a mainstream, evenhanded, and independent-minded legal philosophy is not enough. Qualifications matter too, as does character. And on both counts, Kavanaugh is outstanding.

Let's start with his qualifications. After graduating from Yale Law School, he clerked for three federal judges, including Justice Anthony Kennedy. He went on to argue civil and criminal cases in the Supreme Court and courts throughout the country, teach for a decade at Harvard Law School, publish numerous academic articles in the nation's leading law journals, serve in the White House, and then spend 12 years on the country's most influential court of appeals. Perhaps no statistic better demonstrates Kavanaugh's qualifications better than the fact that 13 of his opinions were later endorsed by the Supreme Court – an unparalleled record of vindication for a federal judge.

Kavanaugh is also a person of impeccable character. I've heard him speak passionately about the importance of family, equality, and public service, and I've witnessed him live those values in his everyday life. He coaches his little girls' basketball teams. He serves meals to the homeless. And he has been among the leading advocates in the judiciary for a fairer and more inclusive profession. As Lisa Blatt, the leading female advocate of the Supreme Court bar, recently wrote, "other than my former boss, Justice Ruth Bader Ginsburg, I know of no other judge who stands out for hiring female law clerks."

In short, Brett Kavanaugh's legal philosophy, qualifications, and character have made him a superb judge, teacher, and mentor. And they will make him an exceptional justice of the Supreme Court.

Justin Walker is an assistant professor at the University of Louisville Brandeis School of Law. He clerked for Judge Brett Kavanaugh and for Justice Anthony Kennedy.

Kavanaugh for the Court

Trump's second nominee will be an intellectual leader on the bench.

By
The Editorial Board
Updated July 9, 2018 10:56 p.m. ET

President Trump kept everyone guessing to the end about his Supreme Court selection Monday, but in nominating Brett Kavanaugh he also kept his promise to select a Justice "who will faithfully interpret the Constitution as written." Judge Kavanaugh has an exemplary record that suggests he will help to restore the Supreme Court to its proper, more modest role in American politics and society.

Mr. Trump stressed the 53-year-old Judge Kavanaugh's legal credentials Monday evening, and well he should. In 12 years on the D.C. Circuit Court of Appeals, he has written more than 300 opinions that span nearly every significant constitutional issue including the separation of powers and federalism. The Supreme Court has adopted the logic of 11 of his opinions in whole or part. He has the experience and intellect to be a leader on the Court, not merely a predictable vote on this or that issue.

In particular, Judge Kavanaugh is among a younger generation of judges who base their rulings on the text of the Constitution and Congressional statute. This method comes through clearly in many opinions, including a case (*Heller v. D.C.*) in which he rejected a balancing test for gun laws and said the Second Amendment requires an originalist historical inquiry.

Judge Kavanaugh has also been a leader on the appellate courts in challenging the *Chevron*doctrine of judicial deference to regulators. In *U.S. Telecom Assn. v. FCC* (2017) he concluded that the Obama Administration's net neutrality rules flouted telecom law. He's also held that regulators must consider the costs of their decisions (*White Stallion Energyv. EPA*).

His sterling dissents in *Free Enterprise Fund v. PCAOB* (2008) and *PHH* Corp. *v. CFPB*(2018) held that limits on the President's ability to remove executive officers except "for cause" are unconstitutional. The Supreme Court adopted his dissent in *Free Enterprise Fund.*

Judge Kavanaugh has also demonstrated judicial modesty on foreign policy by upholding the

executive's collection of metadata and use of military commissions to prosecute enemy combatants. Democrats should note that Judge Kavanaugh has consistently demonstrated deference to the President's core powers regardless of the White House occupant.

Judge Kavanaugh's First Amendment jurisprudence also reflects a deep respect for the free exercise of religion and speech. *In Priests for Life v. HHS*, he concluded the Obama Administration's rule requiring religious organizations to file forms facilitating contraception by third parties substantially burdened their exercise of religion since they had to act contrary to their sincere beliefs. He also extended speech rights to nonprofits' political expenditures (*Emily's List v. FEC*), which teed up the Supreme Court's landmark *SpeechNow* and *Citizens United* rulings.

Given that this is the polarized America of 2018, Judge Kavanaugh's confirmation will inevitably be a political brawl. Democrats can't defeat his nomination alone, so they will deploy every tactic to frighten two or more Republicans to oppose him.

This will include demanding millions of documents from Mr. Kavanaugh's tenure on the staff of special counsel Ken Starr in the 1990s. But Judiciary Chairman Chuck Grassley should resist this gambit as irrelevant to Judge Kavanaugh's duties on the Court. We trust Republicans understand that if they don't hold together to confirm Judge Kavanaugh, they will deserve to lose their majority in November. If they do stay united, they may persuade a couple of Democrats to vote to confirm him as well.

Democrats will also claim that a new conservative 5-4 majority will mean the rollback of American rights from abortion to voting. Don't believe it.

The change we expect would be a Court that returned to the role it played before the 1960s when the Justices became an engine of progressive policy. The American left is distraught because it fears losing the Court as its preferred legislature. A conservative Court won't overturn liberal precedents willy-nilly. But we hope it will be inclined to let most political questions be settled where they should be in a democracy—by the political branches.

https://www.wsj.com/articles/kavanaugh-for-the-court-1531190695

This still preserves for the Court a large role in protecting fundamental rights and the structure of the separation of powers that is a bulwark against tyranny. The Court has become far too embroiled in politics, which has undermined public faith in the law and Constitution.

We firmly believe that liberals have much less to fear from a conservative majority than they imagine. A genuinely conservative Court might even help progressives by liberating them to focus once again on the core task of self-government—persuading their fellow Americans through elections, not judicial fiat.

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https://www.wsj.com/articles/kavanaugh-for-the-court-1531190695

The Kavanaugh Hazing

WSJ wsj.com/articles/the-kavanaugh-hazing-1536015642

September 3, 2018

Sept. 3, 2018 7:00 p.m. ET

The Senate Judiciary Committee opens confirmation hearings for Supreme Court nominee Brett Kavanaugh on Tuesday, and don't expect the "bipartisanship" that everyone extolled at John McCain's memorial services last week. Democrats are out to tarnish the nominee even if they fail to defeat him, and the main goal is to drive voters to the polls to elect a Democratic Congress in November.

Toward that end, you will hear that the 53-year-old judge will join four other conservatives on the High Court eager to eviscerate the rights of Americans. You will hear they want to require back-alley abortions, deny contraception to women, end gay marriage, strip voting rights from minorities, empower corporations to crush workers, and remove constitutional checks and balances on Donald Trump so he can reign supreme.

Have we missed anything?

The hyperbole of the attacks is self-refuting. No Court with Chief Justice John Roberts as the swing vote is going to overturn precedents willy-nilly, even if an originalist interpretation of the Constitution suggests that it should. The Court has other things to consider, such as how deeply precedents have become embedded in law and social practice.

A classic example is the *Miranda* warning when police arrest a criminal suspect. Justice William Rehnquist was a critic of that 1966 decision, but in 2000 he refused a chance to overturn the ruling because the warning had been universally in use for so long. Likewise, a conservative Court will not overturn thousands of legal same-sex marriages.

The real reason Democrats are furious about a Court with five conservatives is that it may no longer be an engine of progressive policy. If liberals want to guarantee a minimum income or a right to suicide, they will have to persuade voters and pass it democratically. No longer will five or six Justices be able to find such rights in the "penumbras" and "emanations" of the Constitution.

Or at least that is our hope. No one can know how a Supreme Court Justice will rule, and some Justices change as the decades go by. Sandra Day O'Connor began as a conservative but moved left over the years on race and other issues. Some conservatives fear that Judge Kavanaugh, as a denizen of the Beltway, will also be pulled left by the forces of liberal social conformity.

He will suddenly have a new set of courtiers, and the media will treat him like one of B.F. Skinner's pigeons. They'll assail him as they now do Justices Clarence Thomas or Samuel

Alito when he rules the way they dislike, while rewarding him as they did former Justices Anthony Kennedy and O'Connor if he moves their way. Judge Laurence Silberman on the D.C. Circuit Court of Appeals calls this "the Greenhouse effect," after a liberal reporter who covered the Court.

Our sense from reading Judge Kavanaugh's essays and opinions—he wrote more than 300 on the D.C. Circuit—is that he has the personal and constitutional grounding to stand up to such hazing. There is also now enough of a conservative counterculture in the Federalist Society and courts that he will get some reinforcement for originalist rulings.

On this point, one question is what Judge Kavanaugh thinks about issues that divide legal conservatives these days. Is he closer to J. Harvie Wilkinson of the Fourth Circuit who roundly criticized the *Heller* gun-rights ruling as conservative activism? Or is he more like Justice Thomas in a willingness to revisit doctrines that prevailed before the era of liberal judicial activism of the 1960s? GOP Senators might try to elicit some insight from Judge Kavanaugh on these questions this week.

By the way, readers can ignore the Democratic protests about the GOP failure to produce more documents from Judge Kavanaugh's tenure in George W. Bush's White House counsel's office. The Trump Administration decided to withhold some 101,000 document pages entirely under executive privilege and allow Senators and their staff to view 147,000 or so in a secure room on Capitol Hill.

Minnesota Senator Amy Klobuchar said Sunday that this is "not normal." She must be running for President, because the process is similar to how the Obama White House handled documents related to Elena Kagan. We're told no Democratic Senators had bothered to look at the documents by Monday. Judiciary Chairman Chuck Grassley also said he'd support Senator Klobuchar's request to make some of those documents public if she wishes. She has not done so—which suggests how little of political consequence is in those pages.

As long as Republicans stay united, they can confirm Judge Kavanaugh without a Democratic vote. But if it looks as if confirmation is assured, don't be surprised if Minority Leader Chuck Schumer gives a pass to some of the Democrats running for re-election in conservative states this year. Mr. Schumer wants to show he is fighting as hard as possible to defeat Judge Kavanaugh, but he wants to be Majority Leader even more.

Appeared in the September 4, 2018, print edition.

Editorial: Justice Kavanaugh?

weeklystandard.com/the-editors/brett-kavanaugh-is-qualified-for-the-supreme-court

July 10, 2018

Say what one likes about President Donald Trump, but there has generally been very little daylight between the intentions he expressed in 2016 and his decisions in office. As a candidate he vowed to nominate federal judges "in the mold of" Justice Antonin Scalia, and he has done so. The nomination of Judge Brett Kavanaugh, the president's second nomination to the Supreme Court, continues that pattern.

Kavanaugh, 53, has written a great deal, and Senate Democrats are certain to find every turn of phrase in his extensive oeuvre that can reasonably—or unreasonably—be read in an unfavorable light. After graduating from Yale and Yale Law and clerking for appeals court judges, Kavanaugh worked for Ken Starr when the latter was independent counsel during the Clinton-Lewinsky investigation and was a chief author of the *Starr Report*—which, despite accusations to the contrary in 1998, was a fair, thorough, and nuanced work of analysis. He then worked as an attorney for President George W. Bush, and later as White House staff secretary, one of the most demanding jobs in Washington.

President Bush nominated Kavanaugh to the Court of Appeals, D.C. circuit, in 2003, though he wasn't confirmed until 2006 thanks to the timeworn Democratic habit of inventing reasons to object to sound Republican nominations. Senators Dick Durbin (D-Ill.) and Patrick Leahy (D-Vt.) accused Kavanaugh in 2007 of having misled them over his role in the Bush administration's post-9/11 detention policy, which by then Democrats pretended to have opposed all along. Expect to hear a great deal of recriminatory rhetoric on that score from Durbin and others.

Kavanaugh is "in the mold" of Scalia in two main senses: He is by all indications a textualist, meaning he interprets the law as it's written rather than as its authors supposedly intended; and he is an originalist, meaning he interprets the text in light of what its words meant when it was enacted into law. Although Kavanaugh clerked for retiring Justice Anthony Kennedy, famous for drawing extratextual distinctions and inventing special models of interpretation, the younger judge relies far more consistently on the simple text of the law. See for instance his recent review in the *Harvard Law Review* in which he urges judges to eschew interpretive canons purporting to deem laws either clear or ambiguous—an "ambiguous" law is often one the judge simply doesn't like—and instead "seek the best reading of the statute by interpreting the words of the statute." That, in our view, beats judicial activism of both the liberal and conservative varieties.

Kavanaugh was born and raised in Washington, a biographical point that would seem not to recommend itself to this president. And yet Kavanaugh was the right choice precisely because he knows and understands the capital. Unlike several other erstwhile conservative judges whose ascent to the high court encouraged a more imperious approach to the interpretation of law, Kavanaugh is less likely to be wowed by the pomp and power of his new job. His work in

the executive branch, moreover, has given him more than a theoretical appreciation of the constitution's separation of powers and of the administrative state. Kavanaugh understands more than the judiciary.

Senate Democrats and allied advocacy groups will mount a ferocious campaign against Kavanaugh. Indeed some Democrats announced their opposition before the president even announced his choice. Former Democratic majority leader Harry Reid having broken the tradition of allowing filibusters on judicial nominees, Democrats probably cannot stop Kavanaugh's confirmation. But the ferocity of their rhetoric will intensify in proportion to the powerlessness of their opposition. We shudder to think what tendentious exegeses and slanderous charges they'll produce when the hearings begin.

Unless we are mistaken, however, neither Judge Kavanaugh's words nor his achievements nor his character will give any fair-minded lawmaker, Democrat or Republican, reason to conclude that he is anything but a first-rate legal mind and a conspicuously qualified nominee.

Sex assault survivors urge Senate to reject Kavanaugh

thehill.com/regulation/court-battles/407216-sex-assault-survivors-urge-senate-to-reject-kavanaugh

Lydia Wheeler September 18, 2018

Survivors of sexual and domestic abuse are pushing the Senate to reject the nomination of Judge Brett Kavanaugh to the Supreme Court following allegations that he physically and sexually assaulted a woman when the two were in high school.

Ultraviolet Action, a group working to fight sexism in government, businesses and the media, said more than 1,600 survivors and their loves ones have signed onto a letter the group organized urging the Senate to "publicly commit to rejecting Brett Kavanaugh's confirmation."

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Christine Blasey Ford, who went public with her accusations over the weekend after a confidential letter she sent Democratic lawmakers leaked to the press, told The Washington Post that Kavanaugh and a friend corralled her into a bedroom during a party in high school, pinned her down and groped her over her clothes while attempting to remove them.

Ford, who is now a professor at Palo Alto University in California, said Kavanaugh put his hand over her mouth when she tried to scream.

Kavanaugh has repeatedly denied the accusations, calling them "completely false."

"Judge Kavanaugh looks forward to a hearing where he can clear his name of this false allegation," White House spokesman Raj Shah said on Monday. "He stands ready to testify tomorrow if the Senate is ready to hear him."

But Ultraviolet Action said it believes Ford, adding that Kavanaugh should be disqualified from holding any office in government, let alone the Supreme Court.

"It proves that Kavanaugh neither has the character nor the integrity to be a Supreme Court justice," the group's letter says. "It also confirms his harmful disregard for the rights of people, particularly women."

Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) on Monday delayed a scheduled Thursday vote on the nomination and announced the committee would hold a public hearing with both Ford and Kavanaugh next Monday.

But on Tuesday, Grassley told conservative radio host Hugh Hewitt that his staff has not heard back from Ford regarding her appearance.

Dems' Latest Documents Hullabaloo

NR nationalreview.com/bench-memos/dems-latest-documents-hullabaloo

September 3, 2018

Law & the Courts
By Ed Whelan
September 3, 2018 12:16 PM

In a letter last Friday, the three lawyers reviewing Judge Kavanaugh's White House counsel's office records on behalf of former president George W. Bush advised Senate Judiciary Committee chairman Chuck Grassley that they had completed their review of those records. Their letter reports that their releases over time produced 267,834 pages of documents for public disclosure and an additional 147,250 pages of documents for the committee members' confidential viewing (which pages Grassley has made available to all senators and all Judiciary Committee staffers). The total of more than 415,000 pages of executive-branch records more than doubles the number (170,000 pages) provided for Elena Kagan during her confirmation process (and is more than the last five nominees' document totals combined). That's of course on top of the best evidence of Judge Kavanaugh's fitness to be a Supreme Court justice: his superb judicial record over his twelve years on the D.C. Circuit.

The letter also reports that the White House, after consultation with the Department of Justice, has declined, on the basis of constitutional executive privilege, to provide an additional 101,921 pages of documents. The letter states that the "most significant portion of these documents reflect deliberations and candid advice concerning the selection and nomination of judicial candidates, the confidentiality of which is critical to any President's ability to carry out this core constitutional executive function." The other withheld documents "likewise reflect functions within the Executive Office of the President the confidentiality of which has traditionally been considered at the core of a President's constitutional privileges, including: advice submitted directly to President Bush; substantive communications between White House staff about communications with President Bush; and substantive, deliberative discussions relating to or about executive orders or legislation considered by the Executive Office of the President."

With his usual extravagant excess, Senate Democratic leader Chuck Schumer immediately declared "a Friday night document massacre." "President Trump's decision to step in at the last moment and hide 100k pages of Judge Kavanaugh's records from the American public," Schumer declared, "is not only unprecedented in the history of SCOTUS noms, it has all the makings of a cover up."

Let's take a more sober look at the matter:

1. The process by which the White House makes a decision at the end of the process whether

to withhold the records of a former president on grounds of executive privilege is exactly what President Obama's 2009 executive order implementing the Presidential Records Act contemplates. See section 3: The White House and the Department of Justice shall review the requested records to determine "whether invocation of executive privilege is justified." Obama's executive order also specifies that executive privilege covers records that reflect "the deliberative processes of the executive branch."

2. There is nothing "unprecedented in the history of SCOTUS noms" about a White House determination that certain records should not be provided to the Senate. Schumer should know this quite well, as he complained at John Roberts's confirmation hearing in 2005 of "the refusal of the [Bush] administration to let us see any documents you [Roberts] wrote when you served as Deputy Solicitor General." (See hearing transcript, p. 441.)

3. Nor, of course, is there any general practice of the Senate's insisting on obtaining all executive-branch records of a Supreme Court nominee. In addition to the Roberts example, the Senate did not demand that the Obama administration provide the tens of thousands of pages from Elena Kagan's tenure as Solicitor General. And the Obama administration would surely have invoked executive privilege in rejecting such a request. Never mind that Kagan, in stark contrast to Kavanaugh, had zero judicial experience and that her SG records would have been the materials most probative of her legal thinking.

4. Senate Democrats didn't even disclose Elena Kagan's records from her work as special counsel to then-committee chairman Joe Biden during the confirmation hearing for Justice Ginsburg in 1993. So their protection of their own institutional privilege stands in stark contrast to their disregard for executive privilege.

5. During the confirmation process for Justice Gorsuch, ranking committee member Dianne Feinstein, on behalf of her fellow Democrats, co-signed a letter to the Bush Library that explicitly recognized that, based on executive privilege or other grounds, some requested documents "would be withheld, even from production, entirely." Feinstein specifically avowed her intent, at the end of the process, "to respect the invocation of privilege by a co-equal branch of our government." To be sure, Feinstein's stated intent was conditioned on her satisfaction with the process. My narrow point here is that, contra Schumer, neither Feinstein nor anyone else a year ago maintained that invocation of executive privilege was somehow inherently illegitimate.

6. I readily acknowledge that the volume of documents as to which executive privilege has been invoked is not trivial. In large part, that's because Kavanaugh was very involved in judicial selection. (Kagan, by contrast, was not, and she also was in the White House counsel's office for a much shorter period.) Further, it's important to emphasize that the confidential communications that are being protected are in many instances not necessarily Kavanaugh's.

For those who imagine that the cause of transparency should trump concerns about the deliberative processes, I will simply quote from the Supreme Court's unanimous opinion in *United States v. Nixon* (1974), in which the Court, in the course of rejecting President Nixon's

claim of an *absolute* privilege for deliberative materials, endorsed "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." As the Court put it:

> [T]he importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

WISCONSIN COALITION AGAINST SEXUAL ASSAULT

WCASA Statement on Dr. Christine Blasey Ford and Judge Brett Kavanaugh

Madison – September 26, 2018 – Despite repeated calls to conduct a full and impartial investigation into the sexual assault allegations against Judge Kavanaugh, the Senate Judiciary Committee is moving ahead with a hearing on Thursday at which Dr. Christine Blasey Ford will share her story and be subject to questioning by a sex crimes prosecutor. While this rushed process is bad enough, we understand that the Senate has scheduled a vote to confirm Judge Kavanaugh, a mere one day after the committee hearing. This sends a message to Dr. Ford, and all sexual assault survivors, that this hearing is a sham process that is not designed to get to the truth about Judge Kavanaugh, but rather which serves to discredit and intimidate her.

If the Senate wanted to design a process that was truly supportive of survivors, it would begin by believing survivors. Instead, Dr. Ford's credibility has been attacked by referencing inaccurate, stereotypical judgments that have been refuted by research such as suggesting delayed reports of sexual assault are not reliable or that failure to report a sexual assault to law enforcement is reason enough to disbelieve a survivor. However, reliable data indicates that two-thirds of sexual assaults are never reported to law enforcement. There are a variety of reasons why survivors choose not to report their sexual assault, one of the most prominent of which is a fear they will not be believed. That reluctance to report is undoubtedly magnified when the offender is in a position of power. The attacks on Dr. Ford's credibility since she went public, and the threats to her life, are immensely damaging to her and all survivors. We do not need more reasons for survivors to remain silent – the way the Senate has conducted this process may create a chilling effect on survivors reporting their assaults for some time to come.

Dr. Ford has shown tremendous courage in going public and by her willingness to testify in front of the Senate Judiciary Committee. However, she is not on trial. Instead of putting the onus on Dr. Ford to prove she is not lying, the Senate Judiciary Committee should focus their attention on Judge Kavanaugh and his actions and subsequent statements. The Senate should treat this hearing as part of a job interview for a lifetime appointment to the Supreme Court. Three survivors have come forward to report incidents of sexual violence by Judge Kavanaugh during his "interview" for the position of Supreme Court Justice. When coupled with repeated questions about the truthfulness of some of his answers during a previous hearing, this should serve to disqualify him from further consideration by the Senate. No one is entitled to positions of power. In fact, those seeking positions of power should be held to a higher standard.

Survivors and advocates will be watching the Senate carefully in the coming days. They will be looking to see if the Senate can demonstrate it has learned any lessons in the 27 years since Dr. Anita Hill testified or in the 24 years since the enactment of the Violence Against Women Act (VAWA).

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The Wisconsin Coalition Against Sexual Assault (WCASA, www.wcasa.org) is a membership agency comprised of organizations and individuals working to end sexual violence in Wisconsin. Among these are the 56 assault service providers throughout the state that offer support, advocacy and information to survivors of sexual assault and their families. WCASA works to ensure that every survivor in Wisconsin gets the support and care they need.

"TRUMP LAWYER MARC KASOWITZ DENIES KAVANAUGH EVER SPOKE TO ANYONE AT THE FIRM ABOUT MUELLER PROBE, CONTRADICTING SEN. KAMALA HARRIS CLAIM" BY BRIAN SCHWARTZ

Trump lawyer Marc Kasowitz denies Kavanaugh ever spoke to anyone at the firm about Mueller probe, contradicting Sen. Kamala Harris claim

cnbc.com/2018/09/06/marc-kasowitz-denies-kavanaugh-ever-spoke-to-anyone-at-his-firm.html

September 6, 2018

- "There have been no discussions regarding Robert Mueller's investigation between Judge Kavanaugh and anyone at our firm," a spokesman for Marc Kasowitz said in a statement first provided to CNBC on Thursday.
- Kasowitz, a personal attorney for President Donald Trump, threw cold water on Sen. Kamala Harris' questioning of Brett Kavanaugh, denying he had any contact with his firm, Kasowitz Benson Torres.
- Harris had grilled Kavanaugh on Wednesday about whether he had any contact with members of Kasowitz's firm regarding Mueller's special counsel investigation into whether the Trump campaign colluded with Russian operatives during the 2016 presidential election.

Marc Kasowitz, a personal attorney for President Donald Trump, threw cold water on Sen. Kamala Harris' questioning of Brett Kavanaugh, denying he had any contact with his firm, Kasowitz Benson Torres.

"There have been no discussions regarding Robert Mueller's investigation between Judge Kavanaugh and anyone at our firm," a spokesman for Kasowitz said in a statement first provided to CNBC on Thursday.

Harris, D-Calif., had grilled Kavanaugh on Wednesday about whether he had any contact with members of Kasowitz's firm regarding Mueller's special counsel investigation into whether the Trump campaign colluded with Russian operatives during the 2016 presidential election. Kavanaugh appeared confused during the late-night questioning.

Harris aides on Wednesday evening had told CNBC on condition of anonymity that they had "reason to believe that a conversation happened and are continuing to pursue it."

Kavanaugh himself addressed the issue again Thursday morning. "I don't recall any conversations of that kind with anyone at that law firm," he said during his hearing.

The Kasowitz denial came as Sen. Cory Booker's own attempt at making waves in the Kavanaugh hearing appeared to have fallen flat. Harris and Booker, D-N.J., are both considered possible contenders for the Democratic presidential nomination in 2020.

Harris' office did not return requests for comment on Kasowitz's statement. On Thursday, she told a CNN reporter that Kasowitz's denial wasn't "under oath." She did not elaborate, according to the reporter.

Throughout Thursday, several Kasowitz associates told CNBC that they had never witnessed Kavanaugh having any interaction with attorneys at the firm.

Mark Corallo, a former spokesman for Kasowitz, said that while he worked with Kasowitz through July 2017, he had never seen Kavanaugh mix with his team.

"Never in my three months had anyone mentioned Brett Kavanaugh's name and not since, either," Corallo said.

A friend of Kasowitz who spoke on condition of anonymity, said that Kasowitz and Kavanaugh come from two different types of legal cloth, making any chance of a conversation between the two very minimal.

"Kasowitz is an aggressive attorney who at times worked for a guy like Trump," this person said. "Kasowitz is a totally different venue compared with Kavanaugh."

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 5, 2005

The Honorable Joseph Biden
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

This letter responds to your letter dated July 29, 2005, regarding the nomination of Judge John Roberts to be an Associate Justice of the United States Supreme Court. You requested that the Department provide certain materials relating to John Roberts' employment from 1989 until 1993 in the Office of the Solicitor General. As discussed in a letter sent today to Chairman Specter, the Department of Justice looks forward to working with the Committee on the Judiciary to facilitate its consideration of Judge Roberts' nomination. The White House and the Department have already begun providing to the Committee approximately 65,000 pages of documents from Mr. Roberts' time as a special assistant to Attorney General William French Smith and as an Associate Counsel to President Ronald Reagan. Many of these documents already have been provided to the Committee, including a large group that was provided even before Judge Roberts' nomination was formally forwarded to the Senate.

With regard to documents from Mr. Roberts' tenure as a Deputy Solicitor General, the Department is committed to making available to the Committee those documents that can be made public without causing substantial harm to the Solicitor General's ability to represent the United States in ongoing and future litigation. To that end, we have provided to the Committee certain materials relating to Mr. Roberts' employment in the Office of the Solicitor General that we believe may assist the Committee in evaluating his nomination. They include a printout listing all cases acted upon by the Solicitor General for which Mr. Roberts was the assigned Deputy Solicitor General, as well as a list of all such cases in which Mr. Roberts served as the office's decisionmaker, either as Acting Solicitor General (when the Solicitor General was either recused or unavailable) or on behalf of the Solicitor General (in situations in which the relevant authority had effectively been delegated to the Deputy Solicitors General). These same documents, which are not of a deliberative, pre-decisional, or privileged nature and which reflect final decisions, are also being released this week in response to FOIA requests submitted to the Department of Justice.

In addition, Judge Roberts has already provided to the Committee copies of the briefs on the merits filed in the Supreme Court for all cases he argued, either as a government attorney or in private practice, as well as transcripts of the corresponding oral arguments. He has also supplied to the Committee all briefs on the merits filed in the Supreme Court, including amicus briefs, that he signed while in private practice, irrespective of whether he argued the underlying case. We have informed the Chairman that if the Committee requests it, we also will provide briefs on the merits and certiorari petitions, including amicus briefs, in cases on which Mr. Roberts was the Principal Deputy Solicitor General or Acting Solicitor General but that he did not argue. All of these filings are of course matters of public record.

We are unable to provide certain additional, non-public materials relating to Mr. Roberts' employment in the Office of the Solicitor General. In particular, while we of course will provide to the Committee those documents that reflect the Solicitor General's ultimate decision with regard to any case, we cannot provide to the Committee documents disclosing the confidential legal advice and internal deliberations of the attorneys advising the Solicitor General. It is simply contrary to the public interest for these documents to be released. As at lease one member of the Committee has noted, the ultimate client of the Solicitor General is the people of the United States, and it is in their interest that the deliberative processes and attorney-client communications of the office be maintained. These internal discussions among lawyers have always been considered privileged, covered by both the deliberative process privilege and the attorney-client privilege, and the Department has traditionally declined to make public the documents reflecting those deliberations. To release these documents would cause grave harm to the ability of the Solicitor General to fulfill his designated function: representing the interests of the United States in litigation, including in litigation in which the Solicitor General defends the constitutionality of acts of Congress. For the Solicitor General's office to perform its public service effectively, the internal deliberations of the office must remain confidential.

There are good reasons for this policy of continuing confidentiality. First, as we have noted, the public interest in the office's zealous representation of the interests of the United States would be compromised by a breach of that confidentiality. But there is more at stake than the office's ability to win cases. By tradition, the Solicitor General's office is charged not simply with winning cases but also with frankly assessing the strengths and weaknesses in the government's cases and sometimes accepting unfavorable outcomes. The Solicitor General often declines to authorize further review in cases the United States has lost, despite contrary recommendations of other components of the Department of Justice, and in fulfilling that function he depends on the advice of his staff. For that process to work, the office's attorneys must be free to express frank judgments not only about legal arguments but also about the views of their colleagues in the Department of Justice. The public benefits from the office's pursuing correct outcomes rather than victory at all costs; indeed, it is primarily this feature that distinguishes the Department of Justice generally, and the Solicitor General's office particularly, from private lawyers.

Second, release of the documents would place the public servants who work in the office in the unfair position of being asked to provide full and candid legal advice in public. If attorneys believe that their communications with each other and with those whom they represent will become public, they cannot help but be chilled from expressing their candid views on cases' strengths and weaknesses and from presenting legal analysis from all sides of an issue. The office simply could not function effectively if its lawyers were asked to provide full and candid legal advice in spite of the expectation that their work product would be fair game in any subsequent Senate confirmation process. If disclosure occurs here, moreover, the office's attorneys would have every reason to expect future disclosures, with immediate costs for the work of the office and for the public.

For all these reasons, it is therefore not surprising that a 2002 letter from all seven then-living former heads of the Office of the Solicitor General — including both Democratic and Republican appointees — emphasized the harm that would be done from disclosure of the office's internal deliberations. As that letter said, the Solicitor General relies on "frank, honest, and thorough advice" from the attorneys in his office. The Solicitor General's "decisionmaking process require[s] the unbridled, open exchange of ideas — an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure. . . . High-level decisionmaking requires candor, and candor in turn requires confidentiality." In addition, releasing these documents could undermine the effectiveness of the United States in litigating cases now pending or cases that will come up in the future. The issues litigated by the Solicitor General's office often recur, and disclosure of documents discussing the office's legal analysis of those issues could be very damaging to the litigating position of the United States in current or future cases.

Finally, the need for confidentiality is not diminished because Mr. Roberts was a Deputy Solicitor General rather than a staff lawyer. That distinction does not decrease the magnitude of the harm that disclosure of the internal deliberations of the Solicitor General's office would do to the litigating position of the United States and the functional effectiveness of the Solicitor General. In addition, the role of a Deputy Solicitor General is primarily to review and comment on internal memoranda and briefs drafted by staff attorneys. Documents relating to Mr. Roberts are much more likely to be annotations or notes on documents written by other lawyers than documents Mr. Roberts himself drafted. It would be extremely difficult to provide those documents without disclosing the confidential communications and analysis of many other lawyers who worked with Mr. Roberts in the Solicitor General's office or elsewhere in the federal government. Today there are five attorneys serving in the Solicitor General's office, and countless others in other components of the Department of Justice, who served with Mr. Roberts. It would be unfair to all lawyers who serve in the office, and particularly so with respect to those who served with Mr. Roberts, for these internal deliberations to be made public.

We are confident that the 65,000 pages of documents the White House and the Department of Justice are providing to the Committee, and the voluminous documents Judge Roberts has himself provided, will enable the Committee to engage in full, fair, and prompt consideration of Judge Roberts' nomination, without inflicting on the litigating abilities of the United States the grave harm that would flow from disclosure of the relatively few internal deliberative documents not being produced. We estimate that this latter body of documents represents only a small fraction — approximately a tenth — of the total body of documents relating to Mr. Roberts' employment in the White House and the Department of Justice.

Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

for William E. Moschella
Assistant Attorney General

cc: The Honorable Arlen Specter
Chairman
Committee on the Judiciary

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary

July 13, 2018

KAVANAUGH HAS AN UNSETTLING RECORD ON DEMOCRACY

Judge Kavanaugh's record raises serious concerns that he would expand the power of big money in politics, weaken voter protections, and insulate the president from the rule of law. Senators must press Kavanaugh and critically examine his track record on these issues.

PRESIDENTIAL POWER

Judge Kavanaugh takes an expansive view of presidential power as it relates to legal oversight over misconduct by the president or the president's associates.

In 2009, Judge Kavanaugh opined in a *Minnesota Law Review* article that presidents should be free from "time-consuming and distracting" lawsuits and investigations, and that the indictment and trial of a sitting president "ill serve[s] the public interest."[1] He also urged Congress to consider a law exempting the president—while in office—from criminal prosecution and investigation, including questioning by criminal prosecutors or defense counsel.[2]

These views suggest Kavanaugh would approve congressional efforts to insulate President Trump from the Mueller probe into his 2016 presidential campaign, and block efforts to hold him accountable. A Justice who believes checks on criminal behavior should not apply to the president raises serious rule-of-law concerns.

MONEY IN POLITICS

Kavanaugh's long money-in-politics record shows he is skeptical of reforms to rein in big money, played a key role in the creation of super PACs, and is willing to go to great lengths to get the outcomes he wants.

Judge Kavanaugh has authored six opinions about money in politics[3] and joined another five.[4] There is reason to believe that if confirmed, Kavanaugh would be more aggressive in lifting restrictions on big money than Justice Kennedy, who was no friend

of reform, but at least strongly supportive of disclosure measures. Although Judge Kavanaugh has occasionally upheld campaign finance laws, he has often done so in such a way as to restrict their scope or invite further Supreme Court scrutiny.

Kavanaugh's record reflects some of the most radical deregulatory impulses of the Supreme Court under Chief Justice Roberts. According to Kavanaugh:

- Money is "absolutely" the equivalent of speech;[5] thus, the contribution and expenditure of money requires the same constitutional protections as other political speech.[6]
- The *only* form of political corruption that justifies campaign finance measures is *quid pro quo* corruption and its appearance (or essentially, bribery).[7]
- SuperPAC and other "independent" spending limits cannot be justified by the interest in preventing corruption; thus, such spending is strictly protected and may not be regulated regardless of the influence it exerts over candidates and elected officials.[8]
- The interest in political equality *cannot* justify campaign finance restrictions, as "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[9] (Kavanaugh believes this principle is "one of the most important sentences in First Amendment history."[10])

Kavanaugh has been hostile to reforms to rein in the power of big money in politics.

He paved the way for super PACs, before the Supreme Court signaled in *Citizens United* that "independent" spending received near-absolute constitutional protection.

- In *EMILY's List v. FEC*,[11] decided a year before the Supreme Court's decision in *Citizens United*, Kavanaugh struck down FEC rules developed to address an influx of spending by outside organizations in the 2004 elections. The rules regulated the extent to which organizations that engage in both state and federal electioneering must comply with federal contribution limits.[12]
    - Kavanaugh held that the rules violated the First Amendment because they did not serve to prevent corruption—"the sole basis for regulating campaign contributions and expenditures."[13]
    - He stated that "independent" non-profits are "constitutionally entitled to raise and spend unlimited money in support of candidates for elected office,"[14] because it is "implausible that contributions to independent expenditure political committees are corrupting."[15]
    - He brushed off fears that even massive outside spending could corrupt the political process, opining that if a non-profit that is independent of a candidate's campaign spends its donations on election activities, "those expenditures are not considered corrupting, *even though they may generate gratitude from and influence with officeholders and candidates*."[16]

- After *EMILY's List*, the Supreme Court held in *Citizens United* that limits on "independent" expenditures to do not serve to prevent corruption or its appearance.[17] Shortly thereafter, when faced with a challenge to contribution limits as applied to groups engaged only in "independent" spending, the D. C. Circuit believed it was compelled by *Citizens United* to strike them down.[18] Kavanaugh joined the *en banc* D.C. Circuit in in *SpeechNow.org v. FEC* to invalidate the limits,[19] giving rise to the phenomenon of Super PACs.
- Nine years since EMILY's List, we have experienced an explosion of outside spending, with wink-and-nod coordination between candidates and outside spenders which on paper are "independent."[20]

Judge Kavanaugh's record raises concerns he would vote to strike down disclosure laws, putting him to the right of Justice Kennedy.

- In *Independence Institute v. FEC*,[21] Judge Kavanaugh went to great lengths to keep a case alive that challenged the federal "electioneering communications" disclosure provisions in the McCain-Feingold Act, although they had already been twice upheld by the Supreme Court.[22] The district court had rejected the challenge as "obviously without merit."[23] Kavanaugh reversed based on a novel theory that would limit disclosure based on a spender's tax-status, a theory subsequently rejected by a three-judge court and the Supreme Court.[24] His approach raises serious questions whether he will support political disclosure measures vital to maintaining transparency and accountability in our democracy.

He has also signaled an openness to revisiting the "soft money" contribution restrictions.

- In a 2010 decision, he upheld the party soft money limits of the McCain-Feingold Act, but only because he felt bound as a lower court judge by earlier Supreme Court precedents approving these limits.[25] In a 2016 interview, he suggested, without prompting, that the Supreme Court might reconsider these "soft money" limits.[26]

Kavanaugh's record on money in politics has been marked by judicial activism.

He is willing to overreach to get the outcomes he wants.

- Kavanaugh's sweeping decision in *EMILY's List* turned a case that could have been decided on administrative law grounds into a broad constitutional ruling with profound consequences for our ability to regulate the influence of big money in elections. The plaintiff had not sought such a broad First Amendment holding, but Judge Kavanaugh delivered one.[27] In the process, he disregarded controlling precedents, drawing a stinging separate opinion from another conservative judge, who observed the opinion was inconsistent with the time-honored doctrine that courts should rule on constitutional issues only

when they must.[28]

- In *Independence Institute*, Kavanaugh claimed that although the Supreme Court had repeatedly upheld the disclosure provisions being challenged, it had never considered whether they were constitutional as applied to a section 501(c)(3) charity like the plaintiff. He justified his departure from precedent on grounds that "later cases often distinguish prior cases based on sometimes slight differences."[29] His theory was ultimately repudiated by a three-judge court and later the Supreme Court.[30]

Even when Judge Kavanaugh has occasionally upheld campaign finance laws, he read the law narrowly or invited the Supreme Court to reconsider it.

- His narrow reading of the Federal Elections Campaign Act in *Bluman v. FEC*—a case upholding the federal ban on campaign contributions and expenditures by "foreign nationals"[31]—would leave the door open for unlimited spending by foreign powers on what Kavanaugh called "issue advocacy." His interpretation means that the law likely would have covered only a small fraction of the campaign activity attributed to Russian operatives in the 2016 elections.
    - The challenge was brought by individuals residing in the U.S. on temporary visas who wished to donate to certain candidates. One also wanted to distribute flyers expressly advocating for Obama's re-election.
    - Kavanaugh held that banning contributions and expenditures by foreign nationals did not violate the First Amendment, citing precedent that the government may exclude foreign citizens from activities "'intimately related to the process of democratic self-government.'"[32]
    - But he went out of his way to narrowly interpret the ban, asserting that it applied only as to a "certain form of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to ***expressly advocate for or against*** the election of a candidate."[33] This construction leaves room for unlimited foreign spending on electoral advocacy posing as "issue advocacy" – including ads seeking to incite division amongst Americans on the bases of race and religion,[34] and that skirt the line of express advocacy with messages like "Hillary is Satan."[35]
    - His analysis casts doubt on whether he would approve of efforts, such as the Honest Ads Act,[36] to strengthen the foreign national ban and disclosure laws to prevent foreign interference in future elections. Kavanaugh must be pressed about his views on the permissible scope of laws seeking to shield our elections from the influence of foreign powers.

- Kavanaugh followed the Supreme Court's controlling decision in *McConnell v. FEC* to uphold the party "soft money" limits of the McCain-Feingold Act in *Republican National Committee (RNC) v. FEC*. But he also signaled his reluctance to do so, suggesting the Supreme Court could "clarify or refine this

aspect of *McConnell* as the Court sees fit."[37] The Supreme Court declined to revisit its precedents and reaffirmed the constitutionality of the limits.[38]

- The RNC had argued that under *Citizens United*, it was entitled to raise and spend unlimited soft-money funds on activities that it claimed did not relate to federal elections, such as redistricting activities, grassroots lobbying efforts, and ads supporting state candidates.
- Kavanaugh said that the RNC's arguments "carrie[d] considerable logic and force," but found that as a lower court judge, he lacked the authority to "clarify or refine *McConnell*" or "otherwise get ahead of the Supreme Court."[39] His adherence to precedent likely does not signal his support for the soft money limits on contributions to political parties – which he has elsewhere indicated could be challenged again – but rather, simply a lower court judge's required deference to binding precedent. As he conceded, the Supreme Court already had "squarely addressed" this issue.[40]

Trump's nominee must be pressed on money in politics.

- Americans of all parties understand that our campaign finance system needs fundamental changes.[41]
  - The current system allows powerful donors to drive elections and public policy. The individuals in this donor class are disproportionately wealthy, white, and male compared to Americans as a whole.[42]
- A clear majority would like to see a Supreme Court justice who would limit the influence of big money.
  - More than 64 percent of voters said they wanted Trump to pick a nominee who would "limit the amount of money corporations and unions can spend on political campaigns,"[43] including 70 percent of Democrats, 60 percent of Independents, and 67 percent of Republicans.
  - In another poll, 63 percent of voters—including 54 percent of Republicans and 60 percent of Conservatives—say it's "very important"[44] that he pick someone who is "open to limiting the influence of big money in politics."[45]
- Trump promised to nominate individuals in the mold of Justice Scalia, an ardent opponent of limits on big money, and vetted[46] nominees through White House Counsel Don McGahn,[47] one of the Commissioners most hostile to campaign finance rules in the history of the Federal Election Commission (FEC).
- Trump's first Supreme Court nominee, Justice Gorsuch, refused to answer questions about his money-in-politics record, but has already proven a vote in favor of big money.[48]

VOTING RIGHTS

Judge Kavanaugh's record suggests that he may jeopardize the freedom to vote and that he is likely to refuse to fairly consider claims of disparate racial impact.

Unfortunately, ours is a long history of excluding people from the democratic process on the bases of race and ethnicity, which continues to play out today through restrictions on the right to vote that disproportionately hurt Black and Latino voters. Voting rights cases require sensitivity to this history, and to the disparate impact of voting laws on people of color. Here Judge Kavanaugh's record also raises concerns.

Judge Kavanaugh has disregarded evidence of discriminatory purpose.

In 2012, Judge Kavanaugh authored a three-judge court opinion approving South Carolina's voter ID law under Section 5 of the Voting Rights Act (the law which, before it was gutted by the Supreme Court, required certain state and local jurisdictions with a history of discriminatory voting practices to obtain approval from the federal government before enacting changes to voting laws).[49] In the opinion, Kavanaugh rejected the Department of Justice's claims that the law would have a discriminatory impact on voters of color.

- Kavanaugh also rejected that the law had a discriminatory purpose, even though there was strong evidence that it did.[50] In the record was an email exchange in which a state legislator responded approvingly ("Amen") to an email from a constituent stating that if African Americans were offered money to get Voter IDs, "it would be like a swarm of bees going after a watermelon."[51] While the opinion acknowledges the *constituent's* disparaging remarks demonstrating "Racial insensitivity," it does not properly acknowledge the *lawmaker's* response to the constituent's remarks – and says, "views of one constituent—and one legislator's failure to immediately denounce those views in his responsive email, as he later testified he should have done—do not speak for the two Houses of the South Carolina Legislature, or the South Carolina Governor."[52]
- Notably, the South Carolina law was only approved after the state made clear that it would broadly interpret a provision in the law (the "reasonable impediment" provision) allowing individuals without the required ID to sign a declaration and vote by provisional ballot. Any such provisional ballot must be counted as long as the declaration is not false, regardless of the reason the voter does not have a photo ID. Nonetheless, Judge Kavanaugh downplayed the individual and cumulative burden on voters forced to sign declarations and cast provisional ballots as a result of the law.[53] He also ignored the Department's evidence that this option could "be applied differently from county to county, and possibly from polling place to polling place, and thus risks exacerbating rather than mitigating the retrogressive effect of the new requirements on minority voters."[54]

Judge Kavanaugh's record demonstrates hostility to racial disparate impact claims.

In *Greater New Orleans Fair Housing Action Center v. HUD*,[55] Kavanaugh joined an opinion dismissing a disparate-treatment claim, which challenged the manner in which grants were calculated for post-Hurricane Katrina property repair. Community housing groups alleged the relief calculation disadvantaged black homeowners by, among other things, tying the grant ceiling to the pre-Katrina home values and leaving black homeowners to shoulder a higher cost deficit.

- The opinion reveals a cavalier attitude about disparate racial impact, stating that "[i]n any state where African–American and white homeowners have significantly different economic profiles, it will presumably be the case that particular elements of a complex formula ... will have a disproportionate negative impact on African-Americans, an impact potentially offset by other elements of the formula."[56] As an example, the court noted that African Americans recovered less money from insurance on average, "so that the formula's deduction of insurance proceeds from the grant appears to favor African-Americans."[57] The court even stated that "the $150,000 cap on total grants would seem to disfavor wealthier (and therefore, according to the [plaintiffs] study, disproportionately white) grant recipients."[58]
- Beyond dismissing the plaintiffs' claim, the opinion launched wide-ranging attacks on the ability to prove disparate impact in any case, by attacking various measurements of disparate impact without providing a clear benchmark for future cases. Judge Rogers' concurrence in the case makes the concerning broad sweep of the opinion clear:

> [T]he majority takes a strange turn in disposing of these appeals. . . . [T]he majority meanders into disparate impact theory—without citation to authority—and into benchmark suppositions not briefed by the parties much less argued in the district court, and set up only to be rejected without record evidence on either side of the new constructs while ignoring support for plaintiffs' evidentiary proffer. . . . Along the way, the majority even speculates that white recipients might have disparate impact claims under a different, size-of-grant benchmark. ***One might well wonder what purpose these meanderings have other than to posit hurdles for future disparate impact claims.***[59]

Judge Kavanaugh should be questioned about carefully assessing cumulative burdens on the right to vote, as well as his views on accepting at face value state interests in preventing "voter fraud" without any evidence. He must also be pressed on analyzing discriminatory intent and disparate impact claims, and whether he believes federal civil rights statutes that outlaw practices that have an unjustified disparate impact based on race—including the Voting Rights Act, the Fair Housing Act, and Title VII concerning employment—are constitutional.

[1] Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1461 (2009).
[2] *Id.*
[3] *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.C. Cir. 2011), *Republican Nat'l Committee v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) ("RNC v. FEC"), *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), *Indep. Inst. v. FEC*, 816 F.3d 113 (D.C. Cir. 2016), and *Citizens for Responsibility and Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013).
[4] *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (en banc), *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), *Citizens for Responsibility and Ethics in Washington v. FEC*, Case No. 5049 (D.C. Cir. 2018), *Holmes v. FEC*, 875 F.3d 1153 (D.C. Cir. 2017) (en banc), and *Pursuing America's Greatness v. FEC*, 831 F.3d 500 (D.C. Cir. 2016).
[5] American Enterprise Institute, *Judge Brett Kavanaugh—The Court: Power, policy, and self-government*, YOUTUBE 47:26-48:03 (Mar. 31, 2016), https://www.youtube.com/watch?v=GCtR0OyHiK8.
[6] *See Bluman*, 800 F. Supp. 2d at 287 ("Political contributions and expenditures are acts of political expression and association protected by the First Amendment."); *see also EMILY's List*, 581 F.3d at 5 ("Campaign expenditures and contributions constitute 'speech' within the protection of the First Amendment.").
[7] *See RNC*, 698 F. Supp. 2d at 152 ("Congress may impose some limits on contributions to federal candidates and political parties because of the quid pro quo corruption or appearance of quid pro quo corruption that can be associated with such contributions."); *see also Emily's List*, 581 F.3d at 6 (holding that the only interest the Court has recognized as justifying campaign finance regulation is quid pro quo corruption and the appearance thereof).
[8] *See RNC*, 698 F. Supp. 2d at 152 ("Congress may not limit non-connected entities—including individuals, unincorporated associations, nonprofit organizations, labor unions, and for-profit corporations—from spending or raising money to support the election or defeat of candidates."); *see also EMILY's List*, 581 F.3d 1, 11 (D.C. Cir. 2009).
[9] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).
[10] *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 432 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); *EMILY's List*, 581 F.3d at 5.
[11] *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).
[12] *Id.*
[13] *Id.* at 11.
[14] *EMILY's List*, 581 F.3d at 6.
[15] *Id.* at 7 (quoting *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008)).
[16] *Id.* at 11 (emphasis added).
[17] *See Citizens United v. FEC*, 558 U.S. 310, 356-57 (2010).
[18] 599 F.3d 686 (D.C. Cir. 2010) (en banc).
[19] *See id.* at 692-93 (citations omitted).
[20] *See, e.g.*, Paul Blumenthal, *Your State And Local Elections Are Now A Super PAC Playground*, HUFF. POST (Oct. 31, 2015), https://www.huffingtonpost.com/entry/2015-elections-super-pac_us_5633d165e4b0c66bae5c7bbb; Derek Willis, *The Special Powers of Super PACS, and Not Just for Federal Elections*, N. Y. TIMES (Dec. 8, 2014), https://www.nytimes.com/2014/12/09/upshot/the-special-powers-of-super-pacs-and-not-just-for-federal-elections.html; Brent Ferguson, *Candidates & Super PACs: the New Model in 2016*, BRENNAN CENTER FOR JUSTICE (June 12, 2015), brennancenter.org/sites/default/files/analysis/Super_PACs_2016.pdf.
[21] *Indep. Inst. v. FEC*, 816 F.3d 113 (D.C. Cir. 2016).
[22] *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003); *Citizens United v. FEC*, 558 U.S. 310 (2010).
[23] *Indep. Inst. v. FEC*, 70 F. Supp. 3d 502 (D.D.C. 2014), *reversed and vacated by* 816 F.3d 113 (D.C. Cir. 2016).
[24] Indep. Inst. v. FEC, 216 F. Supp. 3d 176, 192 (D.D.C. 2016) (3-judge court holding against challenger), summarily affirmed by *Indep. Inst. v. FEC*, 137 S. Ct. 1204 (2017).
[25] *RNC v. FEC*, 698 F. Supp. 2d 150, 160 (D.D.C. 2010).
[26] American Enterprise Institute, *supra* note 5, at 45:29 to 47:17 ("I'll say one thing about the campaign finance jurisprudence. There is clearly a structure that has been set up as a result of the jurisprudence that the political parties and candidates can't raise large sums of money, and

outside groups can... Not a surprise, that outside groups therefore have a much more prominent role in our political system today than they did when parties could raise a lot of money . . . That is a reality, I think, and it is a reality directly attributable to the Supreme Court's jurisprudence which has maintained the limit on contributions to parties, but has not allowed limits on contributions to outside entities.").

[27] *EMILY's List*, 581 F.3d at 31 (Brown, J., concurring in part) (Explaining: "The court, however, is not content just answering a gratuitous constitutional question. Its holding is broader than even the plaintiff requests. Instead of arguing nonprofits have a constitutional right to pay for ads attacking federal candidates with soft money, EMILY's List more modestly challenges the regulations as the 'functional equivalent of spending limits, prohibiting EMILY's List from supporting state and local candidates in certain ways when its federal funds are exhausted' and claims they are not properly tailored because they 'restrict vast amounts of nonfederal activity.'").

[28] *Id.* at 30-31 (Brown, J., concurring in part) (explaining, "Because this case can be decided on statutory grounds, we need not reach the constitutional question, and so should not reach the constitutional question. Our precedent is not wishy-washy[.]")

[29] *Indep. Inst. v. FEC*, 816 F.3d 113, 117 (D.C. Cir. 2016).

[30] *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 192 (D.D.C. 2016) (3-judge court holding against challenger), *summarily affirmed by Indep. Inst. v. FEC*, 137 S. Ct. 1204 (2017).

[31] "Foreign national" is a term defined by FECA, and includes foreign principals (which include, e.g., the government of a country outside the U.S. as well as business entities organized under the laws of a country outside the U.S.), as well as individuals residing in the U.S. who do not have Lawful Permanent Resident status. *See* 52 U.S.C. 30121(b).

[32] *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.C. Cir. 2011) (citation omitted).

[33] *Id.* at 289-90 (emphasis added).

[34] Adam Entous, Craig Timberg, and Elizabeth Dwoskin, *Russian operatives used Facebook ads to exploit America's racial and religious divisions*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/business/technology/russian-operatives-used-facebook-ads-to-exploit-divisions-over-black-political-activism-and-muslims/2017/09/25/4a011242-a21b-11e7-ade1-76d061d56efa_story.html?noredirect=on&utm_term=.4ee2cfd8a32a.

[35] *See* Rick Hasen, *On Kavanaugh and Campaign Finance (and Allowing Foreign Interference in Our Elections): Methinks the Bopp Doth Protest Too Much*, Election Law Blog (July 3, 2018, 5:09pm), electionlawblog.org/?p=99897.

[36] Honest Ads Act, 115 H.R. 4077 (2017).

[37] *RNC v. FEC*, 698 F. Supp. 2d 150, 160 (D.D.C. 2010).

[38] *RNC v. FEC*, 698 F. Supp. 2d 150, 160 (D.D.C. 2010), *affirmed, RNC v. FEC*, 130 S Ct. 3544 (2010) (Justices Scali, Kennedy, and Thomas would not probable jurisdiction and set the case for oral argument.).

[39] 698 F. Supp. 2d at 160.

[40] *Id.* at 161 (the Court squarely addressed the soft money limit in *McConnell*); *id.* at 157 ("*Citizens United* expressly left intact this portion of *McConnell*.")

[41] Nicholas Confessore and Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES, June 2, 2015, https://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html

[42] Adam Lioz, *Stacked Deck: How The Racial Bias In Our Big Money Political System Undermines Our Democracy And Our Economy*, DEMOS (July 23, 2015), http://www.demos.org/publication/stacked-deck-how-racial-bias-our-big-money-political-system-undermines-our-democracy-a-0.

[43] Sam Stein, *Poll: Voters Want Trump's Supreme Court Pick to Limit Corporate Money in Politics, Not Abortion*, DAILY BEAST (July 3, 2018), https://www.thedailybeast.com/abortion-more-scotus-watchers-are-concerned-about-campaign-dollardollardollar-poll.

[44] *Voters want President Trump to nominate a justice who will fight big money in politics (Hattaway Communications)*, RETHINK (Jan 12, 2017), https://rethinkmedia.org/opinion/breaking-poll/voters-want-president-trump-nominate-justice-who-will-fight-big-money-politics?authkey=637f218d632554648ba05c3df80de366e493f09ab643597e4d0cb5ded593c06a.

[45] *See The Supreme Court and Money in Politics: Survey Topline Findings*, HATTAWAY COMMUNICATIONS (January 2017). Preview *available at*

https://rethinkmedia.org/opinion/breaking-poll/voters-want-president-trump-nominate-justice-who-will-fight-big-money-politics?authkey=637f218d632554648ba05c3df80de366e493f09ab643597e4d0cb5ded593c06a.

[46] Joel Achenbach, *How Trump and two lawyers narrowed the field for his Supreme Court choice*, WASH. POST (JULY 8, 2018), https://www.washingtonpost.com/politics/how-trump-narrowed-the-field-for-his-supreme-court-pick/2018/07/08/b9d3b16a-808c-11e8-b660-4d0f9f0351f1_story.html?utm_term=.35ce71178057.

[47] Arn Pearson, *Don McGahn, Trump White House Counsel, Has Long Courted Controversy*, PRWATCH (Nov. 22, 2016), https://www.prwatch.org/news/2016/11/13176/don-mcgahn-trump-transition-lawyer-has-long-courted-controversy.

[48] Rick Hasen, *Breaking: #SCOTUS Declines Soft Money Case; Thomas and Gorsuch Would Vote to Hear*, ELECTION LAW BLOG (May 22, 2017), https://electionlawblog.org/?p=92665.

[49] *South Carolina v. United States.*, 898 F. Supp. 2d 30 (D.D.C. 2012).

[50] *Id.*

[51] *See id.* at 45 (describing the email exchange); *see also, e.g.*, Ryan J. Reilly, *South Carolina Lawmaker Said 'Amen' To Email Comparing Blacks to 'Bees Going After A Watermelon,'* TALKING POINTS MEMO (Aug. 29, 2012), https://talkingpointsmemo.com/muckraker/south-carolina-lawmaker-said-amen-to-email-comparing-blacks-to-bees-going-after-a-watermelon.

[52] *South Carolina v. United States.*, 898 F. Supp. 2d at 45.

[53] *Id.* at 39-42.

[54] Letter from Thomas E. Perez, Ass't Attorney General, Civil Rights Division, Dep't of Justice, to C. Havird Jones, Jr., Ass't Deputy Attorney General, South Carolina Office of the Attorney General, No. 2011-2495 (Dec. 23, 2011), *available at* justice.gov/crt/voting-determination-letter-65.

[55] 639 F.3d 1078 (D.C. 2011).

[56] *Id.* at 1086.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 1093.

The New York Times

Why Sexual Assault Memories Stick

Christine Blasey Ford says she has a vivid memory of an attack that took place when she was 15. That makes sense.

By Richard A. Friedman
Dr. Friedman is a psychiatrist.

Sept. 19, 2018

As a psychiatrist I know something about how memory works. Neuroscience research tells us that memories formed under the influence of intense emotion — such as the feelings that accompany a sexual assault — are indelible in the way that memories of a routine day are not.

That's why it's credible that Christine Blasey Ford, who has accused Judge Brett Kavanaugh, President Trump's Supreme Court nominee, of sexually assaulting her when they were both teenagers, has a vivid recollection of the alleged long-ago event.

"I thought he might inadvertently kill me," she told The Washington Post in a recent interview. "He was trying to attack me and remove my clothing."

Judge Kavanaugh has vigorously denied the charges, leading to a public debate about whether Dr. Blasey's story is true. Her lawyers say she wants the F.B.I. to investigate before she agrees to testify before the Senate. If and when she does testify, you can bet that Republican senators will try to undermine her explosive claim on the basis that the memory of an event that occurred 36 years ago must be unreliable because it happened in the distant past. If she does not testify, some of her critics will undoubtedly argue that the time that's passed is reason to doubt her recollection. Nothing could be further from the truth.

The reason has to do with the way memories are encoded when a person is experiencing intense emotions. When people are assaulted, for example, they experience a surge of norepinephrine, a stress hormone that is a relative of adrenaline.

The role of norepinephrine in the enhancement of memory was demonstrated by a 1994 study in which researchers randomly gave subjects either propranolol, a drug that blocks the effect of norepinephrine, or a placebo just before they heard either an emotionally arousing story or a neutral one. Then they tested subjects' memories of both stories a week later and found that propranolol selectively impaired recall of the emotionally arousing story but not the neutral story. The clear implication of this study is that emotion raises norepinephrine, which then strengthens memory.

That is why you can easily forget where you put your smartphone or what you had for dinner last night or last year. But you will almost never forget who raped you, whether it happened yesterday — or 36 years ago. There's very little chance that you are, as some senators suggest Dr. Blasey is, "mixed up" or "confused."

It is also important to note that what Dr. Blasey is describing in her report of sexual assault by Judge Kavanaugh is not a so-called recovered memory — one that a person believes he has recalled after having suppressed it for many years. Quite the opposite: It is a traumatic memory that she's been unable to forget.

In the interview with The Post she said the assault "derailed me substantially for four or five years," and had caused anxiety for years after that. Indeed, her therapist's notes reflect that, in a 2012 session, she described an attack by students at an "elitist boys' school" (Judge Kavanaugh attended a Maryland prep school) who went on to become "highly respected and high-ranking members of society."

Some commentators don't dispute Dr. Blasey's veracity. Instead, they deem an assault as described by Dr. Blasey as irrelevant to Judge Kavanaugh's fitness to serve on the Supreme Court because he would have been just 17 years old and drunk at the time. We all know that teenagers are notoriously impulsive and should be forgiven for doing things like that, right?

Wrong. Sexual assault cannot be easily dismissed as youthful indiscretion or the product of alcoholic intoxication. First, alcohol does not create violent sexual impulses so much as it unleashes or magnifies pre-existing ones. And second, a sexual assault in which Brett Kavanaugh put his hand over a girl's mouth to silence her would be in a far different category from a dumb but not character-revealing prank like shoplifting cigarettes. Teenagers are notorious risk-takers because, in part, the reward circuit of the brain develops long before the prefrontal cortex, the seat of reasoning and control. But that doesn't mean they have no sense of right or wrong or that they are hard-wired to violate the rights of others.

Some are saying that Dr. Blasey's accusation, even if true, is just one ancient example of admittedly egregious behavior in an otherwise upstanding person who, as President Trump attests, "never had even a little blemish on his record."

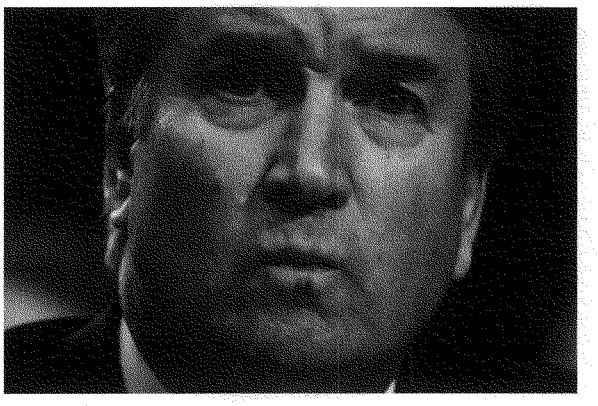
Since teenagers change so much, these people say, bad behavior then isn't necessarily predictive of adult behavior. Sure, but why take the risk for someone who will have so much power? Dr. Blasey's accusation is credible and deserves a full investigation.

Vox

Why didn't Kavanaugh's accuser come forward earlier? Police often ignore sexual assault allegations.

When even those in charge of public safety don't take sexual assault seriously, victims are going to be very cautious.

By German Lopez | @germanrlopez | german.lopez@vox.com | Updated Sep 19, 2018, 4:13pm EDT



Supreme Court nominee Brett Kavanaugh answers questions during Senate hearings. | Win McNamee/Getty Images

In response to the **allegations of sexual assault against Supreme Court nominee Brett Kavanaugh**, some dismissive questions have popped up: Why did Christine Blasey Ford, Kavanaugh's accuser, take more than three decades to come forward? Why didn't she report the incident to the police immediately after Kavanaugh allegedly groped her and tried to undress her while covering her mouth?

The surprising answer, however, is that not reporting sexual assault is typical — and, in fact, it's the reality in most cases of sexual assault and rape, based on the data we have.

Part of this is the result of sexual assault victims fearing the repercussions of speaking out — the shaming, stigma, and retaliation, not to mention the difficulty of potentially reliving a traumatic event over and over in the course of an investigation.

We've seen this with the Kavanaugh accusations, with pundits **questioning whether any of the claims are true**, trolls **doxxing and threatening Ford**, others **digging into Ford's personal history and credibility**, and politicians, particularly on the Republican side, resisting the idea of **getting the FBI more involved** prior to a Senate hearing over the matter.

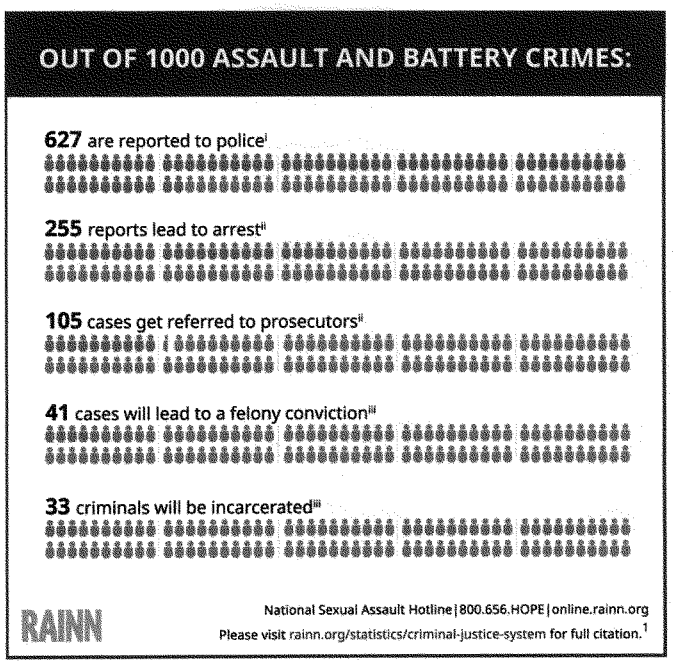
But much of the problem is the fact that even when sexual assault survivors do come forward, police don't appear to pursue their claims as vigorously as they would other crimes.

The result: Most people who commit sexual assault and rape in the US go free — without any kind of criminal investigation or punishment.

The **Rape, Abuse, and Incest National Network** (RAINN), drawing on federal surveys and data, concluded that for every 1,000 rapes, just six perpetrators are incarcerated.

RAINN

By comparison, for every 1,000 assault and battery crimes, 33 perpetrators are locked up.



RAINN

Neither number is particularly encouraging for those seeking justice. But the incarceration rate for rape is still less than *one-fifth* of what it is for assault and battery. That's despite the fact that rape is a more serious crime than assault and battery, so you should expect it to lead to *more* incarceration, not less.

Part of the problem is the vicious cycle this creates: Sexual assault survivors think that the police won't investigate their accusations very seriously, so they're skeptical of coming forward — and opening themselves to all sorts of scrutiny — when they might not even get justice.

Ford **expressed a similar sentiment to the Washington Post** regarding Kavanaugh and whether Congress would take the allegations against him seriously: "Why suffer through the

annihilation if it's not going to matter?"

But if sexual assault survivors don't report their cases to police or other officials, it's obviously going to be much more difficult, if not impossible, for the government to do anything about the crimes.

It's also true, though, that the criminal justice system simply seems to give much less attention to sexual assault than other crimes. Consider the data above: Out of 310 rapes reported to police, 57 led to arrest — a rate of about 18 percent. Meanwhile, out of 627 assault and battery crimes reported to police, 255, or nearly 41 percent, led to arrest — more than double the rate for rapes.

As best as we can tell, this is not because the majority of rape accusations are frivolous. According to the **best research**, 2 to 8 percent of accusations are false. (Although much of this research is now old.)

Instead, this seems to be a matter of resources and culture. It's only in recent decades that police have dedicated more officers and money to sexual assault cases — in part because of laws such as the federal **Violence Against Women Act**. And on a cultural level, police departments and officers are part of the same broader society that is only now taking allegations of rape, sexual assault, and sexual harassment more seriously with the rise of the #MeToo movement.

The reality, though, is that law enforcement agencies still often fail to follow up on sexual assault accusations, as unfair and unjust as that is.

To prevent more crime, police should do better

One surprising thing in the data is that police are very unlikely to arrest people for all kinds of crime — not just rape, but assault and battery, too.

The poor crime-solving rate is true even for murder: In the US, the murder clearance rate, which measures how often a murder results in an arrest, is **typically around 60 percent**. It's even lower for minority communities, according to a **Washington Post investigation**.

Meanwhile, fewer than half of violent crimes in the US are reported, and fewer than half of those are cleared by police, according to a **Pew Research Center report**. And a little more than one-third of property crimes are reported, while less than one-fifth of those are cleared.

This fosters what criminal justice scholars call "legal cynicism." When crimes go unpunished, people are more likely to think that the government — and particularly the police and criminal

justice system — aren't taking such acts very seriously. And that makes people distrust the police and justice system.

That not only makes people less likely to report crime — perpetuating the problem of few crimes going reported — but it might lead to even more crime. For one, if criminals are more likely to think they can get away with the acts, they're more likely to commit them.

But there's another piece to this, too: If people don't feel like police will protect them, they may be more likely to take the law into their own hands.

Consider a hypothetical murder that goes unsolved. If you believe that someone shot and killed a family member or friend and may try to go after you next, *and* police aren't going to do anything about it, then you might be more likely to try to go after the shooter on your own to stop them.

Journalist Jill Leovy documented this phenomenon, with a focus on black communities, in her award-winning book ***Ghettoside*** (which, really, you should read). As she put it, "Take a bunch of teenage boys from the whitest, safest suburb in America and plunk them down in a place where their friends are murdered and they are constantly attacked and threatened. Signal that no one cares, and fail to solve murders. Limit their options for escape. Then see what happens."

Police *can* do better. A 2017 **study** by criminologist Anthony Braga looked at the Boston Police Department's efforts to increase the murder clearance rate by dedicating more resources and technology to solving such killings.

The study found that Boston police raised the murder clearance rate from 47.1 percent before the changes (2007 through 2011) to 56.9 percent during the changes (2012 through 2014). In contrast, the national clearance rate remained stable during these time periods, while the rate for other Massachusetts police agencies actually *declined*. While the study couldn't definitively link Boston's improvement to the specific strategies the city's police used, the research indicates that improvement really is possible, one way or another.

And that suggests that police are generally doing much less than they could to investigate and solve the most serious of crimes.

DIANNE FEINSTEIN
CALIFORNIA

United States Senate
WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

COMMITTEE ON THE JUDICIARY
—RANKING MEMBER
SELECT COMMITTEE ON
INTELLIGENCE
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON RULES AND
ADMINISTRATION

September 18, 2018

Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Grassley:

We write in response to yesterday's announcement of a hearing next Monday regarding Dr. Blasey Ford's credible allegations of sexual assault by Supreme Court nominee Brett Kavanaugh. Given the seriousness of these allegations, and the scrutiny the Committee is under, we are disappointed you decided to move forward without consulting the minority, without confirming witnesses, without demanding the FBI complete an independent review, and without allowing the Committee to perform its duties.

Once again, Republicans are refusing to perform basic due diligence in a rush to confirm Judge Kavanaugh. First, Republicans refused to review Judge Kavanaugh's full White House record from his position as Staff Secretary and from the White House Counsel's office. Now, in this same rush to push a nominee through without thorough vetting, Republicans are again rejecting basic past practices.

We are concerned that the Majority's actions both repeat mistakes of the past and fail to treat these allegations and the witnesses with the respect and carefulness that is required. In 1991, within a week after Anita Hill's allegations of sexual harassment became public, the Judiciary Committee held three days of controversial hearings. These hearings took place *after* the White House directed the FBI to conduct an immediate investigation and that investigation was

completed. Nonetheless, the Senate's handling of those allegations – and the shameful treatment of Anita Hill – has been roundly criticized.

Now, just two days after Dr. Blasey Ford shared her story with the public, Republicans are again rushing forward with a hearing within a week. This time, they are doing so without demanding the FBI perform a background investigation like it did in 1991. As you know, the FBI is not being asked to perform a criminal investigation; rather it is being asked to do an evaluation of the allegations as part of its review of Judge Kavanaugh's record. Like in 1991, this is an important step in providing the Committee the facts. In this case, it is particularly important as there have been press reports about a polygraph test, medical records, and multiple witnesses.

Unfortunately, the Majority also announced the hearing without confirming whether Dr. Blasey Ford is available on that date. We also understand Republicans are planning on only inviting Judge Kavanaugh and Dr. Blasey Ford to testify. While the Committee unquestionably needs to hear from both, there are other relevant witnesses who should be questioned under oath, in a public setting. This includes Mark Judge, who Dr. Blasey Ford identified, and others that might be identified through the FBI's investigation or subsequent due diligence by the Committee itself.

By contrast, even the flawed handling of Anita Hill's claims, involved three days of hearings with four panels of witnesses beyond Professor Hill and Judge Thomas. In total, the Committee heard from 22 witnesses, including experts on sexual harassment and character witnesses.

This nomination should not be railroaded through the Committee in an effort to meet an artificial, outcome based deadline. The Senate's handling of these serious allegations will rightly be scrutinized by all Americans. Failing to even perform the basic due diligence that was done under the Bush Administration, and repeating the mistakes of the past will not reflect well on the Majority or this institution.

The American people must have confidence in the integrity of the process and the willingness of the Senate to hold Supreme Court nominees to the highest

standards of character and fitness. We urge you to join our demand for an FBI investigation, allow the Committee to perform its due diligence, and work with us to find a fair, bipartisan path forward that treats these allegations with the respect that is required.

Sincerely,

DIANNE FEINSTEIN
Ranking Member

PATRICK LEAHY
United States Senator

RICHARD J. DURBIN
United States Senator

SHELDON WHITEHOUSE
United States Senator

AMY KLOBUCHAR
United States Senator

CHRISTOPHER A. COONS
United States Senator

RICHARD BLUMENTHAL
United States Senator

MAZIE K. HIRONO
United States Senator

CORY A. BOOKER
United States Senator

KAMALA D. HARRIS
United States Senator

DIANNE FEINSTEIN
CALIFORNIA

United States Senate
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COMMITTEE ON THE JUDICIARY
—RANKING MEMBER
SELECT COMMITTEE ON
INTELLIGENCE
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON RULES AND
ADMINISTRATION

September 18, 2018

The Honorable Christopher Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

Donald F. McGahn, II
Counsel to the President
The White House
1600 Pennsylvania Ave NW
Washington, D.C. 20500

Dear Director Wray and Mr. McGahn:

As you know, we wrote yesterday seeking to confirm that the White House has directed the FBI to perform its due diligence and conduct an investigation into Dr. Blasey Ford's allegations of misconduct against Brett Kavanaugh. We are extremely disappointed to learn from press reports that the FBI is apparently declining to take any action.

The need for the FBI to perform its due diligence has become even more important in light of Chairman Grassley's announcement that he plans to move forward with a hearing on this matter next Monday. The Committee should have the completed report before any hearing occurs and we ask that you take immediate steps to make sure that we have the FBI's report before we proceed. Please notify us as soon as possible whether this can be completed in time.

In referring these allegations to the FBI, Ranking Member Feinstein has repeatedly made clear that the request is not for a criminal investigation. Instead, the request is for the FBI to conduct appropriate follow-up, including interviewing Brett Kavanaugh, Mark Judge, Christine Blasey Ford, other attendees at the party and all other relevant witnesses, as part of its background investigation of Judge Kavanaugh in connection with his Supreme Court nomination.

This is especially important here, as the allegations involve reports of medical evidence and a polygraph test as well as multiple witnesses. The FBI routinely considers information that does not implicate federal crimes when it conducts background investigations on judicial nominees.

Moreover, when Anita Hill alleged that Supreme Court nominee Clarence Thomas had sexually harassed her, the Judiciary Committee asked for an FBI

investigation before it proceeded. Those claims did not implicate a federal criminal matter. Yet, the same day the White House received this request, then-White House Counsel C. Boyden Gray directed the FBI to investigate. In retrospect, this process has been heavily criticized as being rushed and incomplete, yet even then Republicans ensured the FBI performed an investigation and submitted a report before the Judiciary Committee moved forward with public hearings.

The American people need to have full confidence that these credible allegations have been treated seriously and examined carefully. This nomination should not be treated differently simply because of an artificial deadline to rush the confirmation process. We again ask that the Administration immediately conduct an FBI investigation of Dr. Blasey Ford's claims.

Sincerely,

DIANNE FEINSTEIN
Ranking Member

PATRICK LEAHY
United States Senator

RICHARD J. DURBIN
United States Senator

SHELDON WHITEHOUSE
United States Senator

AMY KLOBUCHAR
United States Senator

CHRISTOPHER A. COONS
United States Senator

RICHARD BLUMENTHAL
United States Senator

MAZIE K. HIRONO
United States Senator

CORY A. BOOKER
United States Senator

KAMALA D. HARRIS
United States Senator

cc: The Honorable Charles E. Grassley

United States Senate

WASHINGTON, DC 20510

September 21, 2018

The President
The White House
1600 Pennsylvania Ave, NW
Washington, DC 20500

Dear Mr. President:

We are deeply troubled regarding the misleading statements you have made this week about the Kavanaugh nomination. On Tuesday, you said "I don't think the FBI really need to be involved because they don't want to be involved. If they wanted to be, I would certainly do that, but as you know, they say this is not really their thing." In response to a reporter's question on Wednesday, you said "It would seem the FBI really doesn't do that. . . They've investigated about six times before, and it seems that they don't do that."

Contrary to your assertions, conducting background investigations on nominees has long been the FBI's standard practice, and it is common for such background investigations to be reopened where new information about a nominee becomes known. In fact, in very similar circumstances during the Senate's consideration of the nomination of Clarence Thomas to the Supreme Court, the Senate Judiciary Committee requested an FBI investigation of Professor Anita Hill's allegations of sexual harassment. On the same day that President George W. Bush received this request, White House Counsel C. Boyden Gray directed the FBI to investigate. The Bureau immediately investigated the matter and produced a report prior to the Judiciary Committee's second round of hearings on the nomination.

Since Dr. Christine Blasey Ford's story became public, she has asked for the FBI to investigate – a request that demonstrates her sincerity and her confidence that an impartial inquiry will further corroborate and confirm the account she has given. The FBI's involvement is required in order to identify and interview all witnesses, review documentary evidence, and provide its report to the Senate. It is not the FBI's job to determine credibility, but it is the FBI's job to gather facts. Regrettably, however, the FBI has thus far failed to act.

We were encouraged earlier this week when you said "a delay is acceptable," and "we want to give it a tremendous amount of time." But then yesterday, after Dr. Ford reiterated her desire to testify, you reversed yourself and said "I don't think you can delay it any longer" and the Senate must "get on with it." In any event, your claim that "we want to get to the bottom of it" is merely lip service unless you are willing to direct the FBI to investigate. Now that it appears likely that the Judiciary Committee will hold its hearing on Thursday, September 27th, the FBI has almost a full week to do its work. It will not take a "tremendous amount of time," but it is necessary if you truly want the facts to be known.

In short, there is no legitimate basis for you to continue blocking the FBI from investigating this important matter. We therefore request that you adhere to precedent and direct the FBI to immediately and thoroughly investigate Dr. Ford's allegations and provide a report to the Senate as soon as possible.

Judge Kavanaugh is being nominated to the highest court in our land. These serious allegations should be fairly and impartially considered before the Senate moves forward.

Sincerely,

Charles E. Schumer
United States Senator

Dianne Feinstein
United States Senator

DIANNE FEINSTEIN
CALIFORNIA

United States Senate
WASHINGTON, DC 20510–0504
http://feinstein.senate.gov

COMMITTEE ON THE JUDICIARY
--RANKING MEMBER
SELECT COMMITTEE ON
INTELLIGENCE
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON RULES AND
ADMINISTRATION

September 26, 2018

The President
The White House
1600 Pennsylvania Ave NW
Washington, D.C. 20500

Dear Mr. President:

We are writing to request that you immediately withdraw the nomination of Brett Kavanaugh to be an Associate Justice on the Supreme Court or direct the FBI to re-open its background investigation and thoroughly examine the multiple allegations of sexual assault.

As you know, earlier this month, Christine Blasey Ford's credible and serious allegations of sexual assault by Judge Kavanaugh were referred to the FBI for investigation. Since then, Deborah Ramirez has come forward with additional allegations of sexual misconduct and today, another woman, Julie Swetnick, has submitted a sworn affidavit to the Senate Judiciary Committee recounting Brett Kavanaugh drinking excessively at parties and engaging "in abusive and physically aggressive behavior toward girls, including pressing girls against him without their consent, 'grinding' against girls, and attempting to remove or shift girls' clothing to expose private body parts."

It is clear from reporting that there were others present or with knowledge of each of these shocking allegations who also should be interviewed. We have repeatedly asked Chairman Grassley and you to direct the FBI to investigate Dr. Ford's and Ms. Ramirez's allegations.

The serious and credible allegations of one woman should have been enough to require a complete investigation by the FBI. It should not have required multiple women with consistent accounts of serious sexual misconduct by Judge Kavanaugh to trigger a meaningful nonpartisan investigation.

Judge Kavanaugh is being considered for a promotion. He is asking for a lifetime appointment to the nation's highest court where he will have the opportunity to rule on matters that will impact Americans for decades. The

standard of character and fitness for a position on the nation's highest court must be higher than this. Judge Kavanaugh has staunchly declared his respect for women and issued blanket denials of any possible misconduct, but those declarations are in serious doubt.

We therefore ask that you immediately direct an FBI investigation or withdraw this nomination.

Sincerely,

DIANNE FEINSTEIN
Ranking Member

PATRICK LEAHY
United States Senator

RICHARD J. DURBIN
United States Senator

SHELDON WHITEHOUSE
United States Senator

AMY KLOBUCHAR
United States Senator

CHRISTOPHER A. COONS
United States Senator

RICHARD BLUMENTHAL
United States Senator

MAZIE K. HIRONO
United States Senator

CORY A. BOOKER
United States Senator

KAMALA D. HARRIS
United States Senator

cc: Hon. Charles E. Grassley, Chairman
Senate Judiciary Committee

ADDITIONAL SUBMISSIONS FOR THE RECORD

A list of material and links can be found below for submissions for the record not printed due to voluminous nature, previously printed by an agency of the Federal Government, or other criteria determined by the Committee:

Ash, Elliott, and Daniel L. Chen, "Kavanaugh is radically conservative. Here's the data to prove it: He's to the right of, and much more political than, his peers on the federal bench," *The Washington Post: PostEverything Perspective*, July 10, 2018, op-ed article:

https://www.judiciary.senate.gov/imo/media/doc/Ash,%20Elliott%20and%20Chen,%20Daniel%20-%20Washington%20Post%20(7-10-18).pdf

Briere, John, and Diana M. Elliott, Department of Psychiatry and the Behavioral Sciences, Keck School of Medicine, University of Southern California, Los Angeles, California, "Prevalence and psychological sequelae of self-reported childhood physical and sexual abuse in a general population sample of men and women," *Child Abuse & Neglect*, Volume 27, 2003, pages 1205–1222, March 2, 2002, research article:

https://www.judiciary.senate.gov/imo/media/doc/Briere,%20John%20and%20Elliott,%20Diana%20M.pdf

Burgess, Sarah, Holton-Arms School Class of 2005, et al., "Holton-Arms Alumnae in support of Dr. Christine Blasey Ford," letter to Hon. Charles E. Grassley, a U.S. Senator from the State of Iowa and Chairman of the U.S. Senate Committee on the Judiciary, and Hon. Dianne Feinstein, a U.S. Senator from the State of California and Ranking Member of the U.S. Senate Committee on the Judiciary, September 25, 2018, letter:

https://www.judiciary.senate.gov/imo/media/doc/Holton-Arms%20Alumnae%20Letter.pdf

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