



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, it is 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.

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-

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

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,

A handwritten signature in black ink that reads "Trip Van Noppen". The signature is written in a cursive, slightly slanted style. The first name "Trip" is written with a large, sweeping 'T'. The last name "Noppen" is written with a long, horizontal stroke at the end.

Trip Van Noppen
President
Earthjustice