



**REPORT ON THE NOMINATION OF  
JUDGE BRETT KAVANAUGH AS AN  
ASSOCIATE JUSTICE OF THE  
UNITED STATES SUPREME COURT**



**LAWYERS' COMMITTEE FOR  
CIVIL RIGHTS  
U N D E R L A W**

## ABOUT THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The principal mission of the Lawyers' Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity – work that continues to be vital today. Among its major areas of work are Educational Opportunities, Fair Housing & Community Development, Voting Rights, Criminal Justice and Economic Justice. Since its inception, the Lawyers' Committee has been committed to vigorous civil rights enforcement, the pursuit of equal justice under law, and fidelity to the rule of law.

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## **Judge Brett Kavanaugh**

U.S. Court of Appeals for the D.C. Circuit

Nominated July 9, 2018 to the United States Supreme Court

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## EXECUTIVE SUMMARY

On July 9, 2018, President Donald Trump nominated Judge Brett Kavanaugh of the United States Court of Appeals of the District of Columbia Circuit to the United States Supreme Court. Judge Kavanaugh's nomination is intended to fill the seat vacated by the retirement of Associate Justice Anthony Kennedy.

Every term, critical cases on issues of great public importance come before the Supreme Court, including cases concerning the interpretation and application of the Constitution and federal civil rights laws. In evaluating nominees to the Court, the Lawyers' Committee for Civil Rights Under Law ("Lawyers Committee") has employed a rigorous standard with two distinct components: (1) exceptional competence to serve on the Court, and (2) a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws. After reviewing the currently available record of Judge Kavanaugh, we have concluded that there is sufficient cause in the record to strongly oppose Judge Kavanaugh's confirmation.

The Lawyers' Committee believes that Judge Kavanaugh satisfies the first prong of our standard. In applying the second prong of this standard, the Lawyers' Committee requires a demonstrated respect for the importance of protecting civil rights based on authored opinions, statements, and articles. Judge Kavanaugh's record raises serious concerns that he is predisposed to side with employers and business interests in disputes with employees and consumers, with law enforcement at the expense of defendants' constitutional rights, and against administrative agencies. In addition, his record also raises concerns about his positions on voting rights, reproductive rights, marriage equality and other areas of core concern to our focus on issues involving civil rights. Finally, he appears unwilling to commit to ensuring that the Judicial Branch serves as an effective check against overreaching and abuses of power by the Executive Branch. Therefore, because Judge Kavanaugh fails to satisfy the second prong of our evaluation, the Lawyers' Committee strongly opposes this nomination.

The Lawyers' Committee will continue its research into Judge Kavanaugh's record, recognizing that a critical amount of material remains unavailable at this time. We believe it is of the utmost importance that all documents pertaining to Kavanaugh's service in the George W. Bush White House and in the Starr Office of Independent Counsel be released. It is of the utmost importance that the Senate Judiciary Committee thoroughly examine the nominee's judicial philosophy – particularly on issues relating to civil rights, including voting rights; racial and economic justice, including reproductive justice and employment discrimination; affirmative action; fair housing; environmental justice and criminal justice. We look forward to working with the Committee to ensure that a full examination takes place and, based upon the record, we may supplement the information shared in this report.



## INTRODUCTION

Since its creation in 1963 at the urging of President John F. Kennedy, the Lawyers' Committee has been devoted to the recognition and enforcement of civil rights in the United States. For more than four decades, our nation has been transformed as we have taken important strides in confronting racial discrimination and injustice. Yet the challenges of unlawful discrimination remain, with significant inequities and disparities throughout our society, and continue to obstruct and undermine the principle of equal justice for all. Recognizing the Supreme Court's critical role in civil rights enforcement and the central role that civil rights enforcement plays in our democracy, the Lawyers' Committee has long reviewed the record of nominees to the Supreme Court to determine if the nominee demonstrates views that are manifestly hostile to the core civil rights principles for which the Lawyers' Committee has advocated. The Lawyers' Committee specifically evaluates Supreme Court nominees to determine whether the nominee possesses both the exceptional competence necessary to serve on the Court and a profound respect for the importance of protecting civil rights afforded by the Constitution and the nation's civil rights laws.

On July 9, 2018, President Trump nominated Judge Brett Kavanaugh of the United States Court of Appeals for the District of Columbia Circuit to the United States Supreme Court. Judge Kavanaugh was nominated to fill the seat vacated by the resignation of Associate Justice Anthony Kennedy. This report examines Judge Kavanaugh's record on issues central to the mission of the Lawyers' Committee. As Judge Kavanaugh has been on the Court of Appeals for just over twelve years, the analysis is based primarily on the opinions he has authored or joined as a judge on that court though the analysis includes a review of his entire record.

Judge Kavanaugh has served on the United States Court of Appeals for the District of Columbia Circuit since 2006. His 2003 nomination to the D.C. Circuit by President George W. Bush languished in the Senate for nearly three years because of significant concerns that his work on behalf of Kenneth Starr in the Office of Independent Counsel and then on behalf of President George W. Bush in the White House reflected excessive conservative partisanship. In the twelve years since Judge Kavanaugh's confirmation to the D.C. Circuit, he has authored approximately 300 opinions on a wide range of issues.

As discussed in this report, Judge Kavanaugh's opinions in reproductive rights, employment, privacy, criminal justice, voting rights, gun control, and housing, along with his speeches and law review articles, reflect his adherence to a conservative judicial philosophy he describes as "originalism" or "textualism," as well as his criticism of what he has characterized as overreaching by both courts and administrative agencies. Indeed, he has cited recently deceased Justice Antonin Scalia as a "judicial hero" and a "role model." Justice Scalia is the foremost proponent of originalism in the history of the Court and his thirty-year record on the Court demonstrated a strong hostility to civil rights. Judge Kavanaugh's embrace of Justice Scalia and his judicial philosophy is extremely disconcerting because replacing Justice Kennedy with a justice like Justice Scalia would have significant negative ramifications on a number of civil rights issues.

## BIOGRAPHY

Judge Kavanaugh was born in 1965 in Washington, D.C. He attended prestigious Jesuit schools in Washington. He graduated from Yale College in 1987 and from Yale Law School in 1990. While in law school, he was a Notes Editor of the Yale Law Journal. He then served as a law clerk for Judge Walter Stapleton on the Third Circuit (1990-1991) and for Judge Alex Kozinski on the Ninth Circuit (1991-1992). From 1992 to 1993, he served a one-year fellowship in the office of U.S. Solicitor General Kenneth Starr. After his fellowship, he served as a law clerk for Justice Kennedy.

From 1994 to 1997, he worked for Mr. Starr in the Office of Independent Counsel. During that time, he led the investigation into the death of Vince Foster, an aide to President Bill Clinton. From 1997 to 1998, he was a partner at Kirkland & Ellis in Washington, D.C. In 1998, he rejoined the Office of Independent Counsel and helped write the 1998 Starr Report to Congress, which outlined eleven grounds for President Clinton's impeachment. Judge Kavanaugh returned to Kirkland & Ellis in 1999. After the November 2000 Presidential election, he was one of the lawyers on George W. Bush's legal team in the contentious litigation over the disputed Florida vote that culminated in the Supreme Court's decision in *Bush v. Gore*. Judge Kavanaugh once again left Kirkland & Ellis in 2001 to serve as Associate Counsel and then Senior Counsel to President George W. Bush. From July 2003 to May 2006, he served as Assistant to the President and Staff Secretary to the President.

Since joining the D.C. Circuit in 2006, Judge Kavanaugh has taught full-term courses on the Separation of Powers at Harvard Law School (each year from 2008 to 2015); on the Supreme Court at Harvard Law School (2014 and 2016-2018); on National Security and Foreign Relations at Yale Law School (2011); and on Constitutional Interpretation at Georgetown University Law Center (2007). He was named the Samuel Williston Lecturer on Law at Harvard Law School in 2009.

By appointment of the Chief Justice, Judge Kavanaugh serves as a member of the Committee on the Judicial Branch of the Judicial Conference of the United States and as a member of the Advisory Committee on Appellate Rules of the Judicial Conference of the United States. He is a member and past President of the Edward Coke Appellate Inn of Court and is a member of the Edward Bennett Williams Inn of Court. He is also a member of the American Law Institute, Lawyers Club of Washington, John Carroll Society, and Federalist Society.

## ANALYSIS OF JUDGE KAVANAUGH'S RECORD

In the twelve years since Judge Kavanaugh's confirmation to the D.C. Circuit, he has authored approximately 300 opinions on a wide range of issues. In this report we largely focus on his opinions in the following areas: economic justice, including reproductive rights and employment discrimination; affirmative action; environmental justice; criminal justice; voting rights and housing. In addition, in order to assess how Judge Kavanaugh's approach might impact his analysis of civil rights claims, the Lawyers' Committee reviewed cases that, while not directly addressing core civil rights claims, deal with issues that often are implicated in civil rights cases. We have also examined his work as a lawyer and statements he has made that implicate civil rights issues.

### ECONOMIC JUSTICE

During his time on the bench, Judge Kavanaugh has repeatedly ruled against workers and their families. He has demonstrated an undue deference to employers, including religious employers, and a hostility towards workers and their right to exercise their statutory rights, including the right to privacy, to organize, to be protected from discrimination, and to a safe workplace.

#### *Access to Healthcare and Reproductive Rights*

Healthcare and reproductive rights are of significant concern to communities of color. Poor people, who are disproportionately minorities, have faced systemic barriers to access health care, which has implications for mortality rates, quality of life, and economic security. In 2013, prior to the implementation of the Affordable Care Act ("ACA"), 25.8% of Blacks and 40.5% of Hispanics were uninsured, compared with 14.8% of whites. Within the first year of the ACA, the percentage of adults who were uninsured decreased by 5.1 percent for Blacks, 7.1 percent for Hispanics, and 3 percent for whites.<sup>1</sup> In addition, because of the ACA, over 15 million women of color now have private insurance coverage for preventive services, including no-cost contraceptives which lets them better plan their personal and professional lives. Access to affordable contraception is essential to the health, economic security, autonomy and equality of low-income women of color, who are at higher risk for unintended pregnancy. Abortion rights are another critical issue for minority communities because if the Supreme Court were to overturn *Roe v. Wade*, women of color, particularly African-American women, would be disproportionately affected, as many of them live in states that would likely criminalize abortions and, because of poverty, they would be limited in their opportunities to travel to a state where abortions are legal.

Judge Kavanaugh's opinions and statements related to health care and reproductive rights suggest he is likely to rule adversely to the interests of those the Lawyers' Committee seeks to protect. In *Seven-Sky v. Holder*,<sup>2</sup> a challenge to the ACA, Judge Kavanaugh dissented from the panel decision upholding the constitutionality of the ACA. In his dissent, Judge Kavanaugh took the startling position that a president can decline to enforce the individual mandate provision of the ACA even if a court has upheld it as constitutional, "if the President concludes that enforcing it would be

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<sup>1</sup> Thomas C. Buchmueller et al., *Effect of the Affordable Care Act on Racial and Ethnic Disparities in Health Insurance Coverage*, 106 AM. JOURNAL OF PUB. HEALTH 1416, 1416–21 (2016).

<sup>2</sup> 661 F.3d 1 (D.C. Cir. 2011).



unconstitutional.”<sup>3</sup> This position demonstrates the extreme deference Kavanaugh would grant the executive branch regarding implementation of the ACA, and more generally.

Judge Kavanaugh’s dissent in *Priests for Life v. U.S. Department of Health & Human Services*<sup>4</sup> demonstrates he would be exceedingly receptive to the religious objections of employers to the detriment of employees’ rights. During the Obama Administration, the ACA provided that a religious organization could obtain an exemption from the Act’s mandate that employers pay for employees’ contraception coverage if it submitted a form to its insurer or a letter to DHS with certain required information. In *Priests for Life*, a religious organization challenged that practice, alleging that submitting the required form or letter violated its religious beliefs because it would make the organization complicit in providing contraceptive coverage. The District Court granted the Government’s motion to dismiss, and appellants filed an emergency appeal. The D.C. Circuit held that the ACA’s regulatory accommodation for religious nonprofits (requiring submission of a form or letter) was the least restrictive means of furthering the Government’s compelling interest in facilitating access to contraception.<sup>5</sup> Appellants petitioned for a rehearing, and the D.C. Circuit denied the petition in a three- sentence per curiam decision.<sup>6</sup> Judge Kavanaugh authored a dissenting opinion, which explained that he would both grant the petition for rehearing and find in favor of the religious organization.<sup>7</sup> In his view, “the regulations substantially burden the religious organizations’ exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties.”<sup>8</sup>

Judge Kavanaugh’s dissent in *Priests for Life* is significant because it signals how he may rule if the various challenges to the Trump administration’s birth control mandate rollbacks reach the Supreme Court. Regulations adopted by the Trump administration last year exempt any employer (including large corporations) with a religious or moral objection to contraception from providing birth control coverage for their employees.

Just last year, in *Garza v. Hargan*, the D.C. Circuit considered whether the Government was required to allow an undocumented minor to obtain an abortion while in government custody in Texas. The trial court ruled in favor of the minor, but in a panel decision written by Judge Kavanaugh, the Court of Appeals reversed.<sup>9</sup> Judge Kavanaugh wrote that the Government could delay providing access to the abortion while it attempted to find a sponsor to whom it could release the minor. However, as Judge Millett subsequently pointed out in her concurring opinion supporting the D.C. Circuit’s *en banc* ruling vacating Judge Kavanaugh’s decision, “the sponsorship process is anything but expeditious,” the sponsorship search had already been underway for nearly seven weeks before the panel’s ruling; and the Government “never requested

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<sup>3</sup> *Id.* at 50 (Kavanaugh, J., dissenting).

<sup>4</sup> 772 F.3d 229 (D.C. Cir. 2014).

<sup>5</sup> *Id.*

<sup>6</sup> 808 F.3d 1, 1 (D.C. Cir. 2015).

<sup>7</sup> *Id.* at 14.

<sup>8</sup> *Id.* at 15. However, we note that Judge Kavanaugh did state in his dissent that the Government has a compelling interest in ensuring that women have access to contraception. See *id.* at 22–23. He should be asked at his confirmation hearing whether he is prepared to stand by that statement.

<sup>9</sup> *Garza v. Hargan*, No. 17-5236, 2017 WL 9854552, at \*1–2 (D.C. Cir. Oct. 20, 2017), *rev’d*, 874 F.3d 735 (D.C. Cir. 2017).

a stay to find a sponsor” and “never suggested in briefing or oral argument that there was any prospect of finding a sponsor at all.”<sup>10</sup> The *en banc* majority allowed the minor to proceed with the abortion.<sup>11</sup>

Judge Kavanaugh wrote an impassioned dissent, characterizing the majority’s decision as recognizing “a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.”<sup>12</sup> He wrote that “the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion.”<sup>13</sup> He also wrote:

It is undoubtedly the case that many Americans – including many Justices and judges – disagree with one or another aspect of the Supreme Court’s abortion jurisprudence. From one perspective, some disagree with cases that allow the Government to refuse to fund abortions and that allow the Government to impose regulations such as parental consent, informed consent, and waiting periods. That was certainly the position of Justices Brennan, Marshall, and Blackmun in many cases. From the other perspective, some disagree with cases holding that the U.S. Constitution provides a right to an abortion.

As a lower court, our job is to follow the law as it is, not as we might wish it to be. The three-judge panel here did that to the best of its ability, holding true to the balance struck by the Supreme Court. The *en banc* majority, by contrast, 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.<sup>14</sup>

In addition to the foregoing opinions, we note that at his 2006 Senate Judiciary Committee confirmation hearing, Judge Kavanaugh refused to express a personal view on *Roe v. Wade*, but testified as follows:

If confirmed to the DC Circuit, I would follow *Roe v. Wade* faithfully and fully. That would be binding precedent of the court. It has been decided by the Supreme Court. . . . It has been reaffirmed many times...<sup>15</sup>

Of course, while a lower court judge is bound by Supreme Court precedent, a Justice of the Supreme Court is free to vote in favor of abandoning prior precedent. In Judge Kavanaugh’s 2017

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<sup>10</sup> *Garza v. Hargan*, 874 F.3d 735, 739, (D.C. Cir. 2017).

<sup>11</sup> *Id.* at 736.

<sup>12</sup> *Id.* at 752.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 756. Notably, Judge Kavanaugh did not join the dissent written by Judge Henderson, which berated the Government for failing to argue that, as a non-citizen, the teenager had no right to an abortion in the first place. *Id.* at 743.

<sup>15</sup> Confirmation Hearing on the Nomination of Brett M. Kavanaugh to be Circuit Judge for the District of Columbia Circuit, 109th Cong. 16 (2006).

speech at the American Enterprise Institute<sup>16</sup> he pointed out that Chief Justice Rehnquist's view that abortion was neither a fundamental right enumerated in the Constitution nor deeply rooted in history and tradition was rejected by a majority of the Court in *Roe v. Wade* and again in *Planned Parenthood v. Casey*. However, Judge Kavanaugh also noted that Chief Justice Rehnquist's view that the "right to die" was neither an enumerated right nor deeply rooted in history and tradition was adopted by the 5-4 majority in *Washington v. Glucksberg*, in an opinion authored by Chief Justice Rehnquist.<sup>17</sup> Significantly, Judge Kavanaugh endorsed Chief Justice Rehnquist's position in each of these cases:

[C]hanges to the constitutional laws are to be made by the people through the amendment process and, where appropriate, through the legislative process – not by the courts snatching that constitutional or legislative authority for themselves.

\* \* \*

Of course, even 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*.

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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*, in the latter case perhaps because of *stare decisis*. But he [Rehnquist] 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. The *Glucksberg* case stands to this day as an important precedent, limiting the Court's role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy.

Judge Kavanaugh's opinions and other writings with respect to reproductive rights have raised substantial concerns about whether he would vote to overturn *Roe v. Wade*. This threat is one that has a starker impact on women of color who face greater barriers than whites in accessing reproductive health care services in our country.

### *Employment Discrimination*

A comprehensive review of his employment discrimination decisions reveals that Judge Kavanaugh more frequently than not has ruled in favor of employers. For example, in *Adeyemi v. District of Columbia*,<sup>18</sup> Judge Kavanaugh authored an opinion affirming summary judgment

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<sup>16</sup> Brett Kavanaugh, Remarks at the American Enterprise Institute, From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist (Sept. 18, 2017), transcript available at <https://www.aei.org/wp-content/uploads/2017/08/from-the-bench.pdf>.

<sup>17</sup> 521 U.S. 702 (1997).

<sup>18</sup> 525 F.3d 1222 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1036 (2008).

against the plaintiff, who brought an Americans with Disabilities Act claim for failure-to-hire. Judge Kavanaugh rejected the plaintiff's challenge to the employer's assessment of his job qualifications, stating, "In cases where the comparative qualifications are close, a reasonable jury would not usually find discrimination because the jury would 'assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call.'" <sup>19</sup> He went on to emphasize that courts must "respect the employer's unfettered discretion to choose among qualified candidates" <sup>20</sup> because to do otherwise "would be to render the judiciary a super-personnel department that reexamines an entity's business decisions – a role we have repeatedly disclaimed." <sup>21</sup>

In *Baloch v. Kempthorne*, <sup>22</sup> Judge Kavanaugh wrote an opinion affirming summary judgment for the employer in a case brought under Title VII and the Age Discrimination in Employment Act ("ADEA"). The plaintiff alleged that a change in his substantive duties constituted an adverse employment action. Rejecting this argument, Judge Kavanaugh wrote that "[a]n adverse employment action does not occur merely because an employer adds more people to the team assigned to a particular task, particularly when the addition simply brings the team back to its former numbers." <sup>23</sup> Significantly, he concluded that "we have previously underscored our hesitancy to engage in 'judicial micromanagement of business practices' by second-guessing employers' decisions about 'which of several qualified employees will work on a particular assignment.'" <sup>24</sup>

Judge Kavanaugh's willingness to exempt a broad category of employees from anti-discrimination protections under federal law in *Miller v. Clinton*, <sup>25</sup> is particularly instructive and alarming. In *Miller*, the majority opinion held that the ADEA barred the State Department from imposing a mandatory retirement age on U.S. workers abroad and terminating an employee solely because he turned 65. <sup>26</sup> The State Department argued that the ADEA did not apply to American workers employed overseas. In its decision, the majority observed that the State Department's reasoning would extend beyond the ADEA to other statutes, and allow the Department to discriminate against employees on the basis of other protected categories, like race. <sup>27</sup> The opinion went on to say, "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." <sup>28</sup>

Judge Kavanaugh, however, dissented, finding that antidiscrimination laws did not apply to contract workers employed overseas by the State Department. <sup>29</sup> Notably, although Judge Kavanaugh posited that the Constitution would still bar the State Department from discriminating

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<sup>19</sup> *Id.* at 1227 (quoting *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc)).

<sup>20</sup> *Id.* at 1227 (quoting *Fischbach v. D.C. Dept. of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996)).

<sup>21</sup> *Id.* at 1227 (quoting *Jackson v. Gonzales*, 496 F.3d 703, 707 (D.C. Cir. 2007)).

<sup>22</sup> 550 F.3d 1191 (D.C. Cir. 2008).

<sup>23</sup> *Id.* at 1197.

<sup>24</sup> *Id.* (quoting *Mungin v. Katten*, 116 F.3d 1549, 1556 (D.C. Cir. 1997)).

<sup>25</sup> 687 F.3d 1332 (D.C. Cir. 2012).

<sup>26</sup> *Id.* at 1340.

<sup>27</sup> *Id.* at 1338.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1354–55.

against workers abroad “on the basis of race, sex, or religion” even if antidiscrimination laws did not apply,<sup>30</sup> his analysis would allow the Department to discriminate based on disability or other classifications that do not trigger heightened scrutiny. Judge Kavanaugh’s willingness to read such a broad civil rights exemption into an ambiguous statute related to government procurement and contracting is cause for great concern. Employment discrimination protections under federal law are vital to ensure that employees from underrepresented groups are treated fairly by employers. Judge Kavanaugh’s nomination poses a real threat to these critical protections.<sup>31</sup>

### *Workers’ Right to Organize*

A review of Judge Kavanaugh’s opinions in labor law cases further bolsters his hostility to workers’ rights and his willingness to undermine protections for the most vulnerable workers, including undocumented workers. In *Agri Processor Co. Inc. v. NLRB*,<sup>32</sup> Judge Kavanaugh disregarded longstanding Supreme Court precedent that undocumented workers “plainly come within the broad statutory definition of employee”<sup>33</sup> under the National Labor Relations Act (“NLRA”) in his dissent, stating he would have held the opposite – “that an illegal immigrant worker is *not* an ‘employee’ under the NLRA.”<sup>34</sup>

In *Agri Processor*, union members filed an unfair practice charge against their employer, a meat processor company, after it refused to bargain with the union.<sup>35</sup> The court noted that after the successful election, the “company ... put the Social Security numbers given by all the voting employees into the Social Security Administration’s online database and discovered that most of the numbers were either nonexistent or belonged to other people.”<sup>36</sup> The company argued that most of the workers were undocumented and that undocumented workers 1) did not count as “employees” protected by the NLRA, and 2) could not belong to the same bargaining unit as legal workers.<sup>37</sup> The administrative law judge and the National Labor Relations Board (“NLRB”) rejected these arguments based on established Supreme Court precedent.<sup>38</sup> On review, the Circuit Court’s majority opinion explained that neither the Immigration Reform and Control Act of 1986 (“IRCA”) (law that requires employers to check employees’ authorization to work in the United States) nor subsequent case law called that holding into question.<sup>39</sup>

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<sup>30</sup> *Miller*, 687 F.3d at 1359.

<sup>31</sup> There are employment discrimination cases where Judge Kavanaugh upheld the rights of workers. In *Ayissi-Etoh v. Fannie Mae*, Judge Kavanaugh joined the majority opinion to hold that a supervisor’s use of an unambiguous racial epithet such as the n-word could constitute a hostile work environment. 712 F.3d 572, 577 (D.C. Cir. 2013). In his concurrence, Judge Kavanaugh noted that even a single verbal incident, if sufficiently severe, can create a hostile work environment actionable under Title VII. *Id.* at 579–80 (Kavanaugh, J., concurring). His statement is consistent with well-settled Title VII law. And in *Ortiz-Diaz v. United States Department of Housing & Urban Development, Office of the Inspector General*, Judge Kavanaugh urged the D.C. Circuit to establish that “all discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII,” reasoning that Title VII plainly prohibits an employer from transferring, or not transferring, an employee because of her race. 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

<sup>32</sup> 514 F.3d 1 (D.C. Cir. 2008).

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* at 14 (Kavanaugh, J., dissenting).

<sup>35</sup> *Id.* at 2.

<sup>36</sup> *Id.* at 2-3.

<sup>37</sup> *Id.*

<sup>38</sup> See *Sure-Tan, Inc., v. NLRB*, 467 U.S. 883, 891–92 (1984).

<sup>39</sup> *Agri Processor*, 514 F.3d at 8.

In his dissent, Judge Kavanaugh erroneously argued that in passing the IRCA Congress had rejected the Court's reading of the NLRA and had changed the employment relationship between employers and undocumented workers.<sup>40</sup> This is despite the fact that neither the IRCA nor any other legislation amended the relevant provisions of the NLRA. Judge Kavanaugh also went out of his way to explain why the undocumented workers' votes should not, as a policy matter, be counted in union elections -- both "legal workers, whose votes may have been diluted," and the employer, "who may have to bargain with a union that would not have been certified but for the votes of the illegal immigrant workers," would have reason to seek to disqualify the votes.<sup>41</sup> Again, Judge Kavanaugh demonstrates an indifference not only to the rights of employees (here, undocumented employees working at a meat processing factory seeking to improve their terms and conditions of employment by exercising their right to organize), but also to existing Supreme Court precedent.

### *Employee Privacy Rights*

In *National Association of Federal Employees v. Vilsack*,<sup>42</sup> Judge Kavanaugh dissented from the majority opinion holding that a random drug-testing program for government employees who worked in residential Job Corps centers required a showing of individualized suspicion under the Fourth Amendment before a drug test could be performed.<sup>43</sup> Calling the Forest Service's drug-testing policy "a solution in search of a problem," the court held that the Government had not offered any "foundation for concluding there is a serious drug problem among staff that threatens these interests and thus renders the requirement for individualized suspicion impractical."<sup>44</sup> Judge Kavanaugh, however, argued that drug testing of the employees was reasonable "to protect the public from harm" and that drug testing, "while no doubt intrusive and annoying," was not an invasion of privacy because it "entails only a urine sample produced in private."<sup>45</sup> Judge Kavanaugh's view was that "it is reasonable to test; indeed it would seem negligent not to test."<sup>46</sup> His dissent in this case signals an expansive and troubling view of the Government's ability to conduct warrantless searches where an agency makes a vague "special needs" claim that is not based on evidence of unlawful behavior. This is of particular concern to people of color, who are more likely to be profiled and subjected to these types of tests without individualized suspicion.

### *Work Safety*

In *SeaWorld of Florida, LLC v. Perez*,<sup>47</sup> Dawn Brancheau, an animal trainer at SeaWorld in Orlando with more than 14 years of experience, was working with a killer whale that injured and drowned her during a performance. The Occupational Safety and Health Administration ("OSHA") investigated Brancheau's death and found cause to issue citations under OSHA's general duty clause, which, in the absence of a specific standard covering the incident, authorizes OSHA to impose penalties and order abatement if the employer willfully failed its duty to keep

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<sup>40</sup> *Id.* at 12–14 (Kavanaugh, J., dissenting).

<sup>41</sup> *Id.* at 15.

<sup>42</sup> 681 F.3d 483 (D.C. Cir. 2012).

<sup>43</sup> *Id.* at 485–86.

<sup>44</sup> *Id.* at 486.

<sup>45</sup> *Id.* at 500–01 (Kavanaugh, J., dissenting).

<sup>46</sup> *Id.*

<sup>47</sup> 748 F.3d 1202 (D.C. Cir. 2014).



the workplace free of “recognized hazards” likely to cause death or serious physical harm.<sup>48</sup> The D.C. Circuit panel affirmed OSHA’s penalties by a 21 vote, with Judge Kavanaugh dissenting. Writing for the court, Judge Judith Rogers found that the orcas were a recognized hazard that the employer could have protected against by taking the measures that OSHA specified in its citation against the employer.<sup>49</sup> The court rejected the employer’s argument that the trainers had “formally accepted and controlled their own exposure to risk.”<sup>50</sup> The court reasoned that decades of precedent make clear that OSHA was meant to displace “such common law doctrines as assumption of risk, contributory negligence, or comparative negligence.”<sup>51</sup> Judge Kavanaugh wrote a dissent, likening the training of killer whales to participation in sports and other dangerous activities performed for entertainment purposes:

[T]he bureaucracy at the U.S. Department of Labor has not traditionally been thought of as the proper body to decide whether to ban fighting in hockey, to prohibit the punt return in football, to regulate the distance between the mound and home plate in baseball, to separate the lions from the tamers at the circus, or the like.

\* \* \*

The Department cannot reasonably distinguish close contact with whales at SeaWorld from tackling in the NFL or speeding in NASCAR.<sup>52</sup>

Judge Kavanaugh goes on to ask: “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?” Based on that premise, Judge Kavanaugh would have held that the Department of Labor had no authority to regulate SeaWorld based on the danger posed by working with killer whales.<sup>53</sup> His dissent is an additional indicator of the judge’s philosophy of providing extreme deference to employer decisions and conduct, even in cases where negligence results in the death of an employee.

## HOUSING

In *Greater New Orleans Fair Housing Action Center v. HUD*,<sup>54</sup> Judge Kavanaugh joined the majority opinion rejecting the African-American plaintiffs’ disparate-impact claim that the formula used for a grant program to help homeowners rebuild after hurricanes violated the anti-discrimination provisions of the Fair Housing Act (“FHA”). Community housing groups argued that the relief calculation disadvantaged African-American homeowners by, among other things, tying the grant ceiling to the pre-Katrina home values and leaving them to shoulder a higher cost

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<sup>48</sup> *Id.* at 1205.

<sup>49</sup> *Id.* at 1208–09.

<sup>50</sup> *Id.* at 1211.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1217, 1221 (Kavanaugh, J., dissenting).

<sup>53</sup> *Id.* at 1222.

<sup>54</sup> 639 F.3d 1078 (D.C. Cir. 2011).

deficit.<sup>55</sup> The court could have rested on its conclusion that “plaintiffs’ facts are at best sketchy even on the implausible resource-gap theory” that plaintiffs suggested as a benchmark. But the opinion went further to point out that greater consideration of the racial impact of a grant formula on minorities raises questions about treatment of whites:

Choice of a benchmark is further complicated by uncertainty whether one need consider only the impact on minority groups. As Title VII permits white employees to bring job discrimination claims, white grant recipients might, on the size-of-grant standard, be able to make a *prima facie* case of disparate impact. In the face of this legal uncertainty, adoption of the size-of grant benchmark would put OCD—and other agencies trying to develop formulae for comparable grants—in a damned-if-you-do, damned-if-you-don’t quandary.<sup>56</sup>

The opinion reveals a troubling approach to 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.”<sup>57</sup> 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.”<sup>58</sup> The court even stated that “the \$150,000 cap on total grants seemed to disfavor wealthier (and therefore, according to the [plaintiff’s] study, disproportionately white) grant recipients.”<sup>59</sup> Beyond dismissing the plaintiffs’ claim, the opinion launched wide-ranging attacks on the ability to prove disparate impact in any case, by undermining 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 panel 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.”<sup>60</sup> The Supreme Court has upheld the right of plaintiffs to bring disparate impact claims in many situations, as an important means of establishing liability when discriminatory intent is difficult to prove. The majority’s attack on disparate impact claims, joined by Judge Kavanaugh, appeared to be gratuitous because it attempted to undermine disparate impact theory without providing any guidance for future disparate impact cases.

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<sup>55</sup> *Id.* at 1081.

<sup>56</sup> *Id.* at 1088.

<sup>57</sup> *Id.* at 1086.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1093.

## CRIMINAL JUSTICE - FOURTH AMENDMENT RIGHTS

The protections of the Fourth Amendment are particularly important for minority communities whose members are often subject to unwarranted suspicion (resulting in intrusive stops, frisks or searches) by law enforcement. Judge Kavanaugh has shown a troubling deference to law enforcement officers and has minimized the Fourth Amendment rights of individuals in our most vulnerable communities.

In *U.S. v. Askew*,<sup>61</sup> police officers received a radio call to look for a suspected armed robber. The suspect was described as “a black male, approximately six-feet tall, wearing a blue sweatshirt and blue jeans.”<sup>62</sup> The officers soon stopped Askew, a 6’3 black male whose clothing was similar, but not identical, to that described over the call (he was wearing blue sweatpants and two jackets). The officers stopped Askew and conducted a *Terry* frisk, which yielded nothing. After the frisk was completed, the complaining witness was brought to the scene. The officers moved Askew so that the witness could see him and possibly identify him as the assailant. As part of the show-up, one of the officers attempted to unzip Askew’s outer jacket. Askew did not consent to the unzipping (the officer never asked). The officer had difficulty unzipping the jacket because the zipper hit a “hard” or “solid” object at Askew’s waist. At this point, Askew pushed the officer’s hand away from the jacket. The complaining witness did not identify Askew as the assailant. However, “the police officers continued to detain him, walked him backwards towards a police vehicle, placed him on the hood of the car, and then fully unzipped his jacket.”<sup>63</sup> At this point, the officers found a gun in Askew’s waist and arrested him.<sup>64</sup>

The District Court denied Askew’s motion to suppress. A divided Circuit panel affirmed the District Court’s ruling. The Circuit then reheard the case *en banc*. The panel held that Askew had a reasonable expectation of privacy. The panel relied on *Minnesota v. Dickerson*, which held that “non-protective evidentiary searches are not permissible during *Terry* stops.” The panel found the facts involving Askew to be “essentially indistinguishable” from the facts present in *Dickerson*. Thus, the panel held the search of Askew violated his reasonable expectation of privacy.

Judge Kavanaugh dissented from this *en banc* opinion. In his dissent, Judge Kavanaugh adopted the Government’s argument to dramatically expand *Terry* stops and seizures by allowing officers to “maneuver” a suspect’s clothing—or, in Askew’s case, to unzip his jacket—to facilitate identification procedures. Judge Kavanaugh sees such activities as part of his expansive notion of “reasonableness.”<sup>65</sup> To him, it was reasonable for the officers to unzip Askew’s jacket during the show-up procedure, even though this action constituted a search, which is outside the traditional territory of a *Terry* stop or seizure, or of an identification procedure.

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<sup>61</sup> 529 F. 3d 1119, 1124 (D.C. Cir. 2008).

<sup>62</sup> *Id.* at 1125.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1134.

## VOTING

In late 2011, the Obama Justice Department exercised its authority under the Voting Rights Act to block a new South Carolina law that required voters to present photo identification, asserting that the law would disproportionately suppress turnout among eligible minority voters. South Carolina was one of more than a dozen states that enacted new voting restrictions in 2011, including eight states that passed variations of a law requiring photo identification. The challenge to the South Carolina law was the first time the Justice Department had exercised its power under the Voting Rights Act to block a voter identification law since 1994. The Justice Department noted that 6-8% of African-American voters in South Carolina lacked a photo ID, compared with 4% of white voters.

In response to the Justice Department's action, South Carolina asked the federal court in the District of Columbia to give preclearance to its photo ID law pursuant to Section 5 of the Voting Rights Act. Judge Kavanaugh's opinion for the Court, rendered in October 2012, blocked the law from being used in the election the following month in order to afford more time for voters and voting officials to learn about it, but allowed the law to be used in future elections.<sup>66</sup> His opinion concluded that the law was not discriminatory, and that states have broad leeway to restrict their voting laws: "many states-particularly in the wake of the voting system problems exposed during the 2000 elections-have enacted stronger voter ID laws. . ."<sup>67</sup>

In other cases relating to election law issues, Judge Kavanaugh has upheld a ban on political contributions by persons in the United States on temporary work visas;<sup>68</sup> invalidated on First Amendment grounds regulations preventing nonprofits from spending soft money on election-related activities;<sup>69</sup> rejected a claim by the Republican National Committee that it should be allowed to accept large soft-money contributions so long as they are used to fund issue ads or state and local election campaigns;<sup>70</sup> and joined in an opinion vindicating the District of Columbia's practice of not tabulating and reporting write-in votes by candidate.<sup>71</sup>

## ENVIRONMENTAL JUSTICE

Judge Kavanaugh has overturned Environmental Protection Agency ("EPA") regulations to protect the air we breathe and water we drink, because he deemed them too expensive for corporations. In *EME Homer City Generation, L.P. v. EPA*,<sup>72</sup> 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 implement the required reductions. Both these conclusions were rejected by the Supreme Court, which upheld the pollution rule on a 6-2 vote.<sup>73</sup>

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<sup>66</sup> *South Carolina v. U.S.*, 898 F.Supp.2d 30, 48–51 (D.D.C. 2012).

<sup>67</sup> *Id.* at 44.

<sup>68</sup> *Bluman v. Federal Election Comm'n*, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

<sup>69</sup> *Emily's List v. Federal Election Comm'n*, 581 F.3d 1 (D.C. Cir. 2009).

<sup>70</sup> *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 153 (D.D.C. 2010), *aff'd*, 561 U.S. 1040 (2010).

<sup>71</sup> *Libertarian Party v. D.C. Bd. of Elections & Ethics*, 682 F.3d 72, 76–77 (D.C. Cir. 2012).

<sup>72</sup> 696 F.3d 7, 11–12 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1584 (2014).

<sup>73</sup> *EME Homer City Generation, L.P. v. EPA*, 134 S. Ct. 1584, 1609–10 (2014).

In a decision authored by Justice Ruth Bader Ginsburg, the Court concluded that Judge Kavanaugh's analysis failed to take into account the complexities of air pollution and would create a standard that's nearly impossible to meet. "Nothing in the text" of the Clean Air Act "propels EPA down this path," she wrote, noting that Judge Kavanaugh's view "could scarcely be satisfied in practice."

Justice Kavanaugh's willingness to rule for businesses seeking to avoid compliance with EPA regulations will disproportionately harm communities of color. A recent report from the EPA found that people of color are much more likely than whites to live near polluters and breathe polluted air. They found that African-Americans are exposed to about 1.5 times more particulate matter than white people, and that Hispanics had about 1.2 times the exposure of non-Hispanic whites. The study found that people in poverty had about 1.3 times more exposure than people above poverty.<sup>74</sup>

## AFFIRMATIVE ACTION

The issue of affirmative action in college admissions will likely be before the Supreme Court in the next few years as cases involving challenges of the affirmative action plans of Harvard University and the University of North Carolina will be tried in the next several months. The Lawyers' Committee is actively involved in the defense of those cases, representing intervenor-defendants in the North Carolina case and representing students serving as *amicus* with additional participation rights in the *Harvard* case. Justice Kennedy served as the fifth vote upholding the constitutionality of Texas's affirmative action plan in *Fisher v. Texas*.<sup>75</sup>

Judge Kavanaugh has espoused a concept of color-blindness that is incompatible with the existing law permitting the limited consideration of race in university admissions to achieve diversity. In a September 1999 *Wall Street Journal* editorial, Judge Kavanaugh dismissed the struggle of Indigenous Hawaiians to be recognized as a sovereign nation with a call for the Supreme Court to "adhere to the fundamental constitutional principle most clearly articulated by Justice Antonin Scalia: 'Under our Constitution there can be no such thing as either a creditor or a debtor race . . . In the eyes of government, we are just one race here. It is American.'"<sup>76</sup> That editorial was written in conjunction with an amicus brief Judge Kavanaugh wrote with the Center for Equal Opportunity, and Robert Bork, noted opponents of affirmative action.<sup>77</sup> In an interview with the *Christian Science Monitor* about the case just before the Supreme Court argument, Judge Kavanaugh stated that "this 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."<sup>78</sup> This position surely would reject any efforts at affirmative action in hiring, education, or housing, which would be a setback for minorities and people of color.

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<sup>74</sup> Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Levels*, 108 AM. JOURNAL OF PUB. HEALTH 480–85 (2018), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304297>.

<sup>75</sup> 136 S.Ct. 2198 (2016).

<sup>76</sup> Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL ST. J., Sept. 27, 1999, at A35.

<sup>77</sup> 528 U.S. 495 (2000).

<sup>78</sup> Warren Richey, *New Case May Clarify Court's Stand on Race*, CHRISTIAN SCIENCE MONITOR, Oct. 6, 1999, at 3.

## COURT REVIEW OF PROCESSES RELATING TO INVESTIGATING THE PRESIDENT

Both Congress and the courts have struggled with how to reconcile the Article II power of the President with a fair and thorough investigation of the President or his close associates. Our country is currently facing a test of its constitutional principles and the proper course to follow when the President and his close associates are under investigation. There is a significant possibility that the courts will soon deal with a subpoena issued to the President for his testimony. The Supreme Court has never addressed whether such a subpoena is enforceable while the President is in office. However, there are relevant precedents that shed light on how Judge Kavanaugh might decide such a case.

The Independent Counsel statute, which was in place during the investigation of President Nixon, was upheld by a unanimous Supreme Court in *Morrison v. Olson*.<sup>79</sup> That statute was subsequently repealed in favor of the appointment of a Special Counsel by the Department of Justice (DOJ) who would have broad discretion in conducting an investigation, subject only to limited oversight by the DOJ. In *Nixon v. United States*, the Supreme Court rejected President Nixon's argument that executive privilege enabled him to withhold production of secret White House tape recordings.<sup>80</sup> Accordingly, we believe that Judge Kavanaugh's perspectives on *Morrison v. Olson*, *United States v. Nixon*, and related questions are relevant in determining how he would approach the current investigation of the President and his campaign.

In a 2016 interview televised on C-SPAN, Judge Kavanaugh was asked whether there were any Supreme Court decisions that should be overruled. He said "I'm going to say one. *Morrison v. Olson*. It's been effectively overruled, but I would put the final nail in the coffin."<sup>81</sup> Judge Kavanaugh has also questioned whether the unanimous decision of the Court in *United States v. Nixon* was correctly decided. In a 1999 lawyer roundtable, 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." Judge Kavanaugh's statements about these two cases are cause for concern. Overturning these decisions could allow Presidents to shield from investigation executive wrongdoing by the President or other executive officials close to the President.

## CONCLUSION

In evaluating nominees for the Supreme Court, the Lawyers' Committee for Civil Rights Under Law requires a demonstrated respect for the importance of protecting civil rights as evidenced by judicial opinions as well as the nominee's statements, scholarly articles or other sources of information. Based upon our review, we believe that Judge Kavanaugh's views reflect a very narrow definition of what constitutes a civil right and an undue skepticism about the importance of protecting those rights in the courtroom. Judge Kavanaugh's record raises serious concerns that he would weaken voter, anti-discrimination and environmental protections, limit reproductive

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<sup>79</sup> 487 U.S. 654 (1988).

<sup>80</sup> 418 U.S. 683 (1974).

<sup>81</sup> Interview by Paul Gigot with Brett Kavanaugh, C-SPAN, March 31, 2016, <https://www.c-span.org/video/?407491-1/discussion-politics-supreme-court>.



rights and access to quality healthcare and insulate the President and the Government from the rule of law. For these reasons, the Lawyers' Committee for Civil Rights Under Law opposes the nomination of Judge Brett Kavanaugh. It is of the utmost importance that the Senate Judiciary Committee thoroughly examine the nominee's judicial philosophy – particularly on issues relating to civil rights including voting rights, racial and economic justice, employment discrimination, reproductive rights, fair housing, criminal justice, environmental justice, and affirmative action. We look forward to working with the Senate Judiciary Committee to ensure that a full and thorough examination takes place.

*“Simply put, we do not find that Judge Kavanaugh brings a commitment to protecting and safeguarding civil rights. The Supreme Court has always occupied a central place in American democracy as the arbiter of some of the most impactful cases that typically arise across our country. We urge the Senate to focus on Kavanaugh's record concerning the interpretation and application of the constitution and federal civil rights laws. We make this request recognizing that hundreds of thousands of documents concerning Kavanaugh's time at the White House remain outstanding, significantly impairing the ability of the Senate to carry out its constitutional obligation to provide advice and consent.”*

Kristen Clarke

President and Executive Director

Lawyers' Committee for Civil  
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