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July X, 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 ____ undersigned national 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 swing 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, economic security, rights of 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 corporate interests, 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 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

¹ See, e.g., <https://civilrights.org/opposition-to-kavanaughs-confirmation-to-the-dc-circuit/>.

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, 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 would 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 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 requirement that religious organizations that objected to providing insurance coverage for contraceptives for their employees, submit a form to their insurer or the federal government in order to avoid monetary penalties. These organizations argued that, because the insurer would then provide coverage of contraceptives to the religious groups’ employees through separate funds provided by

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).

⁶ *Id.* at 50 (Kavanaugh, J., dissenting).

⁷ 808 F.3d 1 (D.C. Cir. 2015).

the insurer or the government, the mere submission of an 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 the religious organizations should have prevailed on their RFRA claim. He asserted that the filing of the form substantially burdened the religious 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 Downplaying concerns about administrability, he further argued that the government could have permitted the organizations to simply provide notice, without filling out any forms, to the government of their objections. Judge Kavanaugh's view that courts ought to accept, without question, any claim by a religious organization that a government requirement substantially burdens the free exercise of religion, and his cavalier attitude towards the government's ability to ensure that the contraceptive coverage requirement would be fulfilled, further demonstrate his hostility to the Affordable Care Act.

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 the Act 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 disregard for 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 ruled for the Trump administration and approved a delay in order to find a sponsor for an undocumented immigrant minor in government custody seeking an abortion, and held that this process did not unduly burden the minor's right under Supreme Court precedent to an abortion.¹¹ Four days later, the D.C. Circuit reheard the case en banc and reversed the panel decision, ruling that the pregnant teenager was entitled to seek an abortion without delay. Judge Kavanaugh dissented and argued that the case should never have been reheard and that the disposition by the majority was wrong. His dissent supported the government's "permissible interests in favoring fetal life," and criticized the majority for creating a right to "immediate abortion on demand."¹² Judge Kavanaugh argued that the majority decision is "ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision."¹³ As one of the judges in the

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).

¹¹ No. 17-5236, 2017 WL 4707112 (D.C. Cir. Oct. 19, 2017).

¹² 874 F.3d at 752 (Kavanaugh, J., dissenting).

¹³ *Id.*

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."¹⁴

Judge Kavanaugh has also revealed 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*¹⁵ 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*.¹⁶ Such unenumerated rights include not only the right to an abortion but also the right to use contraceptives 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."¹⁷ 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."¹⁸

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*,¹⁹ 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."²⁰ 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."²¹ 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

¹⁴ *Id.* at 738 (Millett, J., concurring).

¹⁵ 521 U.S. 702 (1997).

¹⁶ <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.

¹⁷ <https://www.nationalreview.com/2018/07/judge-brett-kavanaugh-impeccable-record-of-constitutional-conservatism/>.

¹⁸ *Id.*

¹⁹ 898 F.Supp.2d 30 (D.D.C. 2012).

²⁰ <https://www.thenation.com/article/63756-reasons-why-racism-is-still-alive-in-south-carolina/>.

²¹ 898 F.Supp.2d 30, 53 (D.D.C. 2012) (Bates, J., concurring).

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 to restrict voting rights as an attorney as well. In the case *Rice v. Cayetano*,²² 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. 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."²³

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 made highly 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."²⁴ 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."²⁵ Judge Kavanaugh's cynical and partisan comments are alarming.

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*,²⁶ 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*,²⁷ 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

²² 528 U.S. 495 (2000).

²³ *Id.* at 529.

²⁴ Brett Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL ST. J., Sept. 27, 1999.

²⁵ *Id.*

²⁶ 720 F.3d 939 (D.C. Cir. 2013).

²⁷ 687 F.3d 1332 (D.C. Cir. 2012).

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.”²⁸ 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.”²⁹

And in *Rattigan v. Holder*,³⁰ 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.”³¹

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 and union disputes. For example, in *SeaWorld of Fla., LLC v. Perez*,³² 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?”³³ 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.”³⁴

In *National Labor Relations Board v. CNN America, Inc.*,³⁵ 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.

²⁸ *Id.* at 1335.

²⁹ *Id.*

³⁰ 689 F.3d 764 (D.C. Cir. 2012).

³¹ *Id.* at 770 (internal quotations and citation omitted).

³² 748 F.3d 1202 (D.C. Cir. 2014).

³³ *Id.* at 1217.

³⁴ <http://jordanbarab.com/confinedspace/2018/07/10/kavanaugh-threat-to-osha-workers/>.

³⁵ 865 F.3d 740 (D.C. Cir. 2017).

Judge Kavanaugh also dissented in *National Federation of Federal Employees v. Vilsack*,³⁶ 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.³⁷

In *American Federation of Government Employees, AFL-CIO v. Gates*,³⁸ 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.”³⁹

Anti-Immigrant Views: In his ruling discussed above in *Garza v. Hargan* (involving the pregnant immigrant) and in cases discussed below, Judge Kavanaugh has demonstrated hostility to 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.”⁴⁰

In *Agri Processor v. National Labor Relations Board*,⁴¹ 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.”⁴² The majority stated that Judge Kavanaugh’s dissent would lead to an “absurd result.”⁴³ 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.”⁴⁴

In another immigration case, *Fogo de Chao Inc. v. Department of Homeland Security*,⁴⁵ Judge Kavanaugh dissented from a ruling that reversed a DHS decision refusing to grant temporary visas to foreign workers with specialized knowledge concerning Brazilian-style cooking, even though such visas had been granted

³⁶ 681 F.3d 463 (D.C. Cir. 2012).

³⁷ *Id.* at 503.

³⁸ 486 F.3d 1316 (D.C. Cir. 2007).

³⁹ *Id.* at 1331 (Tatel, J., dissenting in part).

⁴⁰ <https://www.breitbart.com/big-government/2018/07/04/america-first-scotus-choice-judge-brett-kavanaugh-applies-trumps-economic-patriotism-to-the-law/>.

⁴¹ 514 F.3d 1 (D.C. Cir. 2008).

⁴² *Id.* at 4.

⁴³ *Id.* at 7.

⁴⁴ <https://onlabor.org/the-kavanaugh-nomination-and-labor/>.

⁴⁵ 769 F.3d 1127 (D.C. Cir. 2014).

before. The majority remanded the case for reconsideration of the argument, supported by the restaurant and its workers, that culturally acquired knowledge could constitute specialized knowledge for visa purposes. And the majority explained that Congress created the visa program and the executive branch had previously interpreted it to provide opportunity to the foreign workers. The majority wrote: “Perhaps the dissent [Judge Kavanaugh] disagrees with those policy judgments or the agency’s past practice. But our Constitution places such sensitive immigration and economic judgments squarely in the hands of the Political Branches, not the courts.”⁴⁶

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.”⁴⁷ 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.⁴⁸ And he has said that special counsels should be “appointed (and removable) in the same manner as other high-level executive branch officials”⁴⁹ — 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?”⁵⁰

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.”⁵¹

Judge Kavanaugh’s judicial record reflects his executive authority absolutism. For example, in *PHH Corp. v. Consumer Financial Protection Bureau*,⁵² 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.⁵³ 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

⁴⁶ *Id.* at 1155.

⁴⁷ http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf.

⁴⁸ http://online.wsj.com/public/resources/documents/2018_0628_kavanaugh_1998_president_independent_counsel.pdf.

⁴⁹ *Id.*

⁵⁰ <https://www.c-span.org/video/?101056-1/independent-counsel-statute-future>.

⁵¹ <http://prospect.org/article/here%E2%80%99s-how-democrats-can-expose-what-kavanaugh-threatens>.

⁵² 839 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).

⁵³ *Id.* at 5.

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.”⁵⁴ 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.”⁵⁵ 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.

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.”⁵⁶ 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.⁵⁷ 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,⁵⁸ 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*,⁵⁹ 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.⁶⁰

In *Howmet Corp. v. EPA*,⁶¹ 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

⁵⁴ *Id.* at 6.

⁵⁵ 881 F.3d at 77.

⁵⁶ <https://www.rollcall.com/news/politics/democratic-senators-accused-potential-trump-scotus-pick-offering-misleading-testimony>.

⁵⁷ http://voices.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/.

⁵⁸ <https://www.judiciary.senate.gov/meetings/07/12/2018/executive-business-meeting>.

⁵⁹ 696 F.3d 7 (D.C. Cir. 2012).

⁶⁰ 134 S. Ct. 1584 (2014).

⁶¹ 614 F.3d 544 (D.C. Cir. 2010).

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.⁶² 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*,⁶³ 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.⁶⁴ 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."⁶⁵ And he has called *Chevron* "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."⁶⁶ 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*,⁶⁷ 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 Washington, D.C.'s 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

⁶² *Id.* at 553.

⁶³ No. 15-1328 (D.C. Cir. 2017).

⁶⁴ <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3075&context=dlj>.

⁶⁵ <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4733&context=ndlr>.

⁶⁶ <http://harvardlawreview.org/wp-content/uploads/2016/06/2118-2163-Online.pdf>.

⁶⁷ 670 F.3d 1244 (D.C. Cir. 2011).

rifles.”⁶⁸ 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.”⁶⁹ 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.⁷⁰ For example, in *United States v. Askew*,⁷¹ 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*,⁷² 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.”⁷³

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.⁷⁴ For example, in *EMILY’s List v. Federal Election Commission*,⁷⁵ 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*,⁷⁶ he wrote the opinion for two conservative panel members (over a strong dissent) utilizing what Demos and Campaign

⁶⁸ *Id.* at 1269 (Kavanaugh, J., dissenting).

⁶⁹ <https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063>.

⁷⁰ <http://www.pfaw.org/report/the-dissents-of-judge-brett-kavanaugh-a-narrow-minded-elitist-who-is-out-of-the-mainstream/>.

⁷¹ 529 F.3d 1119 (D.C. Cir. 2008).

⁷² 642 F.3d 1161 (D.C. Cir. 2011).

⁷³ *Id.* at 1189 (Kavanaugh, J., dissenting).

⁷⁴ <https://campaignlegal.org/sites/default/files/2018-07/CLC%20Demos%20Kavanaugh%20Brief%207-12-18%209pm.pdf>.

⁷⁵ 581 F.3d 1 (D.C. Cir. 2009).

⁷⁶ 816 F.3d 113 (D.C. Cir. 2016).

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.”⁷⁷

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 can use in private or religious schools.⁷⁸ 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.⁷⁹

In *Santa Fe Independent School District v. Doe*,⁸⁰ 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.”⁸¹ 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 two 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 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

⁷⁷ <https://campaignlegal.org/sites/default/files/2018-07/CLC%20Demos%20Kavanaugh%20Brief%207-12-18%209pm.pdf>.

⁷⁸ 767 So. 3d 668 (2000).

⁷⁹ No. SC04-2323 (S. Ct. Fl., 2006).

⁸⁰ 530 U.S. 290 (2000).

⁸¹ <https://www.au.org/sites/default/files/2018-07/Santa%20Fe%20Independent%20School%20Dist%20v%20Doe%20amicus%20brief.pdf>.

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.”⁸²

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, and, what, if anything, he did to try and stop it. Judge Kavanaugh has reportedly remained close friends with Judge Kozinski since his 1991-1992 clerkship.⁸³ 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. 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.”⁸⁴ 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.”⁸⁵ Judge 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.⁸⁶ 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.⁸⁷ 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

⁸² <https://www.nytimes.com/2018/07/09/opinion/editorials/trump-kavanaugh-supreme-court-senate.html>.

⁸³ <https://abovethelaw.com/2018/07/did-brett-kavanaugh-know-about-alex-kozinski/?rf=1>.

⁸⁴ <https://twitter.com/courtneymilan/status/1016530256411283456>.

⁸⁵ <https://twitter.com/JoannaGrossman/status/939542418638147584>.

⁸⁶ <https://www.politico.com/story/2018/07/09/brett-kavanaugh-vince-foster-files-703344>.

⁸⁷ <https://www.nytimes.com/2018/07/11/us/politics/rosenstein-kavanaugh-document-review-prosecutors.html>.



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
Other organizations in alpha order