



THE CIVIL RIGHTS RECORD OF JUDGE BRETT KAVANAUGH

A REPORT BY THE NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.

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INTRODUCTION

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Founded by Thurgood Marshall in 1940, LDF has worked to pursue racial justice and eliminate structural barriers for African Americans in the areas of criminal justice, economic justice, education, and political participation for over 75 years. Many of LDF's historic victories have been in the United States Supreme Court, and other federal courts. In fact, LDF has been involved in over 700 cases before the United States Supreme Court, a docket second only to the United States Department of Justice (DOJ). In landmark LDF cases such as *Brown v. Board of Education*,¹ *Newman v. Piggie Park Enterprises, Inc.*,² *Swann v. Charlotte-Mecklenburg Board of Education*,³ and many others, the Supreme Court's decisions have transformed the meaning of equality and justice for millions of Americans. LDF is committed to protecting the central role that courts play in the enforcement of civil rights laws and the Constitution's guarantee of equal protection and other foundational rights. Because the replacement of a Justice on the Supreme Court can change the Court's balance and dynamic in both subtle and dramatic ways, each nomination is extraordinarily important to the future direction of our country. For these reasons, LDF plays an active role in evaluating nominations to federal courts, and in particular, the United States Supreme Court.

As a fundamental part of its evaluation, LDF reviews the record of Supreme Court nominees to analyze their legal views and positions. In particular, LDF considers whether the nominee has demonstrated a commitment to faithfully applying civil rights statutes and adhering to established constitutional interpretations that have allowed our country to make critical, if incomplete, progress toward becoming a more just society. The purpose of our analysis is not necessarily to endorse or oppose a nominee. In fact, LDF has not taken a position on every Supreme Court nominee for whom it has issued a report. Instead, LDF shares its conclusions about a nominee's record to (1) contribute to the public's full understanding of a nominee's potential impact on civil rights, (2) support the Senate's constitutional obligation to "advise and consent" on such nominations, and (3) ensure that the Supreme Court's role in vindicating the civil rights of those who are most marginalized is fully recognized and considered in the confirmation process.⁴

To that end, LDF has reviewed the available record of D.C. Circuit Court of Appeals Judge Brett M. Kavanaugh, who was nominated by President Donald J.

¹ 347 U.S. 483 (1954).

² 390 U.S. 400 (1968).

³ 402 U.S. 1 (1971).

⁴ LDF acknowledges the significant contributions made to this report by the law firms of Orrick, Herrington & Sutcliffe LLP and Milbank, Tweed, Hadley & McCloy LLP, as well as Professor Rena Steinzor of the University of Maryland Francis King Carey School of Law.

Trump to fill the vacancy created by the June 25, 2018 retirement of Associate Justice Anthony M. Kennedy.

I. NOMINATION BACKGROUND AND CONTEXT

The nomination of Judge Kavanaugh to be a justice on the Supreme Court comes at a unique and unprecedented moment in our country's history. Our review of Judge Kavanaugh's record grapples with the judicial philosophies he holds and the rulings he has issued. It also reflects the highly unusual context surrounding his nomination. His record on and off the court independently shapes our assessment of his fitness to serve on the nation's highest court and our evaluation of the likely effect he would have on the Court's jurisprudence concerning fundamental civil rights and protections. Together, this record and the fraught context of Judge Kavanaugh's nomination cement our position that he is unfit to serve as the next justice of the Supreme Court.

Indeed, the context of Judge Kavanaugh's nomination provides a critical framework within which to evaluate his fitness for elevation to the Supreme Court. We set forth four critical elements of this context below.

First, in selecting Judge Kavanaugh as the nominee, President Trump undertook a most unusual process. Multiple uncontested reports confirm that President Trump outsourced to activist conservative legal organizations the creation of short-lists of nominees from which the President would select his choice to fill vacancies on the federal bench, including on the Supreme Court.⁵ One of the primary organizations involved in this enterprise is the Federalist Society for Law and Public Policy Studies ("the Federalist Society"), a thirty-five-year-old organization founded to advance extremist conservative legal positions, including a cramped approach to constitutional interpretation that depends on a one-sided, limited, and archaic view of constitutional provisions. In action, that interpretive approach, commonly known as "originalism," has consistently threatened Supreme Court decisions that guarantee the human and civil rights of women, people of color, and criminal defendants. Another influential organization in creating President Trump's slate of nominees for the federal judiciary has been the Heritage Foundation. The Heritage Foundation has been explicit in its hostility to the principle of *stare decisis*—the judicial canon that the Court should stand by its prior decisions absent extraordinary circumstances. Specifically, the Heritage Foundation has identified Supreme Court

⁵ See Ed Kilgore, *A Look at Trump's Shortlist for Replacing Anthony Kennedy*, N.Y. MAG, July 3, 2018, <http://nymag.com/daily/intelligencer/2018/07/trumps-shortlist-for-kennedy-replacements-on-supreme-court.html>; Andy Kroll, *Inside Trump's Judicial Takeover*, ROLLING STONE, Aug. 19, 2018, <https://www.rollingstone.com/politics/politics-features/trumps-judicial-takeover-711200/>.

decisions that it believes should be reversed, such as *Roe v. Wade*,⁶ and *Grutter v. Bollinger*,⁷ and has expressed hostility to critical provisions of the Voting Rights Act of 1965, which was passed to ensure equality in all election processes.⁸

The list developed by these organizations was made public on May 18, 2016, supplemented on September 23, 2016, and finally supplemented on November 17, 2017.⁹ Judge Brett Kavanaugh, a long-time Federalist Society Member, was added to the list for the first time in November 2017, and has been regularly discussed by court observers as one of the candidates most favored by the Federalist Society.¹⁰

Second, in considering Judge Kavanaugh's placement on these specially curated lists of potential nominees, we cannot ignore the clear and consistent promise that President Trump made during the 2016 presidential campaign concerning how he would treat a vacancy on the Supreme Court. On multiple occasions, then-candidate Trump vowed that he would only appoint justices to the Supreme Court who would overturn *Roe v. Wade*,¹¹ the 1973 landmark decision which upheld the

⁶ See Monica Burke, *Why Pro-Lifers Have Cause for Hope*, HERITAGE FOUND., Jan. 22, 2018, <https://www.heritage.org/civil-society/commentary/why-pro-lifers-have-cause-hope> (calling the *Roe* decision an “invent[ed] . . . constitutional right to abortion on demand”).

⁷ See Hans A. von Spakovsky & Elizabeth Slattery, *Discriminatory Racial Preferences in College Admissions Return to the Supreme Court: Fisher v. University of Texas at Austin*, HERITAGE FOUND. Dec. 3, 2015, <https://www.heritage.org/poverty-and-inequality/report/discriminatory-racial-preferences-college-admissions-return-the> (criticizing the Court's “past decisions allowing the use of racial preferences in college admissions,” including *Grutter v. Bollinger*, and advocating that the Court hold that the use of race in college admissions “for any reason is a violation of equal protection”).

⁸ See Hans A. von Spakovsky, *Voting Rights Act's “Preclearance” Was Meant to Be Temporary*, HERITAGE FOUND., Feb. 27, 2013, <https://www.heritage.org/election-integrity/commentary/voting-rights-acts-precleanance-was-meant-be-temporary> (arguing that the “Supreme Court should strike down Section 5, which was a temporary, emergency provision that was only supposed to last five years”).

⁹ Alan Rappaport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES, May 18, 2016, <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html> (noting initial list and reliance on Federalist Society and Heritage Foundation); Reena Flores & Major Garrett, *Donald Trump Expands List of Possible Supreme Court Picks*, CBS NEWS, Sept. 23, 2016, <https://www.cbsnews.com/news/donald-trump-expands-list-of-possible-supreme-court-picks/> (list supplemented); Press Release, White House, President Donald J. Trump's Supreme Court List, Nov. 17, 2017, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/> (latest list).

¹⁰ See Dylan Matthews, *Brett Kavanaugh, Donald Trump's Supreme Court Nominee, Explained*, VOX, July 9, 2018, <https://www.vox.com/explainers/2018/7/9/17540334/brett-kavanaugh-trump-supreme-court-anthony-kennedy> (observing that Federalist Society mainstay Leonard Leo had “been Trump's most important adviser on court nominations” and had “singled Kavanaugh out as one of the two most promising contenders for [Justice] Kennedy's seat[.]”).

¹¹ See, e.g., Mark Berman, *Trump Promised Judges Who Would Overturn Roe v. Wade*, WASH. POST, March 21, 2017, https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/?noredirect=on&utm_term=.690f1bc0747d (quoting candidate Trump's promise that *Roe* would be overturned “because I am putting pro-life justices on

right of women to decide whether to carry a pregnancy to term. While presidential candidates have routinely signaled the qualities of the kind of justices they would appoint if able, President Trump’s statements vowing only to select nominees who would overturn an existing Supreme Court case were unprecedented.¹² President Trump’s selection of Judge Kavanaugh and our review of Judge Kavanaugh’s record suggest that, if confirmed to the Supreme Court, he very well may help President Trump keep his promise to overturn *Roe v. Wade* and other critical Supreme Court precedent.

The third and, perhaps, most troubling and distinctive contextual fact is that Judge Kavanaugh’s nomination has occurred while the President is facing multiple federal investigations of his businesses and his campaign, including the investigation of potential felonious activity involving collusion with a foreign power in the very election process that brought him to office and enabled this nomination. Among these multiple investigations is that of Special Counsel Robert Mueller who began investigating the now-established interference of a foreign adversary in the 2016 presidential campaign that led to the election of Donald Trump. It is unclear whether the President is a target of these investigations, but recent developments demonstrate that these investigations raise important questions that go to the very legitimacy and breadth of the President’s power and authority.

As of this writing, Special Counsel Mueller’s investigation into Russian governmental interference in the 2016 election—and any potential involvement with then-Candidate Trump’s campaign—is still ongoing and has resulted in thirty-six indictments and six guilty pleas.¹³ Recently, in connection with this investigation, the President’s former campaign chairman Paul Manafort was found guilty of financial fraud.¹⁴

Even more alarmingly, on the same day Mr. Manafort was found guilty, the President’s former personal attorney Michael Cohen pled guilty in a separate proceeding in the United States District Court for the Southern District of New York

the court”); Dan Mangan, *Trump: I’ll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC, Oct. 19, 2016, <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html> (discussing candidate Trump’s promise that *Roe* would be overturned “automatically” if he was elected and was able to appoint justices).

¹² Mr. Trump’s opponent made assurances as well—that she would only appoint justices who would uphold that decision. *See, e.g.*, Tessa Berenson, *Watch Clinton Describe Her Ideal Supreme Court Justice*, TIME, Mar. 10, 2016, <http://time.com/4253569/hillary-clinton-supreme-court-nominee-debate/> (“I would look for people who believe that *Roe v. Wade* is settled law[.]”).

¹³ Editorial Bd., *The Case for Robert Mueller’s Probe of Russian Meddling*, NEWSDAY, Aug. 25, 2018, <https://www.newsday.com/opinion/editorial/robert-mueller-russian-election-meddling-1.20655665>.

¹⁴ *See* Sharon LaFraniere, *Paul Manafort, Trump’s Former Campaign Chairman, Guilty of 8 Counts*, N.Y. TIMES, Aug. 21, 2018, <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html>.

to violating federal campaign finance law—admitting under oath to illegal actions he says he committed at the direction then-candidate Trump.¹⁵ According to election law experts, this latter admission may well implicate the President in conduct that would constitute a felony.¹⁶

In the face of these ongoing investigations, the President and his new counsel have made statements indicating the President’s belief that he is above the law. Specifically, they have suggested the President can unilaterally end the Mueller investigation,¹⁷ refuse to comply with federal court subpoenas,¹⁸ pardon those found guilty¹⁹ and even conduct the investigations himself.²⁰ This confluence of events creates an uncomfortable backdrop to Judge Kavanaugh’s nomination. If Judge Kavanaugh is confirmed, the President’s authority to take the actions he and his counsel have threatened or have already committed would likely be determined by a Supreme Court in which Judge Kavanaugh cements an ultra-conservative majority likely to defer to even the most extreme executive authority.

Finally, there is the matter of the incomplete records from Judge Kavanaugh’s public service that have been furnished to the Senate Judiciary Committee. Our analysis in this report is based on our review of Judge Kavanaugh’s judicial record,

¹⁵ *Id.*

¹⁶ Richard L. Hasen, *Michael Cohen’s Guilty Plea Directly Implicates Donald Trump in a Felony*, SLATE, Aug. 21, 2018, https://slate.com/news-and-politics/2018/08/michael-cohens-guilty-plea-directly-implicates-donald-trump-in-a-felony.html?wpsrc=sh_all_dt_tw_ru (“If Cohen’s story is corroborated, Trump has committed a crime, one that does not depend upon proof of Russian collusion or obstruction.”).

¹⁷ See Kadhim Shubber, *Trump Believes He Has Power to Fire Mueller, Says White House*, FIN. TIMES Apr. 10, 2018, <https://www.ft.com/content/5e0678e0-3d02-11e8-b9f9-de94fa33a81e>.

¹⁸ See Mark Landler & Noah Weiland, *Giuliani Says Trump Would Not Have to Comply with Mueller Subpoena*, N.Y. TIMES, May 6, 2018, <https://www.nytimes.com/2018/05/06/us/politics/giuliani-says-trump-would-not-have-to-comply-with-mueller-subpoena.html>.

¹⁹ Robert Costa, Josh Dawsey, & Ashley Parker, *Trump Fixates on Pardons, Could Soon Give Reprieve to 63-Year-Old Woman After Meeting with Kim Kardashian*, WASH. POST, June 5, 2018, https://www.washingtonpost.com/politics/trump-fixates-on-pardons-could-soon-give-reprieve-to-63-year-old-woman-after-meeting-with-kim-kardashian/2018/06/05/37ac6cb6-683d-11e8-bbc5-dc9f3634fa0a_story.html?noredirect=on&utm_term=.4e4ce14b392f (recounting White House official’s description of the President as “obsessed” with pardons and quoting Newt Gingrich’s interpretation of the President’s actions as “a signal that [the President is] in an all-out war with Mueller and people should know [he] is willing to issue pardons”); John Wagner, *Trump Says He Has ‘Absolute Right’ to Pardon Himself of Federal Crimes but Denies Any Wrongdoing*, WASH. POST, June 4, 2018, https://www.washingtonpost.com/politics/trump-says-he-has-absolute-right-to-pardon-himself-of-federal-crimes-but-denies-any-wrongdoing/2018/06/04/3d78348c-67dd-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.3874eba9df3a.

²⁰ See Felicia Sonmez, *Trump Says About Russia Probe: ‘I Could Run It If I Want.’* WASH. POST, Aug. 20, 2018, https://www.washingtonpost.com/politics/trump-says-about-russia-probe-i-could-run-it-if-i-want/2018/08/20/500aeacc-a4d2-11e8-97ce-cc9042272f07_story.html?noredirect=on&utm_term=.8ffa39eb7587.

encompassing over 300 written opinions, focusing on constitutional and statutory issues with clear relevance to the clients that LDF represents. We have also examined his votes in relevant cases in which other judges authored the decision, and his legal record from his work in private practice, as well as his publications and speeches, personal background, and work outside of the law.

Despite the voluminous materials we have reviewed, our analysis is necessarily incomplete because the public has had access to only a fraction of the records produced during the time that Judge Kavanaugh served as Staff Secretary to President George W. Bush—a job which Judge Kavanaugh described as the position he found “most instructive” to him in his role as a judge. The Ranking Member of the Committee, Senator Dianne Feinstein requested all of the records from this period of Judge Kavanaugh’s service.²¹ However, as of the time of this writing, they have not been produced, nor is it expected that they will be produced before the confirmation hearing set to commence on September 4, 2018.

According to the National Archives, it “processed and released roughly 70,000 pages of documents relating to Chief Justice John Roberts and 170,000 pages relating to Justice Elena Kagan[,]” and, by contrast, there are “the equivalent of several million pages of paper and email records related to Judge Kavanaugh in the holdings of the George W. Bush Presidential Library and Museum and in the National Archives.”²²

Moreover, in a rebuff to tradition in the Senate, the current Chair of the Senate Judiciary Committee, Senator Chuck Grassley, has requested from the National Archives only a fraction of the full materials from Judge Kavanaugh’s service as a presidential Staff Secretary. In response to Senator Grassley’s request, on August 2, 2018, the National Archives informed Senator Grassley that even the limited materials he sought could not fully be furnished to the Committee before the end of October.²³ Despite receiving this clear indication from the National Archives, eight days later Senator Grassley announced that the hearings for Judge Kavanaugh would

²¹ See Letter from Ranking Member Dianne Feinstein & Other Democratic Members of the Jud. Comm. to Brigadier Gen. Patrick X. Mordente, Director, George W. Bush Pres. Library & Museum, at 1, July 31, 2018, https://www.feinstein.senate.gov/public/_cache/files/c/f/cf09bc38-c37e-40ae-95f4-859ea4d1d1ee/8CA1FC58A79BEDD4B6E6FB6426E1A6FF.7-31-18-all-judiciary-dems-to-nara-requesting-kavanaugh-documents.pdf.

²² See *National Archives Works to Release Records Related to Judge Kavanaugh*, NAT’L ARCHIVES, Aug. 15, 2018, <https://www.archives.gov/news/articles/archives-staff-release-records-related-to-judge-kavanaugh>.

²³ See Letter from Gary M. Stern, Nat’l Archives Gen. Counsel, to Jud. Comm. Chairman Charles E. Grassley, at 2 (Aug. 2, 2018), <https://www.archives.gov/files/foia/stern-letter-to-grassley-8-2-2018.pdf>.

commence on September 4, more than a month before the documents Senator Grassley sought could be furnished to the Committee.²⁴

Senator Grassley then took the unusual step of assigning blanket “Committee Confidential” status to the vast majority of the documents that were received by the Committee. This designation means that those documents cannot be shared with the public even if used by the members of the Committee in public confirmation hearings.²⁵ On August 10, 2018, Ranking Member Dianne Feinstein sent a letter to the Chairman outlining the highly unusual and disturbing nature of this action by the Committee Chair.²⁶ Nonetheless, there has been no change in the blanket Committee Confidential designation.²⁷

To be clear, of the “several million” pages of documents held by the National Archives that may be relevant to Judge Kavanaugh’s service in the Administration of President George W. Bush, Chairman Grassley has requested only approximately 900,000 pages.²⁸ As of August 24, 2018, only slightly over 400,000 pages have been furnished to the Committee, and just over 200,000 are available for public review.²⁹ This leaves critical swaths of Judge Kavanaugh’s record unexamined.

Thus, our review, and that of the Senate Judiciary Committee, is limited to the truncated record made available to the public. This troubling lack of transparency has compromised the constitutionally sanctioned confirmation process that the Senate Judiciary Committee has set for September 4–7, 2018, despite the deeply

²⁴ See Press Release, S. Comm. on the Judiciary, Grassley: Kavanaugh Hearings to Begin September 4 (Aug. 10, 2018), <https://www.judiciary.senate.gov/press/rep/releases/grassley-kavanaugh-hearings-to-begin-september-4>.

²⁵ See Letter from Sen. Sheldon Whitehouse to Jud. Comm. Chairman Charles E. Grassley, at 1 (Aug. 20, 2018), <https://www.whitehouse.senate.gov/imo/media/doc/Letter%20to%20Grassley%20on%20Committee%20Confidential%20Documents.pdf>.

²⁶ See Letter from Ranking Member Dianne Feinstein to Jud. Comm. Chairman Charles E. Grassley, at 1–2 (Aug. 10, 2018) (publicly available at, e.g., Sen Dianne Feinstein (@SenFeinstein), TWITTER (Aug. 10, 2018)).

²⁷ See Letter from Ranking Member Dianne Feinstein, and Senators Patrick J. Leahy, Richard J. Durbin, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Richard Blumenthal, Mazie Hirono, Cory A. Booker, and Kamala D. Harris, to Senator Charles E. Grassley, Chairman, Committee on the Judiciary to Jud. Comm. Chairman Charles E. Grassley, at 1–4 (Aug. 28, 2018), https://www.feinstein.senate.gov/public/_cache/files/4/1/41748a5c-8069-4f4f-b938-c36b8a071628/5896693BA3D621868590005E18910237.feinstein-to-grassley-on-kavanaugh-process.pdf.

²⁸ See *National Archives Works to Release Records*, *supra* note 22.

²⁹ See Press Release, S. Comm. on the Judiciary, Historic Transparency: Volume of Kavanaugh’s Public Exec Branch Material Tops Levels of Past SCOTUS Nominees (Aug. 24, 2018), <https://www.judiciary.senate.gov/press/rep/releases/historic-transparency-volume-of-kavannahs-public-exec-branch-material-tops-levels-of-past-scotus-nominees>.

fraught circumstances surrounding the President, Judge Kavanaugh, and the confirmation process.

Thus, even before considering the opinions he has authored, the speeches he has given, and his full legal record, the following is true: Judge Kavanaugh's nomination is tainted by the influence of reactionary groups in his selection by the President and by the President's assertion that his nominees will target and overturn settled Supreme Court precedent. A woefully inadequate document production is thwarting the Senate's "advice and consent" function and the ability of the American public to determine whether they want their Senators to support this nominee. And perhaps most significantly, the President's credibility has been sapped by the ongoing investigations that raise questions about the legitimacy of his occupancy of the Oval Office and the vast powers it confers, such as the nomination of Supreme Court Justices.

This highly unusual and critical context powerfully bears on our assessment of Judge Kavanaugh's nomination. In specific areas, such as Judge Kavanaugh's views on expansive executive authority, the link between context and judicial outlook is clear. However, independent of the contested context of Judge Kavanaugh's nomination, the conclusions set forth below represent our considered analysis of the impact Judge Kavanaugh would have on civil rights and racial justice if he were confirmed to the United States Supreme Court.

II. EXECUTIVE SUMMARY

LDF opposes the confirmation of Judge Kavanaugh to the Supreme Court. LDF takes this position in consideration of both the unprecedented context in which this nomination arises and based on our review of the available record of Judge Kavanaugh's long career in public life.

Context always matters, and the context of this political moment is unique and important to a fair evaluation of this nomination. President Donald Trump's administration is laboring under the cloud of federal investigations emanating from the proven interference of a foreign adversarial government in the 2016 presidential election. Those investigations have already resulted in six guilty pleas and thirty-six indictments.³⁰ A collateral federal investigation has implicated the involvement of the President in illegal campaign activity. The President has publicly taken a number of highly questionable positions regarding his power and authority in relation to these investigations. The resolution of the President's claims, should he advance them in litigation, raises fundamental questions about Presidential authority under the Constitution. Such questions can only be answered, ultimately, by the Supreme

³⁰ Editorial Bd., *The Case for Robert Mueller's Probe of Russian Meddling*, NEWSDAY, Aug. 25, 2018, <https://www.newsday.com/opinion/editorial/robert-mueller-russian-election-meddling-1.20655665>.

Court. The nomination of a justice within the context of this looming set of circumstances raises extraordinary concerns.

Not only has the nomination been rushed forward despite these investigations and allegations, it has been rushed forward while a substantial portion of Judge Kavanaugh's pre-judicial records remain unavailable to the public. Since Justice Kennedy announced his retirement, LDF has taken the position that the Senate should refrain from moving forward with a confirmation process until the Special Counsel's investigation is complete, in order to avoid the taint of these investigations on the nominee, and to avoid conflicts that might compel recusal of the nominee from hearing matters emanating from the pending investigation.

This context is made even more troubling by the nomination of Judge Brett Kavanaugh, whose record reveals him to be an executive power maximalist, and who appears to believe in nearly unbridled Presidential power, including freedom from federal indictment. Judge Kavanaugh went so far as to write in a published opinion that a President may choose not to enforce some congressional statutes if he or she believes that enforcing it would be unconstitutional, even if a federal court has held that the law is constitutional.³¹ That is a breathtaking position, which is inconsistent with the basic rule set forth by Chief Justice Marshall in 1803 that it is the duty of the judiciary, and not the executive, to "say what the law is."³²

A review of Kavanaugh's record also calls into question his judicial values on core issues of civil rights and racial justice. The nature of the docket of the D.C. Circuit Court of Appeals where Judge Kavanaugh has served has limited his opportunities to speak on some of the issues most important to LDF. Yet, he has given us ample evidence of his ideology through his career and record to this point for us to draw firm conclusions about what sort of judge he is and what sort of Justice he would be. It is clear, on close examination, that Judge Kavanaugh's judicial philosophy would place in jeopardy fundamental statutes and constitutional precedent designed to protect civil rights and advance racial justice. For example:

- **Race Consciousness and Affirmative Action.** Judge Kavanaugh's work as a private lawyer for an anti-affirmative-action organization in a case challenging Hawaii's right to remedy past discrimination against indigenous Hawaiians reflects a strong hostility to considering race even to remedy entrenched racial discrimination. His advocacy in connection with the case showed disturbing blindness to the need for legal remedies for historic discrimination. For example, quoting a noxious passage from Justice Antonin Scalia's dissent in *Adarand Constructors, Inc. v. Peña*, he asserted that "there can be no such thing as either a creditor or debtor

³¹ See *Seven-Sky v. Holder*, 661 F.3d 1, 50 & n.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

³² *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

race.” His confirmation would threaten the government’s ability to use race to promote diversity and halt discrimination.

- **Criminal Justice.** Judge Kavanaugh’s criminal justice record is generally consistent with the reactionary criminal justice record of Chief Justice William Rehnquist, who Judge Kavanaugh called his first judicial hero and whose criminal justice jurisprudence he has praised at length. Judge Kavanaugh has shown nearly reflexive deference to assertions made by law enforcement and skepticism of the experience of people arrested for alleged crimes.
- **Economic Justice.** LDF’s research indicates that Judge Kavanaugh has generally ruled against workers raising claims of employment discrimination and workers seeking to work together to protect their rights. His record suggests that he also could threaten the critical civil rights theory of disparate impact, which would seriously undermine efforts to remedy the persistent segregation that plagues our country.
- **Political Participation.** Judge Kavanaugh upheld a restrictive voter photo ID law, and he has consistently hampered political participation by striking down campaign finance laws that seek to ensure that money does not drown out the voices of Americans without it.
- **Administrative Law.** The broad portfolio Congress has assigned to administrative agencies means that the technical area of administrative law has significant implications in every area of law, including civil rights and racial justice. Judge Kavanaugh has advanced radical, precedent-challenging administrative law views that would hamper the good agencies can do.
- **Access to Justice.** Ensuring that those who are most marginalized have the opportunity to “have their day in court” is fundamental to our system of justice. Judge Kavanaugh has been anything but even-handed in considering who deserves such access. He has shown special solicitude to well-heeled business interests, yet has failed to appreciate the harms suffered by the less politically and economically powerful.

These facts raise further concerns when placed in the context of this Administration’s judicial nomination strategy. This Administration has nominated judges who demonstrate remarkable hostility not only to civil rights and principles of equality but also to well-established judicial norms and standards. Several such nominees have refused even to acknowledge that the Supreme Court’s seminal, unanimous 1954 decision in *Brown v. Board of Education* was rightly decided. *Brown* stands for a principle that is essential to both civil rights and to the rule of law, i.e., that our Constitution does not permit racial apartheid in our public schools. In this context, the Senate must press Judge Kavanaugh to demonstrate his commitment to

enforcing the rule of law, the legacy of *Brown*, and this nation's civil rights laws and show that he stands behind and supports racial equality and justice.

LDF has identified all of these threats to civil rights that would be posed by Judge Kavanaugh's confirmation even without meaningful access to Judge Kavanaugh's records from his time in the White House, or his time working for independent counsel Kenneth Starr. Those records are essential to a full understanding of Judge Kavanaugh's values, which are key to the judicial process, and particularly important during this incredible presidency.³³

The failure to release Judge Kavanaugh's entire record should halt any movement until that voluminous record is fully released and reviewed. Most egregiously, although Judge Kavanaugh spent just under three years as Staff Secretary to President George W. Bush, the Judiciary Committee has refused to request any documents involving work he performed during that time.³⁴ As discussed in Part I of this report, a host of significant events occurred during that time, and Judge Kavanaugh would have been at the center of those events as Staff Secretary to President Bush. Indeed, when considering "what prior legal experience ha[d] been most useful for [him] as a judge[.]" Judge Kavanaugh has emphasized that of his "five-and-a-half years at the White House" his "three years as staff secretary . . . were the most interesting and informative" for him.³⁵

To be sure, the Judiciary Committee has requested that the National Archives provide a subset of the documents pertaining to Judge Kavanaugh's time in the White House Counsel's Office.³⁶ But the National Archives will be unable to complete its review of those documents for production to the public until the end of October 2018 at the earliest.³⁷ In an unprecedented maneuver, the Judiciary Committee has

³³ Accordingly, LDF will continue its review and update its analysis of Judge Kavanaugh's record as appropriate as documents become available.

³⁴ See Letter from Jud. Comm. Chairman Charles E. Grassley to Brigadier Gen. Patrick X. Mordente, Director, George W. Bush Pres. Library & Museum, at 1 (July 27, 2018), <https://www.archives.gov/files/foia/07.27.2018-grassley-to-bush-library-re-kavanaugh.pdf> (hereinafter "July 27 Grassley Request"); Seung Min Kim, *Clearinghouse for Kavanaugh Documents is a Bush White House Lawyer, Angering Senate Democrats*, WASH. POST, Aug. 15, 2018, https://www.washingtonpost.com/politics/clearinghouse-for-kavanaugh-documents-is-a-bush-white-house-lawyer-angering-senate-democrats/2018/08/15/224973dc-a082-11e8-b562-1db4209bd992_story.html?noredirect=on&utm_term=.2963ad6f7ca4 ("Republicans have requested Kavanaugh's White House counsel records but have ruled his staff secretary papers out of bounds.").

³⁵ Hon. Brett M. Kavanaugh, *One Government, Three Branches, Five Controversies: Separation of Powers Under Presidents Bush and Obama*, MARQUETTE LAWYER, Fall 2016, <https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2016-fall/2016-fall-p08.pdf>.

³⁶ See July 27 Grassley Request, *supra* note 34.

³⁷ See Letter from Gary M. Stern, Nat'l Archives Gen. Counsel, to Jud. Comm. Chairman Charles E. Grassley, at 2 (Aug. 2, 2018), <https://www.archives.gov/files/foia/stern-letter-to-grassley-8-2-2018.pdf>.

essentially outsourced the review of the documents that the National Archives is reviewing to a private lawyer who works for President George W. Bush, and who was Judge Kavanaugh’s deputy when he was Staff Secretary.³⁸ That private lawyer is the one making the calls on which documents the American public may see and which are “exempt.”³⁹

Finally, the National Archives has also not yet finished reviewing and producing documents from Judge Kavanaugh’s time in the Office of the Independent Counsel in the 1990s.⁴⁰ That Office handled some of the most sensitive and complex legal issues connected with President Bill Clinton’s eventual impeachment trial, and it is fair to assume that there may be valuable information bearing on Judge Kavanaugh’s legal views and philosophy in those documents.

LDF takes seriously its responsibility to provide a timely review of the record of all Supreme Court nominees. Thus, it has proceeded with this report despite the rushed pace of the process and incomplete record. We turn now to Judge Kavanaugh and his record.

III. METHODOLOGY

Our evaluation of every nominee rests on a few important principles. We can stipulate at the outset that—like all recent nominees—Judge Kavanaugh has attended excellent schools and demonstrates legal intelligence and savvy. He has served in a number of high-profile political positions, and has been a federal appellate court judge for over a decade. But that can only begin, not end, a full evaluation of a nominee’s fitness to serve as a justice on the United States Supreme Court. Judging requires *judgment*, and that judgment must be applied within a legal and social context. Since context matters, judicial philosophy and jurisprudential values matter. We cannot call a judge qualified until we understand his or her values based on the entire record and understand how he or she believes judges ought to decide cases.

When we consider judicial qualification, we recognize that judges are not automatons who produce the “correct” answer once one inputs the law and facts. To the contrary, “perception is a critical part of the judicial function, [and] judges cannot

³⁸ See Seung Min Kim, *supra* note 34 (“[T]he National Archives . . . has effectively been sidelined. In its place is a team led by attorney Bill Burck, who also served in the Bush White House as Kavanaugh’s deputy when the nominee was staff secretary.”); *National Archives Works to Release Records*, *supra* note 22 (describing Burck’s review as “something that has never happened before”).

³⁹ See Letter from William A. Burck to Jud. Comm. Chairman Charles E. Grassley (Aug. 2, 2018), <https://www.democrats.senate.gov/imo/media/doc/2018.08.02%20Letter%20Burck%20to%20Grassley.pdf> (stating privilege decisions were made based on Burck’s “assessment of [the documents] contents”).

⁴⁰ See Josh Gerstein, *More Documents Emerge from Kavanaugh’s Work for Starr*, POLITICO, July 30, 2018, <https://www.politico.com/story/2018/07/30/brett-kavanaugh-ken-starr-documents-749713>.

simply jettison the[ir] experiences and knowledge[.]”⁴¹ This is unavoidable. As one experienced state Supreme Court Justice observed, “the art of judging begins with the portrayal of the facts[.]” and “extends also to the description of the dispositive legal principles, the selection of relevant authorities, and the holding of the case.”⁴² This is legitimate and proper and—until relatively recently—was widely understood.⁴³ In some ways, it is also obvious. After all, the Fourteenth Amendment did not change between *Plessy v. Ferguson*⁴⁴ and *Brown v. Board of Education*.⁴⁵ The quality of the judgment applied did.

Once we understand that good judgment is what separates judges who uphold civil rights from those who do not, it becomes clear that values and philosophy matter.⁴⁶ Some jurists—perhaps most notably Chief Justice John Roberts—have suggested that they apply neutral philosophies that render values irrelevant and that they therefore merely act as “umpires” calling “balls and strikes” within the bounds of those philosophies.⁴⁷ But an examination of the fruits of those philosophies calls into question their purported neutrality.

Take “textualism,” which as Justices like Justice Antonin Scalia have applied it would have judges evaluate statutes and constitutional provisions through hyper-technical semantical parsing and extensive reliance on dictionary definitions examined in a vacuum.⁴⁸ Last term, the most ardently textualist Supreme Court Justices read the National Voter Registration Act’s text narrowly to find that the Act

⁴¹ Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 432–33 (Spring 2000).

⁴² Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591, 594–95 (1996).

⁴³ Cf. *McCulloch v. State*, 17 U.S. 316, 407 (1819) (“[The Constitution’s] nature, therefore, requires, that only its great outlines be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . we must never forget, that it is a *constitution* we are expounding.”) (Marshall, J.).

⁴⁴ 163 U.S. 537 (1896).

⁴⁵ 347 U.S. 483 (1954).

⁴⁶ See Ifill, *supra* note 41, at 475 (“[T]he judge who relies on plain language, like the one who looks to legislative history or statutory purpose, makes value judgments.”) (quoting Pollock, *supra* note 42, at 597) (alteration in original).

⁴⁷ See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Hon. John G. Roberts); Elizabeth H. Slattery, et al., *The Legacy of Justice Antonin Scalia: Remembering a Conservative Legal Titan’s Impact on the Law*, Heritage Foundation (Aug. 30, 2016), at 1–2, <http://thf-reports.s3.amazonaws.com/2016/SR186.pdf> (arguing that “textualism” and “originalism” “minimize the potential impact of [judges’] personal views or biases”).

⁴⁸ See, e.g., Joseph Kimble, *Ideological Judging: The Record of Textualism*, July 31, 2018, <https://www.law.com/nationallawjournal/2018/07/31/ideological-judging-the-record-of-textualism/> (“Textualism . . . focuses intently on the words and syntax of a law to decide cases. Other considerations—legislative history, the law’s broader purpose, judicial intuition, sensible policy, a decision’s real-world consequences—matter much less, and sometimes not at all.”).

permitted Ohio’s radical voter-purging process.⁴⁹ They reached that decision despite the four dissenters’ cogent explanation that the majority had not only misread the statute but had done so in a way that contradicted Congress’s purposes in enacting the statute.⁵⁰ This is, unfortunately, a not uncommon result when textualist analysis is applied to statutes that aim to correct grave social ills.

Textualism’s cousin “originalism” has generated similar anti-egalitarian results. That philosophy requires judges to moonlight as amateur historians to discern what the “public” hundreds of years ago understood constitutional provisions to mean.⁵¹ Putting aside the likelihood that judges are underqualified for this task, this philosophy is facially neutral. But almost invariably, in practice, its strongest adherents seem to reach regressive results. For example, focusing on his interpretation of “the original understanding of the Cruel and Unusual Punishments Clause[,]” Justice Clarence Thomas would have held methods of execution posing a “substantial risk of severe pain” do not violate the Eighth Amendment even if that substantial risk could be easily mitigated, unless the State actually intended to inflict such pain.⁵²

The bottom line, then, is that we have an excellent idea of what sorts of judicial philosophies advance civil rights and racial justice and which do not. And notwithstanding any claimed neutrality, these philosophies are (at least in the close cases) generating results based at least partly on the jurists’ values.⁵³

Judge Kavanaugh has himself recognized that values matter. Many tests in constitutional and statutory law instruct judges to “evaluate the strength of the government’s interest in [a] regulation” versus the “burden the regulation places on [a] relevant right.”⁵⁴ But, as Judge Kavanaugh acknowledges, “judges have no objective way of deciding whether an interest is ‘compelling’ or ‘important’ without making a judgment about the desirability of that interest.”⁵⁵

⁴⁹ See *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842, 1848 (2018).

⁵⁰ See *id.* at 1850, 1857–59 (Breyer, J., dissenting).

⁵¹ See *id.*

⁵² *Baze v. Rees*, 553 U.S. 35, 94 (2008) (Thomas, J., concurring).

⁵³ This is perhaps why the Heritage Foundation—hardly a neutral legal observer—is an ardent supporter of textualism and originalism. See, e.g., Slattery, *supra* note 47, at 1 (praising “champions of originalism and textualism”). See also *infra* Part III.B.

⁵⁴ Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1915 (May 2017) (noting tests of this kind in First, Second, and Fourteenth Amendment cases as well as Religious Freedom Restoration Act cases).

⁵⁵ *Id.* (“It’s sometimes as if you were asked to umpire a baseball game, and you asked the Commissioner of Baseball whether the bottom of the strike zone was at the knees or at the hips, and you were told that it was up to you.”); see also *Judicial Decision-Making*, C-SPAN (Nov. 11, 2011), at 48:42–49:50, <https://www.c-span.org/video/?302639-1/judicial-decision-making> (“[C]ommon sense . . . does and

The list of values indispensable to judging is long. One that LDF focuses on is an understanding of the continued salience of racism in our society. Good judging requires understanding the persistence of that original sin and the vital role the judiciary plays in the battle to eradicate it. And judges must appreciate where America has fallen short no less than the places where it has succeeded. Justice Thurgood Marshall provides a sterling example. His prior experience as a civil rights lawyer for LDF challenging all forms of American racism gave him insight that was unique on the Supreme Court.⁵⁶ Through his opinions and interactions with his colleagues, he ensured that the distance we had traveled and had still to go was not forgotten. As his colleague Justice Byron White said, “He . . . would tell us things that we knew but would rather forget[.]”⁵⁷

Every term we see the impact of judicial philosophy, including in cases that are not obviously about race. For example, last term the Supreme Court decided that the Federal Arbitration Act’s pro-arbitration principles let employers force employees who wished to sue them collectively into individual arbitrations, even though a later law (the National Labor Relations Act) protected employees’ rights to engage in “concerted activities for . . . mutual aid or protection.”⁵⁸ LDF filed a brief to assist the Court in that judgment, in which we explained how ensuring that workers retain the ability to band together to combat discrimination has been and will continue to be essential in ensuring the full effectiveness of our civil rights laws.⁵⁹ Among other things, the Court’s decision required a value judgment about which statute’s principles ought to control. And as Justice Ruth Bader Ginsburg explained in dissent, that judgment lacks critical context unless one understands the long history of worker exploitation that the National Labor Relations Act sought to solve.⁶⁰

should play a role in how we think about how this is going to work. As I said, the interpretation of the text at issue, the precedent at issue, but how it’s going to work.”)

⁵⁶ See Hon. Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (Summer 1992) (“Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match.”).

⁵⁷ *Id.* at 1216; see also Hon. Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1218–19 (Summer 1992) (discussing Justice Marshall’s influence and observing that he could “ma[k]e clear what legal briefs often obscure: the impact of legal rules on human lives”); Hon. William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 25 (Sept. 1991) (listing examples of Justice Marshall’s approach to judging).

⁵⁸ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting).

⁵⁹ See Brief for NAACP Legal Defense & Educational Fund, Inc. Impact Fund, and 30 Civil Rights Organizations as Amici Curiae Supporting Respondents in Nos. 16-285 & 16-300 and Petitioner in No. 16-307, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Nos. 16-285, 16-300, 16-307), 2017 WL 3588728, at *10–12 (explaining that “concerted actions are uniquely effective in remedying and deterring systemic employment discrimination”).

⁶⁰ See *Epic Sys.*, 138 S. Ct. at 1633–34 (Ginsburg, J., dissenting).

We took all this into account in our consideration of whether Judge Kavanaugh ought to be confirmed to a lifetime appointment to the country's most important court.

A. BIOGRAPHICAL SUMMARY⁶¹

Judge Brett Michael Kavanaugh was born in 1965 in Washington, D.C., and grew up in Bethesda, Maryland. His mother was a teacher and Maryland state judge; his father was a leading lobbyist for the cosmetics industry. He graduated from Georgetown Preparatory School, like Justice Neil Gorsuch, and then attended both college and law school at Yale. After graduating from law school in 1990, he served as judicial law clerk for Third Circuit Court of Appeals Judge Walter Stapleton, and recently resigned Ninth Circuit Court of Appeals Judge Alex Kozinski.⁶² After his clerkship with Judge Kozinski, he obtained a fellowship in the United States Solicitor General's Office, after which he moved on to a clerkship with Justice Anthony Kennedy during the 1993 term.

From his Supreme Court clerkship, Kavanaugh transitioned to the Office of the Independent Counsel under Independent Counsel Kenneth Starr, who was at that time investigating the Clinton administration in various ways. As part of the office, Judge Kavanaugh unsuccessfully argued to the Supreme Court that deceased Deputy White House Counsel Vincent Foster's communications with his lawyers "were no longer privileged because he was deceased."⁶³ He left the office briefly in 1997, then returned after President Bill Clinton's affair with Monica Lewinsky became public; he ultimately helped draft the portion of the Independent Counsel's report that "identified potential grounds to impeach[.]"⁶⁴ He spent time at the law firm Kirkland & Ellis before and after his return to the office.

⁶¹ Basic biographical facts drawn from Matthew Nussbaum, *Brett Kavanaugh: Who Is He? Bio, Facts, Background and Political Views*, POLITICO, July 9, 2018, <https://www.politico.com/story/2018/07/09/brett-kavanaugh-who-is-he-bio-facts-background-and-political-views-703346>; Amy Howe, *Introduction: A Close Look at Judge Brett Kavanaugh*, SCOTUSBLOG, July 13, 2018, <http://www.scotusblog.com/2018/07/introduction-a-close-look-at-judge-brett-kavanaugh/>; and Scott Shane, et al., *Influential Judge, Loyal Friend, Conservative Warrior—and D.C. Insider*, N. Y. TIMES, July 14, 2018, <https://www.nytimes.com/2018/07/14/us/politics/judge-brett-kavanaugh.html>.

⁶² Judge Kozinski resigned from the U.S. Court of Appeals for the Ninth Circuit on December 18, 2017, amid allegations of inappropriate sexual behavior while on the bench. See Matt Zapotosky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct Allegations*, WASH. POST, Dec. 18, 2017, https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html?utm_term=.b1bbe66b41c9.

⁶³ Shane, *supra* note 61.

⁶⁴ *Id.*

When President George W. Bush took office, Kavanaugh sought and obtained a position in the White House Counsel's Office, where he spent just under two years as an Associate Counsel and Senior Associate Counsel. His tenure there involved work on judicial nominations, and he "strongly" supported the nomination of John Roberts to the D.C. Circuit.⁶⁵ He also was involved in at least some discussions regarding whether American citizens held as terrorism suspects could be denied access to lawyers, providing his thoughts on Justice Kennedy's likely view.⁶⁶

Kavanaugh moved from the White House Counsel's Office to a role as White House Staff Secretary, "a role that controls the flow of papers into and out of the Oval Office."⁶⁷ The position involved ensuring that "every word of proposed executive orders or speeches was vetted" and "reconcil[ing] competing views."⁶⁸ He continued to provide judicial nominations counsel in this position.⁶⁹ It was while holding this post that President Bush first nominated him for the D.C. Circuit in 2004. He was not initially confirmed, and was only confirmed to the Circuit in 2006, after he was re-nominated.

We note that in this way Judge Kavanaugh's biography mirrors that of nearly all of the current Justices. He attended an Ivy League college and law school, clerked, served in the federal government, and served as a federal appellate judge. If confirmed, he would continue the trend toward a disturbing lack of background diversity on the Supreme Court, which limits indigenous knowledge of how the law works in contexts outside those encountered in the legal contexts from which the Justices tend to come.

As relevant here, among his many organizations, Judge Kavanaugh's Senate Judiciary Questionnaire responses indicate that he has been involved with the conservative Federalist Society since 1988.⁷⁰ He also co-chaired the Federalist Society's School Choice Subcommittee of the Religious Liberties Practice Group between 1999 and 2001.⁷¹ During his time on the bench, he gained a reputation as a leader in conservative legal thought.⁷² In fact, he received the Heritage Foundation's

⁶⁵ *Id.*

⁶⁶ *Id.* (discussing Kavanaugh's advice to the Attorney General that "Justice Kennedy was likely to rule that citizens have a right to lawyers").

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See GEORGE W. BUSH, DECISION POINTS 97–98 (Random House 2010).

⁷⁰ See S. Comm. on the Judiciary, *Questionnaire for Nominee to the Supreme Court, Judge Brett Michael Kavanaugh, at 6*, [https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJQ%20\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJQ%20(PUBLIC).pdf) (last visited Aug. 28, 2018) (hereinafter "Kavanaugh Questionnaire").

⁷¹ *Id.*

⁷² See, e.g., Robin Bravender, *D.C. Judge a Formidable Foe for Obama's Environmental Agenda*, E&E NEWS, Oct. 13, 2015, <https://www.eenews.net/stories/1060026242>.

“Defender of the Constitution” award in 2017.⁷³ As we will now explain, these memberships illuminate his judicial approach and philosophy.

B. JUDICIAL PHILOSOPHY

Judge Kavanaugh has been a member of the Federalist Society since law school, and lists fifty-two Federalist Society events at which he has been a speaker or moderator on his questionnaire.⁷⁴ The ideological movement that the Federalist Society (and the Heritage Foundation) represent has been at the front lines of a concerted, decades-long effort to cut back on seminal cases the Supreme Court decided in the 1960s and 1970s in support of basic civil rights for all Americans.⁷⁵ These organizations regularly describe their ideal judges as ones who simply apply the law neutrally.⁷⁶ But the rule of law depends upon respecting precedent (cases decided by previous courts), even when a judge does not agree with prior decisions. The evidence shows that this ideological movement’s goals are thus not neutral, but are rather squarely and radically activist; they would upset settled precedent and undermine the rule of law.⁷⁷

The Federalist Society and Heritage Foundation developed and curated President Trump’s Supreme Court shortlist.⁷⁸ Presumably, President Trump selected Judge Kavanaugh from this list precisely because he trusts that Judge Kavanaugh approves of those groups’ activist agenda. Last year, at the Heritage Foundation’s Joseph Story Distinguished Lecture, Judge Kavanaugh praised Society favorites Chief Justice William Rehnquist and Justice Antonin Scalia as “giants” who “helped bring about a revolution in legal theory and legal doctrine.”⁷⁹ Notably, both of these Justices were well known for protracted campaigns against cases they disliked. For

⁷³ See Kavanaugh Questionnaire, *supra* note 70, at 4.

⁷⁴ See *id.* at 15–39. By contrast, he has spoken only twice at events sponsored in part by the American Constitution Society, which is the organization commonly considered to be the Federalist Society’s more liberal counterpart; both times, the event was co-sponsored with the Federalist Society. See *id.* at 21, 23.

⁷⁵ See, e.g., Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 33–34 (2013) (discussing Reagan-era Heritage Foundation report that attacked affirmative action and promised to eliminate discrimination “against white males”); see also *supra* notes 6,7,8.

⁷⁶ See, e.g., Slattery et al., *supra* note 47, at 1–2 (arguing that “commitment to the text and original public meaning” will “minimize the potential impact of [judges’] personal views or biases on the law”); Hon. Brett M. Kavanaugh, *The Role of the Judiciary in Maintaining the Separation of Powers* (Feb. 1, 2018), at 4, <https://www.heritage.org/sites/default/files/2018-02/HL1284.pdf> (hereinafter “*The Role of the Judiciary*”) (“The judge’s job is to interpret the law, not to make the law or make policy Don’t make up new constitutional rights that are not in the Constitution.”).

⁷⁷ See, e.g., *supra* notes 6,7,8.

⁷⁸ See Kroll, *supra* note 5; Lawrence Baum & Neal Devins, *Federalist Court*, SLATE, Jan. 31, 2017, http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/how_the_federalist_society_became_the_de_facto_selector_of_republican_supreme.html.

⁷⁹ *The Role of the Judiciary*, *supra* note 76, at 3.

example, Chief Justice Rehnquist dissented in *Roe* and continued to argue that it should be overruled 28 years later in *Stenberg v. Carhart*.⁸⁰ And Justice Scalia's unsuccessful attack on affirmative action in higher education in *Grutter v. Bollinger* did not dissuade him from continuing to advocate against it in *Fisher v. University of Texas*.⁸¹

Judge Kavanaugh had similar praise for current Heritage Foundation Ronald Reagan Distinguished Fellow Emeritus Edwin Meese, who, as President Reagan's Attorney General, articulated that Administration's constitutional vision through a series of influential reports issued by the DOJ's Office of Legal Policy (OLP).⁸² Indeed, the Reagan-era DOJ generally and OLP in particular were incubators for conservative legal ideas, and scholars have recounted a substantial Federalist Society influence.⁸³

The Meese-era memos made their targets clear—the heart of the Second Reconstruction-era principles that LDF fights to protect. Those memos attack race consciousness and affirmative action, disparate impact statutes,⁸⁴ and Congressional power to enforce the Reconstruction Amendments. In “The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation,” OLP hints darkly that the Supreme Court might “define discrimination in terms of disparate impact and thereby use the Equal Protection Clause to require race and gender affirmative action policies[.]”⁸⁵ In another memo, OLP warns that “the redefinition of discrimination

⁸⁰ Compare *Roe v. Wade*, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting), with *Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (advocating that *Roe*'s principles be overruled).

⁸¹ Compare *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part) (arguing that affirmative action is unconstitutional), with *Fisher v. Univ. of Tex. At Austin*, 570 U.S. 297, 315 (2013) (same argument).

⁸² See *The Role of the Judiciary*, supra note 76, at 3 (“I cannot emphasize enough how significant General Meese has been in changing the direction of American law.”); Dawn E. Johnsen, *Ronald Reagan and The Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 389–92 (2003) (discussing Attorney General Meese and the reports issued by his OLP).

⁸³ See, e.g., AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 95–96 & nn. 9–10 (Oxford Univ. Press 2015) (crediting then-OLP head and notable Federalist Society member Stephen Markman with the memos on conservative constitutional theory, and noting their endorsement by, inter alia, Federalist Society co-founder Steven Calabresi); see also Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000*, 89 DENV. U. L. REV. 197, 202–03, 214–15 (2011).

⁸⁴ Generally, disparate-impact statutes permit courts to grant relief without explicit proof that someone “intended” to discriminate against a particular plaintiff if the plaintiff can show that the action complained of disproportionately affected a protected class, like a racial group. Such statutes are key to “smoking out” racial discrimination that might hide behind facially neutral actions. See also *infra* Part IV.F.i.

⁸⁵ Siegel, supra note 75, at 28 (quoting OFFICE OF LEGAL POLICY, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION i(1988)).

from a concept of intentional conduct to one of statistically disproportionate results or effects means . . . that affirmative action is here to stay, a permanent feature of American society.”⁸⁶ The same memo attacked the LDF-litigated case *Griggs v. Duke Power Company*,⁸⁷ which first recognized Title VII disparate impact liability, as a “tragic turn[.]”⁸⁸ Finally, the memos advocated a narrow reading of the enforcement power that the Reconstruction Congresses wrote into the Reconstruction Amendments to ensure that Congress would be able to legislate to protect the new constitutional rights enacted after the Civil War, including the right to vote free from racial discrimination.⁸⁹

Chief Justice Rehnquist and Justice Scalia helped make the memos’ goals realities, at least in part. For example, Rehnquist, Judge Kavanaugh’s “first judicial hero,”⁹⁰ was in the vanguard of an assault on the enforcement powers embedded in the Reconstruction Amendments, making it more difficult for Congress to pass effective legislation combatting the discrimination outlawed by those Amendments.⁹¹ He also penned an influential article in which he attacked the concept of the “living Constitution” on the grounds that it enables “judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution.”⁹² But Constitutional rights inherently impose rules of conduct—sometimes unpopular ones. Recall that *Brown* eradicated racial apartheid in schools at a time when much of the nation approved of it or would have acquiesced in its persistence. The litigation strategy undergirding *Brown* recognized that the Fourteenth Amendment had made that state of affairs untenable and unconstitutional. This makes it concerning that Judge Kavanaugh says “it’s impossible to overstate” Rehnquist’s article’s “significance” to his “understand[ing of] the role of a judge in our constitutional system.”⁹³

⁸⁶ OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL: REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 158 (1987).

⁸⁷ 401 U.S. 424 (1971).

⁸⁸ REDEFINING DISCRIMINATION, *supra* note 86, at 156.

⁸⁹ See OFFICE OF LEGAL POLICY, GUIDELINES ON CONSTITUTIONAL LITIGATION 57–59 (1988) (criticizing Supreme Court decisions embracing a strong enforcement power and ordering government attorneys not to “rely on or contribute to” that expansion); see also Jeffrey Rosen & Tom Donnelly, *America’s Unfinished Second Founding*, THE ATLANTIC, Oct. 19, 2015, <https://www.theatlantic.com/politics/archive/2015/10/americas-unfinished-second-founding/411079/> (discussing the origin and purposes of the Reconstruction Amendments).

⁹⁰ Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist* (Sept. 18, 2017), at 6, <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf> (hereinafter “*From the Bench*”).

⁹¹ See, e.g., Johnsen, *supra* note 82, at 402–03.

⁹² William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 705–06 (May 1976).

⁹³ *From the Bench*, *supra* note 90, at 9.

Justice Scalia, who according to Judge Kavanaugh “helped bring about a massive and enduring change on the Supreme Court and in American law,”⁹⁴ was consistently a regressive voice when the Court spoke on civil rights and racial justice issues.⁹⁵ For example, in line with the OLP memos’ reasoning, he was one of the first Justices to attack the disparate impact provisions of the Civil Rights Act as unconstitutional.⁹⁶ Again, while in principle “textualism” or “originalism” are clearly consistent with civil rights, in Justice Scalia’s hands they almost invariably generated results that hampered civil rights and racial justice.

Given his choices of heroes, and his immersion in the movement, it is no surprise that Judge Kavanaugh, in his prior role as Associate White House Counsel and Senior Associate White House Counsel, worked closely with President Bush and his senior leadership to select judges who continued to advance this agenda.⁹⁷ As Staff Secretary, the President sought his counsel on whom to nominate to fill Justice Sandra Day O’Connor’s seat; he recommended then-Judges John Roberts and Samuel Alito.⁹⁸

This legal movement is a defining part of Judge Kavanaugh’s background and critical context. The Federalist Society provides a nearly flawless screening mechanism for its legal principles and has ensured that the President’s shortlist only contains nominees that adhere to the legal philosophies embodied by Chief Justice Roberts, and Justices Thomas, Alito, and Gorsuch. This is an essential lens through which we examined Judge Kavanaugh’s record and assessed his fitness to join the Supreme Court.

⁹⁴ *The Role of the Judiciary*, *supra* note 76, at 4.

⁹⁵ See, e.g., *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2532 (2015) (Alito, J. dissenting, joined by Roberts, C.J., Scalia & Thomas, J.J.) (arguing that the Fair Housing Act does not permit disparate impact liability); *Shelby County*, 570 U.S. 529, 557 (2013) (joining opinion invalidating Section 5 of the Voting Rights Act); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part) (attacking affirmative action on the ground that “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction”); Tr. Oral Arg. at 66–67, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (asking why Black students should not attend “less-advanced,” and “slower-track” schools, “where they do not feel that they’re being pushed ahead in classes that are too fast for them”), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-981_onjq.pdf.

⁹⁶ *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

⁹⁷ See, e.g., Jeffrey Toobin, *Advice and Dissent*, NEW YORKER, May 26, 2003, <https://www.newyorker.com/magazine/2003/05/26/advice-and-dissent> (describing Kavanaugh as the “main deputy” within the White House Counsel’s office working on judicial confirmations).

⁹⁸ See BUSH, *supra* note 69, at 97–98.

IV. WHAT JUDGE KAVANAUGH'S RECORD MEANS FOR CIVIL RIGHTS AND RACIAL JUSTICE

Judge Kavanaugh sits on the D.C. Circuit, which is in large part a specialized court that often deals with narrow points of administrative law. Relatively speaking, he has therefore decided cases implicating fewer of the issues of major concern to LDF that he would confront on the Supreme Court, if confirmed. But that does not mean that we lack evidence about what sort of judge he is, or what sort of Justice he would be—particularly because, as just discussed, we know the legal movement he represents. And, as we hope to make clear, many issues that are not obviously critical to racial justice and civil rights at first glance turn out to be on closer examination. Finally, our review revealed some generally applicable concerns about Judge Kavanaugh's willingness to undermine basic precedent that should be of relevance to defenders of civil rights.

A. EXECUTIVE POWER

i. The Executive Power in This Moment

As mentioned above, the political moment matters. As this report goes to press, Special Counsel Mueller's investigation proceeds, and we still do not know the full extent of Russian governmental interference in the 2016 election. The still unresolved cloud looming over this Administration should have foreclosed proceeding with a Supreme Court nomination at this moment. But the cloud now heightens our attention to this nominee's view of executive power. And we cannot ignore the fact that the President has, in this context, nominated one of the greatest executive-power maximalists on the bench today.

A brief level-setting may be useful. Article II of the Constitution creates the executive branch of the federal government and sets forth various Presidential responsibilities and powers. For example, it establishes the President's pardon power, and his power to nominate Supreme Court Justices.⁹⁹ One constant Article II-based dispute, however, is what the Constitution means when it states that "[t]he Executive Power shall be vested in a President of the United States of America."¹⁰⁰

Whether the Supreme Court applies a maximalist view of executive power has real-world consequences. Here are just a few.

- **Civil Rights.** Executive power can violate civil rights. We saw that immediately after President Trump's inauguration, when he relied on

⁹⁹ U.S. CONST., art. II, § 2, cl. 1; U.S. CONST., art. II, § 2, cl. 2.

¹⁰⁰ U.S. CONST., art. II, § 1, cl. 1.

his executive power to issue the travel bans that were repeatedly struck down by the courts as discriminating against Muslims based on their religion in violation of the First Amendment.¹⁰¹ When a revised version of the travel ban reached the Supreme Court, the Court decided to ignore the mountains of the evidence that it too was discriminatory. Why? In part, the majority's ruling was driven by a perceived need to avoid issuing a ruling that would infringe on "the core of executive responsibility" or hamper "the authority of the Presidency itself."¹⁰²

- **Presidential Pardons.** As noted, Article II gives the President the power to pardon. This can also directly affect civil rights; President Trump used this power to pardon Sheriff Joe Arpaio last year, who was convicted of criminal contempt for defying a court order that he refrain from racially profiling and unlawfully detaining Latinos in Maricopa County, Arizona.¹⁰³ In an astonishing provocation earlier this year, the President tweeted "I have the absolute right to PARDON myself[.]"¹⁰⁴
- **The Special Counsel's Investigation.** As Special Counsel Mueller's work continues, it may generate a host of issues touching on Presidential power. The President's lawyer recently stated that if Mueller attempts to require the President's testimony before his grand jury, it "would go to the Supreme Court[.]"¹⁰⁵ We could expect an argument that compelling Presidential testimony would infringe on Article II. Moreover, the very existence of Mueller's investigation could be turned into an executive-power question. Just this month, two judges have heard and rejected claims (based on Article II) that Mueller's

¹⁰¹ See, e.g., *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 269–70 (4th Cir. 2018); *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1134–40 (D. Hawaii 2017).

¹⁰² *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018); see also *id.* at 2419–20 ("Any rule of constitutional law that would inhibit the flexibility to respond to changing world conditions should be adopted only with the greatest caution[.]" (internal quotation marks omitted)).

¹⁰³ Kyle Swenson, *Federal Judge Refuses to Erase Joe Arpaio's Conviction Despite Trump Pardon*, WASH. POST, Oct. 20, 2017, https://www.washingtonpost.com/news/morning-mix/wp/2017/10/20/federal-judge-refuses-to-erase-joe-arpaio's-conviction-despite-trump-pardon/?utm_term=.fec5e1f81d39.

¹⁰⁴ John Wagner, *Trump Says He Has 'Absolute Right' to Pardon Himself of Federal Crimes but Denies Any Wrongdoing*, WASH. POST, June 4, 2018, https://www.washingtonpost.com/politics/trump-says-he-has-absolute-right-to-pardon-himself-of-federal-crimes-but-denies-any-wrongdoing/2018/06/04/3d78348c-67dd-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.3874eba9df3a.

¹⁰⁵ Greg Sargent, *Get Ready for This Nightmare Scenario Involving Trump, Mueller and Kavanaugh*, WASH. POST, Aug. 7, 2018, https://www.washingtonpost.com/blogs/plum-line/wp/2018/08/07/get-ready-for-this-nightmare-scenario-involving-trump-mueller-and-brett-kavanaugh/?utm_term=.775bc112bde3&wpisrc=nl_most&wpmm=1.

appointment is unconstitutional.¹⁰⁶ But, for what it is worth, the President seems to think it is.¹⁰⁷ Finally, of course, whether a President may be indicted while still in office is a potential issue on the table.

This should all make clear why LDF carefully evaluated Judge Kavanaugh's views and values in this area.

ii. Judge Kavanaugh's Executive Power Philosophy

Judge Kavanaugh has declared that Article II's reference to the executive power means "not some of the executive power, but all of it."¹⁰⁸ That phrasing references an executive-power theory called the "unitary executive theory," which Justice Scalia most famously articulated (in a lone dissent) in 1988's *Morrison v. Olson*.¹⁰⁹ On this view, the Constitution "allocates the power of law execution and administration to the President alone[,] and any law or action infringing on that power is suspect."¹¹⁰ This is a longstanding Federalist Society legal position.¹¹¹

This view has supported Judge Kavanaugh's long campaign against restrictions on Presidential power to remove Executive Branch officials. Supreme Court precedent allows Congress to prevent the President from removing the heads of "independent agencies," except for cause, under certain circumstances.¹¹² The full legal background of the debate in this area is beyond the scope of this report. As a brief summary: in 1926, the Supreme Court issued a decision (*Myers v. United States*)¹¹³ that suggested an unbounded Presidential removal power, but nine years later began delivering a long line of cases explaining that the power can in fact be limited.¹¹⁴ The first of those later cases is called *Humphrey's Executor v. United States*,¹¹⁵ and it is one that Judge Kavanaugh has targeted for years.

Before addressing his attacks on removal-power limits, we pause to address why they matter. Commonly recognized benefits of independent agencies include

¹⁰⁶ See *In re Grand Jury Investigation*, Grand Jury Action No. 18-34, 2018 WL 3688461, at *2 (D.D.C. July 31, 2018); *United States v. Concord Mgmt. & Consulting LLC*, Criminal Action No. 18-cr-0032-2, slip op. at 1 (D.D.C. Aug. 13, 2018).

¹⁰⁷ See *supra* note 104 (discussing the President's tweet to that effect).

¹⁰⁸ *In re Aiken Cty.*, 645 F.3d 428, 439 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

¹⁰⁹ See *Morrison v. Olson*, 487 U.S. 654, 705, 709 (1988) (Scalia, J., dissenting).

¹¹⁰ Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 549 (Dec. 1994).

¹¹¹ See generally *id.* Steven Calabresi is a co-founder of the Federalist Society.

¹¹² *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 85–91 (D.C. Cir. 2018) (en banc) (*PHH Corp. II*). "For cause" restrictions are generally accepted to be substantial because it is difficult to find "good cause" to remove.

¹¹³ 272 U.S. 52 (1926).

¹¹⁴ *PHH Corp. II*, 881 F.3d at 85–91.

¹¹⁵ 295 U.S. 602 (1935).

their insulation from political pressure applied by Congress or the President and their ability to synthesize and apply expert decision-making.¹¹⁶ That insulation from political pressure also means insulation from industry pressure, which is particularly significant in an era in which campaign finance regulation has been hampered by a host of Supreme Court decisions.¹¹⁷ Accordingly, Congress has established these agencies in many areas, including agencies dedicated to ensuring equal employment opportunity and economic justice. Important independent agencies include the Equal Employment Opportunity Commission, Federal Communications Commission, the National Labor Relations Board, and the Securities and Exchange Commission.¹¹⁸

This arrangement offends Judge Kavanaugh’s view of executive power, and he began targeting it almost immediately after he took the bench in 2006. In 2008, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, he offered a lengthy dissent attacking the Public Company Accounting Oversight Board (created in response to the Enron scandal).¹¹⁹ Emphasizing the “original understanding” of the Constitution, he characterized Congress’s choice to prevent the President from removing Board members at will as an assault on “individual liberty” and left little doubt that he believes *Humphrey’s Executor* was wrongly decided and should be overruled.¹²⁰ Later, in 2011, in a case called *In re Aiken County*, he elected to write an unnecessary separate opinion to attack *Humphrey’s Executor* again in a case where the court lacked jurisdiction.¹²¹ This time, he went further, suggesting that recent Supreme Court cases had undermined that older precedent.¹²²

Finally, in 2016, he commanded a majority of a D.C. Circuit panel for an attack on the independent Consumer Financial Protection Board, an agency created in the wake of the 2008 financial crisis to protect consumers. Judge Kavanaugh found it constitutionally dispositive that this independent agency was headed by a single individual (as opposed to multiple members).¹²³ Again employing a “history-focused approach,” he detected an unconstitutional threat to “individual liberty” in the fact

¹¹⁶ See generally Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013).

¹¹⁷ See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹¹⁸ *In re Aiken Cty.*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (listing examples).

¹¹⁹ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

¹²⁰ *Id.* at 694, 696–97, 701. The Supreme Court heard the case. Although it agreed that the Board violated the separation of powers, it declined Judge Kavanaugh’s invitation to overrule *Humphrey’s Executor*. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010).

¹²¹ See *In re Aiken Cty.*, 645 F.3d 428, 439 (D.C. Cir. 2011) (*In re Aiken Cty. I*) (Kavanaugh, J., concurring).

¹²² *Id.* at 444–46. The recent case was *Free Enterprise Fund*. See *supra* note 120.

¹²³ *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d at 6–7 (D.C. Cir. 2016) (*PHH Corp. I*). Prior Supreme Court precedent authorized independent agencies with multiple heads, so he needed a basis on which to distinguish those cases.

that this agency design was novel.¹²⁴ And despite the precedent permitting these types of restrictions, he made his view clear: the Constitution requires that “[t]o supervise and direct subordinate executive officers, the President must be able to remove those officers at will.”¹²⁵ This latter statement is not, in fact, the law. Judge Kavanaugh’s determination nonetheless to reach his desired result shows something we saw often in reviewing his cases: the use of immaterial factual distinctions to circumvent binding precedent. Indeed, *Morrison v. Olson* upheld for-cause protection for a single individual (supposedly the key to why the CFPB was unconstitutional), yet Judge Kavanaugh found it not applicable.¹²⁶

His opinion was later vacated and overruled by a majority of the D.C. Circuit sitting en banc, which criticized Judge Kavanaugh for elevating his “policy” disapprovals of single-director independent agencies to the level of constitutional principle.¹²⁷ And it observed the oddity of a “liberty” focused analysis that fails to recognize the liberty interests Congress sought to protect with the CFPB—the liberty “of the individuals and families” whom the CFPB protects from unscrupulous businesses.¹²⁸ Thus, the CFPB and the protection of its director lived on.

This tells us three important things about Judge Kavanaugh. First, it shows that he has little problem carrying on an extended campaign against long-standing precedent. Since 2008, he has issued opinions essentially imploring the Supreme Court to overrule *Humphrey’s Executor*. And his ruling in the CFPB case shows that he is willing to draw meaningless distinctions to avoid precedent he dislikes. Second, it tells us that he does not fully appreciate the public interest justifications that support longstanding precedent or understand the necessity of a Constitution that protects *all* Americans. As his court noted, the “version of liberty” that he relied on in the CFPB case “elevat[es] regulated entities’ liberty over those of the rest of the public[.]”¹²⁹ Third—returning to our political moment—his views would affect the ongoing Special Counsel investigation. The Special Counsel is an executive officer, and Judge Kavanaugh believes without qualification that the Constitution requires that the President “be able to remove [executive] officers at will.”¹³⁰ A Justice Kavanaugh with the ability to reshape precedent might well consider

¹²⁴ *Id.* at 6–8.

¹²⁵ *Id.* at 13.

¹²⁶ *See id.* at 20. His argument was unpersuasive: *Morrison* “did not expressly consider whether an independent agency could be headed by a single director” and the independent counsel there “had only a limited jurisdiction for particular defined investigations[.]” *Id.* That is essentially distinguishing the case on the basis that it is not this case, which is a feeble distinction.

¹²⁷ *PHH Corp. II*, 881 F.3d at 109.

¹²⁸ *Id.* at 106.

¹²⁹ *Id.* at 108.

¹³⁰ *PHH Corp I.*, 839 F.3d at 13.

unconstitutional the regulatory limitations on the Special Counsel’s removal.¹³¹ That issue could be squarely presented if President Trump decided to order Special Counsel Mueller’s firing (or otherwise interfere; recall that President Trump recently declared that he could “run” the Special Counsel’s investigation if he wanted).¹³²

Four more examples of Judge Kavanaugh’s executive-power views are worth discussing.

First, Judge Kavanaugh has said that “the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”¹³³ Based on that expansive claim, he argued in an Affordable Care Act case that the President “might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional.”¹³⁴ His only citation for this remarkable view was a concurring opinion by Justice Scalia.¹³⁵ This is inconsistent with the two-hundred-year-old principle announced in *Marbury v. Madison* that it is “the province and duty of the judicial department to say what the law is.”¹³⁶

Second, Judge Kavanaugh believes that “the pardon power gives the President absolute, unfettered, unchecked power to pardon every violator of every federal law.¹³⁷ To be sure, the pardon power is generally considered to be quite broad—but

¹³¹ See 28 C.F.R. 600.7(d) (outlining bases for removal of a Special Counsel). The issue would also arise if any of the various proposed bills to protect the Special Counsel from removal were enacted. See, e.g., Steve Vladeck, *It’s Time for Congress to Pass the Mueller Protection Bills*, LAWFARE, Mar. 19, 2018, <https://www.lawfareblog.com/its-time-congress-pass-mueller-protection-bills>.

¹³² See Steve Holland, Jeff Mason, & James Oliphant, *Exclusive: Trump Worries that Mueller Interview Could Be a “Perjury Trap”*, REUTERS, Aug. 20, 2018, <https://www.reuters.com/article/us-usa-trump-mueller-exclusive/exclusive-trump-worries-that-mueller-interview-could-be-a-perjury-trap-idUSKCN1L526P>.

¹³³ *Seven-Sky v. Holder*, 661 F.3d 1, 50 n.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). To his credit, he has also stated that “the President may not decline to follow a statutory mandate or prohibition simply because of policy objections. *In re Aiken Cty.*, 725 F.3d 255, 259 (D.C. Cir. 2013) (*In re Aiken Cty. III*).

¹³⁴ *Id.* at 50. He did suggest elsewhere that this power might give way if a “final Court decision in a justiciable case rejects the constitutional objection.” See *In re Aiken Cty.*, No. 11-1271, 2012 WL 3140360, at *1 n.1 (D.C. Cir. Aug. 3, 2012) (*In re Aiken Cty. II*) (Kavanaugh, J., concurring). It is more than fair to ask, however, whether the more aggressive and unprecedented version he has articulated better represents his views.

¹³⁵ *Seven-Sky*, 661 F.3d at 50 n.43 (citing *Freytag v. Comm’r*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring)).

¹³⁶ 5 U.S. 137, 177 (1803).

¹³⁷ Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1912 (May 2014).

in these unusual times, the courts may be forced to consider whether it is in fact unlimited.¹³⁸

Third, Judge Kavanaugh has questioned *United States v. Nixon*, which required President Richard Nixon to turn over materials subpoenaed by a special prosecutor.¹³⁹ In his view, the opinion “took away the power of the president to control information in the executive branch” and perhaps should have been considered nonjusticiable (beyond a court’s power to decide).¹⁴⁰ *Nixon* has long been considered a shining moment in which the Supreme Court made clear that no one is above the law.

Finally, in 1999, Judge Kavanaugh argued in a law review article that Congress ought to “clarify[]” that impeachment must precede any indictment of the President, arguing in essence that the President ought to be above the law while in office because of the importance of the position.¹⁴¹ The article goes beyond policy suggestions to state explicitly that “[t]he Constitution itself seems to dictate . . . that congressional investigation *must* take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.”¹⁴² Along the same lines he contended in 2009 that “the President should be excused from some of the burdens of ordinary citizenship while serving in office.”¹⁴³ Again, in these times, these beliefs are not academic questions.

A full-length law review article could be written on Judge Kavanaugh’s expansive views of executive power. We cannot exhaust them here.¹⁴⁴ But the beliefs

¹³⁸ See, e.g., *supra* note 104.

¹³⁹ *United States v. Nixon*, 418 U.S. 686, 686–88, 702, 713–16 (1974).

¹⁴⁰ Mark Sherman, *Kavanaugh: Watergate Tapes Decision May Have Been Wrong*, AP, July 22, 2018, <https://apnews.com/3ea406469d344dd8b2527aed92da6365/High-court-nominee-gets-started-answering-questions>. While he later included *Nixon* in a list of “the greatest moments in American judicial history[,]” he did not repudiate the reasoning he gave previously. Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 688 (Spring 2016).

¹⁴¹ Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2157, 2161 (July 1998) (“Why is the President different from Members of Congress or Supreme Court Justices or Cabinet officials? The Constitution vests the entire executive power in a single President[.]”).

¹⁴² *Id.* at 2158 (emphasis added); see also *id.* at 2157 (“[A] serious question exists as to whether the Constitution *permits* the indictment of a sitting President.”).

¹⁴³ Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1460 (2009).

¹⁴⁴ For example, his *Free Enterprise Fund* dissent also advanced a highly restrictive view of Article II’s Appointments Clause. He proposed essentially the same view in *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring). To oversimplify, his Appointments Clause theory relates to his removal-power complaints: officers in the Executive Branch over whom little control is exercised (because of removal restrictions or other aspects) by “principal officers of the United States” are principal officers requiring nomination by the President and

discussed are concerning on their own merits and for what they reveal about his broader approach to the law, including his interest in overruling seminal precedents, and his apparent willingness to manipulate them based on untenable factual distinctions.

It is worth noting that Judge Kavanaugh's actions since his nomination are consistent with our concern about his deference to the executive. For example, he made the incredible claim at his nomination event that he had witnessed "firsthand" the President's "appreciation for the vital role of the American judiciary."¹⁴⁵ More recently, in his meeting with one Senator, he declined to say whether the President must comply with a subpoena.¹⁴⁶ Yet, he is being rushed to confirmation to sit on the Court that will ultimately decide the ability of the President to undertake actions he has threatened that may undermine the rule of law.¹⁴⁷

In sum, executive maximalism is at the core of Judge Kavanaugh's jurisprudence. That means it will affect his thinking in any area in which it is relevant—and there are many. We saw this year how the majority's view of executive power in *Trump v. Hawaii* influenced their ruling in President Trump's favor.¹⁴⁸ Indeed, it even affected how the majority evaluated the statute in the case.¹⁴⁹ No one should be misled into thinking that these extreme views will not affect civil rights or racial justice. Constitutional values inevitably clash. A Justice's views—explicit or implicit—on what values matter most can be outcome determinative.¹⁵⁰ Judge Kavanaugh himself recognizes as much.¹⁵¹ All Americans should be concerned with the possibility of seating a new Justice who prioritizes Presidential power in a world where the President is determined to push that power as far as it can go. For this

confirmation by Congress. *See id.* Notably, no Justice accepted this view when the Supreme Court decided *Free Enterprise Fund*.

¹⁴⁵ *But see In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUSTICE, June 5, 2017, <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts>.

¹⁴⁶ *See* Nolan D. McCaskill, *Schumer After Meeting with Kavanaugh: Roe v. Wade Is in Jeopardy*, POLITICO, Aug. 21, 2018, <https://www.politico.com/story/2018/08/21/schumer-kavanaugh-abortion-roe-wade-790871>.

¹⁴⁷ *See supra* Part IV.A.

¹⁴⁸ *Trump*, 138 S. Ct. at 2418–20.

¹⁴⁹ *See id.* at 2409.

¹⁵⁰ In an opinion illustrating this, Judge Kavanaugh concluded that the Fourth Amendment permitted the government to bulk collect domestic telephone call records without a warrant or particularized suspicion of wrongdoing. *See Klayman v. Obama*, 805 F.3d 1148, 1148–49 (D.C. Cir. 2015) (Kavanaugh, J., concurring). His justification? The program "serves a critically important special need—preventing terrorist attacks on the United States." *Id.* at 1149. That is an argument rooted in a belief that the Executive's power there outweighed the Fourth Amendment rights of citizens; and it is not one mandated by the Fourth Amendment's text. *See also* Part IV.C.ii (discussing *Klayman*).

¹⁵¹ *The Judge as Umpire*, *supra* note 54, at 1917 (discussing how constitutional judging requires assessing "whether [you] think the law is important enough to uphold in light of the larger values at stake").

reason, Judge Kavanaugh’s executive-power views are particularly ill-suited to this moment.

B. RACE-CONSCIOUSNESS AND AFFIRMATIVE ACTION

LDF has long fought to protect the rights of public and private institutions to consider race for purposes of promoting diversity and for purposes of remedying race-based wrongs.¹⁵² It is now widely recognized that diversity is a good in itself that promotes the well-being of all members of a company or educational community. And racialized disparities in our economic, educational, housing, and criminal justice systems, plus persistent evidence of explicit and implicit social bias,¹⁵³ continue to make clear that “[i]n order to get beyond racism, we must first take account of race.”¹⁵⁴ Nevertheless, race-consciousness and affirmative action have been under constant attack since they were first pursued. As described earlier, their eradication has been a long-held goal of Judge Kavanaugh’s legal movement. That mission was most recently thwarted in 2016, when a 4-3 Supreme Court majority led by Justice Kennedy upheld the University of Texas’s race-conscious admissions program against a claim that it violated the Equal Protection Clause.¹⁵⁵ Since then, Justice Gorsuch has joined the Court, and Justice Kennedy has retired. There is little doubt that a new case will soon reach the court, and that whoever replaces Justice Kennedy will be determinative.

With that in mind, LDF has reviewed the available evidence of Judge Kavanaugh’s position on race-conscious action. He has not addressed the issue on the bench. But an amicus brief he filed—and the public-relations campaign he undertook in support of his client there—gives us sufficient evidence of his views on the matter.

The case was *Rice v. Cayetano*, in which a white American rancher challenged Hawaii’s law permitting only Native Hawaiians to vote for trustees for the state’s Office of Hawaiian Affairs (OHA).¹⁵⁶ Hawaii had concluded that the “compelling history” of discrimination against native Hawaiians justified this step to help “compensate for past wrongs” against that group and to counteract continuing harms

¹⁵² See, e.g., Brief for the Patterson Respondents, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 367216 (joint LDF-ACLU brief supporting affirmative action in higher education); Brief of the NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae in Support of Respondents, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (No. 00-730), 2001 WL 902130 (supporting remedial governmental affirmative-action contracting program).

¹⁵³ See *Schuetz v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 380–81 (Sotomayor, J., dissenting) (explaining the ways in which race continues to matter).

¹⁵⁴ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.).

¹⁵⁵ *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2205, 2214–15 (2016).

¹⁵⁶ *Rice v. Cayetano*, 528 U.S. 495, 528 (2000) (Stevens, J., dissenting); Sharon K. Hom & Eric Yamamoto, *Collective Memory, History & Social Justice*, 47 UCLA L. REV. 1747, 1765–66 (Aug. 2000) (discussing case’s factual background).

stemming from those wrongs.¹⁵⁷ Specifically: OHA managed “ceded lands,” which consist of land seized by the United States when it annexed Hawaii after the 1893 overthrow of its government; those ceded lands were placed in trust after Hawaii became a state in 1959.¹⁵⁸ OHA was created to manage that trust to benefit indigenous Hawaiians and remedy their past mistreatment.¹⁵⁹

Judge Kavanaugh, then in private practice, joined Robert Bork and anti-affirmative-action crusader Roger Clegg to file an amicus brief in *Rice* supporting the rancher, on behalf of a group of organizations including the anti-affirmative action Center for Equal Opportunity.¹⁶⁰ Analogizing Hawaii’s program to the regime upheld in *Plessy v. Ferguson*,¹⁶¹ the brief contended that “the intent, meaning, history, and policy of the Equal Protection Clause all suggest that the Constitution does not allow governmental racial classifications[.]”¹⁶² It is fair to hold Judge Kavanaugh accountable for the contents of a brief he coauthored, but in any event he made his individual positions quite clear in a media blitz to support the brief. First, in a *Wall Street Journal* op-ed, he railed against Hawaii’s program as a “naked racial-spoils system” and called the Justice Department’s support of the program “politically correct” and a “political calculation.”¹⁶³ He closed by invoking Justice Scalia’s attack on affirmative action—which he called a “fundamental constitutional principle”—that “there can be no such thing as either a creditor or debtor race[.]”¹⁶⁴ And in a subsequent interview he expressed hope that the case was “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[.]”¹⁶⁵

Judge Kavanaugh’s extreme views are flatly inconsistent with Supreme Court precedent that “race may be considered in certain circumstances and in a proper fashion.”¹⁶⁶ As Justice Kennedy recognized, the “enduring hope is that race should

¹⁵⁷ *Rice*, 528 U.S. at 528, 534 (Stevens, J., dissenting); Hom & Yamamoto, *supra* note 156, at 1766–67, 1771–77 (discussing purpose of law).

¹⁵⁸ Hom & Yamamoto, *supra* note 156, at 1766–67.

¹⁵⁹ *See id.*

¹⁶⁰ Brief of Amici Curiae Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen & Abigail Thernstrom in Support of Petitioner, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 345639 (hereinafter “*Rice Amicus*”).

¹⁶¹ 163 U.S. 537 (1896).

¹⁶² *Rice Amicus* at 14–15, 24.

¹⁶³ Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So.*, WALL ST. J., Sept. 27, 1999, https://turtletalk.files.wordpress.com/2018/07/are_hawaiians_indians_the_jus.pdf.

¹⁶⁴ *Id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring)).

¹⁶⁵ Warren Richey, *New Case May Clarify Court’s Stand on Race*, CHRISTIAN SCI. MONITOR, Oct. 6, 1999.

¹⁶⁶ *Inclusive Cmty.*, 135 S. Ct. at 2525; *see also Parents Involved*, 551 U.S. 701, 787–89 (Kennedy, J., concurring).

not matter; the reality is that too often it does.”¹⁶⁷ Nothing Judge Kavanaugh has said since *Rice*—on or off the bench—indicates that he has developed a deeper understanding of that reality.¹⁶⁸ To the contrary, what we know about his ideological loyalties indicates that the understanding he displayed in *Rice* has likely calcified.¹⁶⁹

The limited evidence that we have from Judge Kavanaugh’s time in the White House Counsel’s office supports this conclusion. He followed the affirmative action cases *Grutter v. Bollinger* and *Gratz v. Bollinger* closely. When petitioners (the white individuals attacking the affirmative action programs) filed their briefs, he commented that they were “well-done.”¹⁷⁰ He joined meetings regarding the cases as the 2002 term proceeded.¹⁷¹ His post-decision emails made his feelings on the decisions clear. Three days after the decision, he forwarded (without comment) an op-ed titled “Confused O’Connor” to a wide group of colleagues; unsurprisingly, the op-ed was heavily critical, saying her *Grutter* opinion upholding the affirmative action program at the University of Michigan was not “either logical or clear.”¹⁷² A few days later, he emailed himself extensive quotes “from [Justice Potter] Stewart’s dissent in *Fullilove*[.]” in which the Justice was joined by Justice Rehnquist in arguing the Constitution was colorblind and comparing the Court’s decision to uphold a program designed to facilitate access to public contracting opportunities to minority-owned businesses to *Plessy v. Ferguson*.¹⁷³ This is all strong evidence that, in line with his *Rice* brief, he opposed the decisions. Of course, due to the rushed nomination process, we do not know what materials on this subject are in the remainder of his White House Counsel materials, or in the as yet entirely unreleased Staff Secretary materials.

¹⁶⁷ *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring).

¹⁶⁸ LDF appreciates Judge Kavanaugh’s condemnation of a supervisor’s use of the word “nigger” in a concurrence arguing that a single use of the word could constitute a hostile work environment for Title VII purposes. See *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring). But it is not enough to recognize the historical insidiousness of that word; that should be the bare minimum. Good judging requires an understanding that racism is broader and deeper than its most jarring expressions.

¹⁶⁹ See *supra* Part III.B.

¹⁷⁰ E-mail from Brett M. Kavanaugh to Alberto R. Gonzales, David G. Leitch, and Noel J. Francisco (Jan. 21, 2003). All emails, unless otherwise noted, are part of the productions on the Judiciary Committee’s website at <https://www.judiciary.senate.gov/nominations/supreme/pn2259-115>.

¹⁷¹ See, e.g., E-mail from Brett M. Kavanaugh to Lauren Vestewig, Scott McClellan, & David Dunn (June 13, 2003) (requesting new time for “meeting re. Affirmative Action”); E-mail from Jonathan F. Ganter to group including Brett M. Kavanaugh (March 11, 2003) (subject line “Michigan A.A. Conference Call,” noting that per Noel Francisco’s request a conference call to discuss the “Michigan case” has been arranged, with Kavanaugh set to attend).

¹⁷² E-mail from Brett M. Kavanaugh to group (June 26, 2003) (titled “Richard Cohen op-ed”).

¹⁷³ E-mail from Brett M. Kavanaugh to Brett M. Kavanaugh (July 1, 2003). *Fullilove v. Klutznick*, 448 U.S. 448 (1980) upheld a public-works affirmative action program.

This is all cause for grave concern about how a Justice Kavanaugh would treat race-conscious government action.¹⁷⁴ Affirmative action is one clear flash point, but the philosophy he expresses could also jeopardize those federal and state statutes whose efficacy depends on the government being able to recognize race in order to eradicate racism, such as Section 2 of the Voting Rights Act and the disparate impact provisions of the Fair Housing Act.

Judge Kavanaugh's demonstrated anti-race-consciousness philosophy fails to recognize the reality of race in America and would further cramp the Supreme Court's racial jurisprudence if he has the opportunity to write those views into law.¹⁷⁵

C. CRIMINAL JUSTICE

Since its incorporation in 1940, LDF has fought to eliminate the arbitrary role of race in the administration of the criminal justice system to ensure the fair and equitable treatment of African Americans and communities of color. Each year, the Supreme Court is the final arbiter of many cases of critical importance to people who are accused or convicted of criminal offenses. In 2016, for example, LDF was counsel of record before the Court and argued successfully that our client Duane Buck's death sentence was the product of racial discrimination.¹⁷⁶ In this past term, the Court considered, among other topics, when the government can conduct a warrantless search,¹⁷⁷ the applicability of qualified immunity doctrine,¹⁷⁸ the rights of people who accept plea deals and their ability to then challenge the constitutionality of a statute they were convicted under,¹⁷⁹ the scope of the reasonable expectation of privacy under the Fourth Amendment,¹⁸⁰ the right for people to control decisions about their defense under the Sixth Amendment,¹⁸¹ and the Fifth Amendment's double-jeopardy protection.¹⁸² If appointed to the Court, Judge Kavanaugh would have the opportunity to join his fellow justices in shaping the scope of criminal law and procedures for decades to come.

¹⁷⁴ We note here that Judge Kavanaugh has on multiple occasions met with the Yale Black Law Students Association, and once with the Harvard Black Law Students Association, to provide "advice for aspiring clerks." *E.g.*, Kavanaugh Questionnaire at 16. This is commendable. It is, of course, not enough to outweigh the concerning record we have outlined here.

¹⁷⁵ Judge Kavanaugh's views on voting rights and employment discrimination are relevant here, but this report addresses them below, in dedicated sections. *See infra* Parts IV.D & IV.E.

¹⁷⁶ *Buck v. Davis*, 137 S. Ct. 759 (2017).

¹⁷⁷ *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

¹⁷⁸ *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018).

¹⁷⁹ *Class v. United States*, 138 S. Ct. 798 (2018).

¹⁸⁰ *Byrd v. United States*, 138 S. Ct. 1518 (2018).

¹⁸¹ *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

¹⁸² *Currier v. Virginia*, 138 S. Ct. 2144 (2018).

LDF analyzed Judge Kavanaugh’s key decisions and public comments about criminal procedure protections, direct criminal appeals, the Fourth Amendment, qualified immunity, sentencing, and *habeas* petitions. His opinions across multiple contexts—including, but not limited to, excessive force by law enforcement, qualified immunity, and the Fourth Amendment—lean in favor of the prosecution. Further, he consistently credits the positions offered by law enforcement and governments in several areas, most notably in Fourth Amendment issues. It should be noted that Judge Kavanaugh does not appear to have materially weighed in on other types of criminal law issues that have significant ramifications for civil rights, such as *Batson* challenges,¹⁸³ certain Sixth and Eighth Amendment claims, or the constitutionality of the death penalty and solitary confinement. Judge Kavanaugh also has authored a few heartening decisions in the criminal justice area, but they do not begin to outweigh our larger concerns about his record.

i. Judge Kavanaugh, Chief Justice Rehnquist, and Criminal Justice

Supreme Court decisions have confirmed the existence of constitutional rights that many people have taken for granted. Indeed, the Warren Court played a major role establishing some of the most important principles in criminal law, including *Gideon v. Wainwright*’s¹⁸⁴ declaration that indigent criminal defendants have a Sixth Amendment right to a court-appointed counsel; *Mapp v. Ohio*’s¹⁸⁵ holding that the Fourteenth Amendment extended the Fourth Amendment right against unreasonable searches and seizures to the states, and that evidence seized in violation of the right must be excluded; and *Miranda v. Arizona*’s¹⁸⁶ well-known holding that defendants must be informed of their Fifth Amendment right to remain silent and their right to counsel upon being taken into custody. It is critical that every Supreme Court Justice accept these foundational principles as settled law.

Judge Kavanaugh’s public comments cast doubt on whether he would do so. As noted previously, Judge Kavanaugh has lauded Chief Justice Rehnquist’s retrenchment of the Warren Court’s principles. He lavished particular admiration on cases involving people accused of crimes.¹⁸⁷ His examples—and the language he chooses to describe them—are telling. Judge Kavanaugh praised Justice Rehnquist’s expansion of “special needs searches,” which allow law enforcement officials to

¹⁸³ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁸⁴ 372 U.S. 335 (1963).

¹⁸⁵ 367 U.S. 463 (1961).

¹⁸⁶ 384 U.S. 436 (1966).

¹⁸⁷ *From the Bench*, *supra* note 90, at 9–10. (“He led the charge in rebalancing Fourth Amendment law to respect the rights of the people and victims of violent crime as well as of criminal defendants.”).

conduct searches without a warrant or individualized suspicion.¹⁸⁸ Judge Kavanaugh also credited Rehnquist’s attack on the “judge-created” exclusionary rule (which bars the prosecution from using illegally acquired evidence) as a rule that leads to “freeing obviously guilty violent criminals.”¹⁸⁹ And he appeared pleased with the relative success of Justice Rehnquist’s project of limiting *Miranda*.¹⁹⁰ There is little doubt that Judge Kavanaugh supports Justice Rehnquist’s success in calling to “a halt to the number of sweeping rulings of the Warren Court” in these criminal justice areas.¹⁹¹

The context of Judge Kavanaugh’s praise for Justice Rehnquist is also telling. Judge Kavanaugh made these statements in a speech that, by his own account, was designed to raise awareness about Justice Rehnquist’s important impact on modern constitutional law.¹⁹²

ii. Fourth Amendment

In Fourth Amendment cases, Judge Kavanaugh generally finds the actions of law enforcement and government officers to be reasonable. His opinions reveal substantial deference for law enforcement and the government’s purported justifications for searches, which may explain why he is reluctant to second-guess decisions made by these actors. Judge Kavanaugh frequently rules in favor of law enforcement and government officials when deciding Fourth Amendment claims, including challenges to surveillance programs, special needs searches, and law enforcement stops and frisks. Four cases in particular demonstrate Judge Kavanaugh’s deference in these areas.

In *Klayman v. Obama*, Judge Kavanaugh concurred from the denial of rehearing en banc, which effectively upheld the National Security Agency’s (NSA) warrantless metadata collection program that collected millions of call records without a warrant.¹⁹³ Judge Kavanaugh felt compelled to write a solo concurrence explaining why the “metadata collection program is entirely consistent with the Fourth Amendment.”¹⁹⁴ In his view, warrantless bulk surveillance did not constitute a search under the Supreme Court’s “third-party doctrine.”¹⁹⁵ Under this theory, Judge Kavanaugh reasoned, U.S. residents did not have a reasonable expectation of privacy in their phone records because they voluntarily turned them over to phone

¹⁸⁸ *Id.* at 9–10.

¹⁸⁹ *Id.* at 10.

¹⁹⁰ *Id.* at 11.

¹⁹¹ *Id.* at 9.

¹⁹² *Id.* at 5.

¹⁹³ 805 F.3d 1148 (D.C. Cir. 2015) (en banc); *see also id.* at 1148 (Kavanaugh, J., concurring in the denial of rehearing en banc).

¹⁹⁴ *Id.* at 1148 (Kavanaugh, J., concurring in the denial of rehearing en banc).

¹⁹⁵ *Id.* at 1148–49.

companies.¹⁹⁶ And even if the bulk collection was a search, he said, it would fit “comfortably within Supreme Court precedents applying the special needs doctrine.”¹⁹⁷ That doctrine permits suspicionless, warrantless searches when the government provides a sufficiently “special” need. In his view, the general goal of preventing terrorist attacks qualified, making a warrant unnecessary.¹⁹⁸

This is concerning for two reasons. First, Judge Kavanaugh endorsed a justification contradicted by publicly available evidence. Prior to the decision, the Privacy and Civil Liberties Oversight Board released a report finding that the NSA program showed no evidence that it thwarted any terrorist attacks or was essential in preventing attacks.¹⁹⁹ Second, Judge Kavanaugh appears to favor generalized national security concerns over individual privacy rights. Indeed, without any analysis, he declared that a “critical national security need outweighs the impact on privacy occasioned by this program.”²⁰⁰ This presents yet another area where an appropriate review of Judge Kavanaugh’s record depends on full access to his records as White House Counsel and Staff Secretary to fill this informational void: what did he know and think about these issues during this time?

*National Federation of Federal Employees-IAM v. Vilsack*²⁰¹ further demonstrates Judge Kavanaugh’s willingness to uphold governmental enforcement programs based on suspect evidence under the special needs doctrine. The majority here concluded that a random drug-testing program violated the Fourth Amendment. Under this program, a certain class of employees were all subject to random drug testing. The government justified the testing as ensuring that these employees—who worked with at-risk youth—were deterred from using drugs and selling drugs at work. The justification lacked evidence; the majority called the program “a solution

¹⁹⁶ See *id.* Interestingly, Judge Kavanaugh’s reasoning in *Klayman* is arguably inconsistent with the Supreme Court’s recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), where it found that the collection of comparable data—cell-site location information—constituted a Fourth Amendment search requiring a warrant supported by probable cause. See, e.g., Orin Kerr, *Judge Kavanaugh on the Fourth Amendment*, LAWFARE, July 21, 2018, <https://www.lawfareblog.com/judge-kavanaugh-fourth-amendment> (suggesting that *Carpenter* may be inconsistent with Judge Kavanaugh’s reasoning).

¹⁹⁷ *Klayman*, 805 F.3d at 1149. Recall that he praised Rehnquist’s expansion of the special needs category—this is that ideology in action.

¹⁹⁸ *Id.*

¹⁹⁹ Michael Isikoff, *NSA Program Stopped No Terror Attacks, Says White House Panel Member*, NBC NEWS, Nov. 2, 2015, <https://www.nbcnews.com/news/world/nsa-program-stopped-no-terror-attacks-says-white-house-panel-flna2D11783588>; PRIVACY AND CIVIL LIBERTIES OVERSIGHT BD., *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* (Jan. 23, 2014), [https://www.pclob.gov/library/215-Report on the Telephone Records Program.pdf](https://www.pclob.gov/library/215-Report%20on%20the%20Telephone%20Records%20Program.pdf).

²⁰⁰ *Klayman*, 805 F.3d at 1149.

²⁰¹ 681 F.3d 483 (D.C. Cir. 2012).

in search of a problem,” and unjustified by a “special need.” Judge Kavanaugh disagreed. Notably, his opinion relied heavily on broad, unsupported generalizations. For example, he asserted that “the potential for drug problems is obvious” at these specialized residential schools.²⁰² Even though there was no evidence that it was needed, Judge Kavanaugh referred to the testing program as an “eminently sensible”²⁰³ way to “maintain[] a drug-free workforce[.]”²⁰⁴ Indeed, he said, *not* implementing the program would be “negligent.”²⁰⁵

In *United States v. Askew*, Judge Kavanaugh subverted the Fourth Amendment’s reasonableness test to uphold police conduct, and was later overturned by the full D.C. Circuit sitting en banc. In *Askew*, police officers stopped Paul Askew, claiming that he matched the description of someone who committed armed robbery.²⁰⁶ After complying with an officer’s request to produce identification and stand by a patrol car, another officer patted him down for weapons and did not find any.²⁰⁷ Next, the police officer brought Askew in front of the robbery victim and partially unzipped his outer jacket without his consent and not for officer safety—the unzipping, the officers said, was to let “the victim [] see what Askew had on[.]”²⁰⁸ The victim did not identify Askew, yet after she left the officers put Askew on the hood of a police car and fully unzipped his jacket, finding a firearm.²⁰⁹

Writing for the panel majority, Judge Kavanaugh rejected Askew’s arguments that the gun should be excluded. Judge Kavanaugh reasoned that, under these circumstances, “police . . . may reasonably maneuver a suspect’s outer clothing (such as unzipping an outer jacket so a witness can see the suspect’s clothing) when taking that step could assist a witness’s identification.”²¹⁰ Under the Fourth Amendment balancing test, Judge Kavanaugh concluded that the government’s “strong interest in identification of an armed robber outweighs the limited additional intrusion at issue in this case.”²¹¹ In his view, the officers’ action was a “relatively minimal additional interference with individual privacy.”²¹² Moreover, Judge Kavanaugh reasoned that the unzipping of the jacket fell short of a full search that is prohibited under Supreme Court precedent.

²⁰² *Id.* at 501 (Kavanaugh, J., dissenting).

²⁰³ *Id.* at 502.

²⁰⁴ *Id.* at 501.

²⁰⁵ *Id.* at 502.

²⁰⁶ 482 F.3d 532, 536–37 (D.C. Cir. 2007).

²⁰⁷ *See id.* at 537.

²⁰⁸ *Id.*

²⁰⁹ *See id.*

²¹⁰ *Id.* at 545.

²¹¹ *Id.* at 542.

²¹² *Id.*

Judge Harry Edwards’ dissent warned that Judge Kavanaugh’s ruling would transform the Fourth Amendment into a “dead letter.”²¹³ He explained that this ruling departed from well-established precedent to effectively “rewrite Fourth Amendment law.”²¹⁴ Notably, the full D.C. Circuit agreed with Judge Edwards, reversing Judge Kavanaugh’s holding.²¹⁵ Judge Kavanaugh dissented from the en banc decision, making essentially the same arguments he had for the panel majority. *Askew* provides important insights into Judge Kavanaugh’s nearly reflexive deference to rationales given for Fourth Amendment intrusion. If accepted, Judge Kavanaugh’s view would have greatly expanded police power during stop and frisks.

Askew, *Klayman*, and *Vilsack* reveal several concerning trends. First, Judge Kavanaugh appears to favor deference to national security justification at the expense of individual privacy rights—even without evidence to support those justifications—especially when the government cites terrorism-related goals or special needs. In the same vein, Judge Kavanaugh’s reasonableness calculus under the Fourth Amendment favors law enforcement concerns and gives undue deference to public safety claims. Third, Judge Kavanaugh is willing to rely on an expansive application of the special needs doctrine to buttress opinions when the reasonableness calculation is not so clear. Tellingly, Judge Kavanaugh accepts government claims even when the available evidence undermines such claims, as in *Klayman* and *Vilsack*. Fourth, *Askew*, *Klayman*, and *Vilsack* each reveal Judge Kavanaugh’s willingness to downplay the intrusiveness of a search, especially in the context of drug-testing policies, law enforcement street encounters, and mass surveillance. To develop a fuller understanding of his views, the public needs full access to his White House Counsel’s Office records to determine his role in proposing and advocating for the NSA’s warrantless bulk data collection program.

iii. Qualified Immunity

The fact-bound nature of Judge Kavanaugh’s qualified immunity cases makes it difficult to draw detailed conclusions about his beliefs on the subject. However, his major qualified immunity case indicates that he fully supports the Supreme Court majority’s disturbing efforts to effectively “transform[] the doctrine into an absolute shield for law enforcement officers[.]”²¹⁶

In *Wesby v. District of Columbia*, police officers had arrested every partygoer for unlawful entry. A D.C. Circuit three-judge panel found that the police officers made the arrests on the mistaken and unreasonable belief that they did not need to

²¹³ *Id.* at 548 (Edwards, J., dissenting).

²¹⁴ *Id.* at 560.

²¹⁵ See *United States v. Askew*, 529 F.3d 1119, 1123 (D.C. Cir. 2008) (en banc).

²¹⁶ *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

take into consideration the partygoers' state of mind, as required by law.²¹⁷ The original panel had concluded that this was not grounds for either making an arrest or for granting qualified immunity, and upheld a damages verdict against the officers. Judge Kavanaugh dissented from the denial of rehearing en banc, however, because he thought the officers “at least *reasonably could have believed* that they had probable cause.”²¹⁸ He claimed that police officers can make reasonable judgements to “disbelieve protests of innocence.”²¹⁹ However, as the concurring opinion explaining the denial of rehearing pointed out, such expansive reasoning would “impermissibly shift the burden of discerning probable cause” from police officers to the communities they serve.²²⁰ Ultimately, the Supreme Court granted certiorari and agreed with Judge Kavanaugh, holding that the police officers had probable cause to arrest partygoers and entitled to qualified immunity.²²¹ This decision reflects the same general theme as his other criminal justice cases: considerable deference to police conduct.

iv. Direct Criminal Appeals/Sentencing

Our review of Judge Kavanaugh's sentencing cases revealed a concerning tendency to apply little to no meaningful review of district court sentencing decisions. In our view, while review is in fact deferential, appellate courts should carefully review cases so that they retain their ability to correct unjust sentences. That said, Judge Kavanaugh has written a case criticizing (in our view appropriately) the use of uncharged, unproven conduct to enhance sentences.

First, some brief background. The Federal Sentencing Guidelines outline sentencing “ranges” that are pegged to the conduct that a convicted defendant committed. Before *United States v. Booker*,²²² the guidelines were mandatory for all courts to follow; *Booker* made them “advisory,” giving courts discretion to decline to follow them.²²³ An issue arising since *Booker* has been to what degree courts must explain the sentences they give, particularly when they deviate from what the Guidelines “advise.”

²¹⁷ *Wesby v. District of Columbia*, 765 F.3d 13, 22-25 (D.C. Cir. 2014).

²¹⁸ *Wesby v. District of Columbia*, 816 F.3d 96, 105 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc).

²¹⁹ *Id.* at 107.

²²⁰ *Id.* at 100 (Pillard & Edwards, JJ., concurring in the denial of rehearing en banc).

²²¹ *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

²²² 543 U.S. 220 (2005)

²²³ Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 20–22 (2016).

Judge Kavanaugh apparently believes that very little explanation is necessary. A prime example is *In re Sealed Case*.²²⁴ The defendant there pled guilty to drug trafficking and gun possession offenses, and received a “downward departure” from the recommended Guidelines sentence because he helped the government convict other drug traffickers. He received time served and five years of supervised release. But he repeatedly violated probation, and—after hearings on the issue—the district court revoked supervised release and sentenced the defendant to 18 months’ incarceration. That sentence was an *upward* departure from the Sentencing Guidelines recommendation, which was three to nine months in prison.²²⁵

On appeal, the defendant challenged the sentence itself and the method in which the court imposed it. The majority, in an opinion written by Judge Janice Rogers Brown, agreed with the defendant, explaining that the district judge “gave no explanation at all for choosing a sentence of eighteen months, twice the Guidelines maximum,” and that a departure from the Guidelines requires a sentencing judge to “provide a specific reason for a departure and that he commit that reason to writing[.]”²²⁶ Because the district judge failed to “state[] with specificity in the written order of judgment and commitment” the reason for departure,” the court was unable to ascertain whether the sentence was reasonable, and accordingly vacated the sentence and remanded the case for resentencing.²²⁷

Judge Kavanaugh disagreed. He contended that the “majority opinion illustrates the magnetic pull that the Guidelines still occasionally exert over appellate courts in cases involving sentences outside the Guidelines range” after *Booker*.²²⁸ But Judge Kavanaugh failed to grapple with the majority’s contention that the sentencing statute itself requires that the reason for an upward departure be explained with specificity in writing. Rather, he said, the district court originally “granted the defendant a downward departure because he had demonstrated that he was amenable to supervision, but he’s now demonstrated that he’s not,” the defendant had “fail[ed] to verify his income” as required by the court, and the totality of the circumstances indicated that the sentence should stand.²²⁹ His belief, in short, was that in making the Guidelines “advisory” the Supreme Court required nearly nonexistent review of district court sentences and reasons for sentences.²³⁰

²²⁴ 527 F.3d 188 (D.C. Cir. 2008).

²²⁵ *Id.* at 190.

²²⁶ *Id.* at 191, 192.

²²⁷ *Id.* at 191, 193.

²²⁸ *Id.* at 194.

²²⁹ *Id.* at 195.

²³⁰ *Id.* at 199.

United States v. Gardellini is similar.²³¹ The defendant there pled guilty to filing a false income tax return; while the applicable advisory Guidelines range was 10 to 16 months, the district court concluded that the defendant “suffered substantially” due to his prosecution and had been treated for depression resulting from the stress of the investigation.²³² Accordingly, the district court imposed a fine in lieu of prison time and sentenced him to five years of probation in Belgium, where his family resided. The government appealed, contending that the sentence was substantively unreasonable under *Booker* and cases based on *Booker*.²³³ Judge Kavanaugh, writing for the majority, reiterated his deferential views: “it will be the unusual case when we reverse a district court sentence—whether within, above, or below the applicable Guidelines range—as substantively unreasonable.”²³⁴

On the other hand, in *United States v. Settles*,²³⁵ Judge Kavanaugh criticized precedent permitting “a sentencing judge [to] consider uncharged or even acquitted conduct in calculating an appropriate sentence, so long as that conduct has been proved by a preponderance of the evidence and the sentence does not exceed the statutory minimum for the crime of conviction.”²³⁶ In *Settles*, the defendant was convicted of one count of unlawful possession of a firearm and ammunition by a convicted felon, but acquitted of possession with intent to distribute cocaine and of using or carrying a firearm for a drug trafficking offense.²³⁷ However, the district court relied on the acquitted evidence when determining the appropriate sentence, holding that the government had “proved by a preponderance of the evidence that [the defendant] had possessed the gun in connection with possessing with intent to distribute.”²³⁸ The district court’s reliance on the acquitted conduct increased the defendant’s advisory guidelines range from 37–46 months to 57–71 months.²³⁹

Judge Kavanaugh observed the unjustness of this approach, stating that he “understand[s] why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence,” and that “[m]any judges and commentators have similarly argued that using acquitted conduct to increase a defendant’s sentence

²³¹ 545 F.3d 1089, 1090 (D.C. Cir. 2008).

²³² *Id.* at 1091.

²³³ *Gardellini*, at 1090-91.

²³⁴ *Id.* at 1090.

²³⁵ *United States v. Settles*, 530 F.3d 920 (D.C. Cir. 2008).

²³⁶ *Id.* at 923.

²³⁷ *Id.*

²³⁸ *Id.* at 922.

²³⁹ *Id.*

undermines respect for the law and the jury system.”²⁴⁰ Nevertheless, bound by precedent, he affirmed.²⁴¹

v. Death Penalty

LDF has consistently worked to eliminate the death penalty, which has been and continues to be applied in a racially biased manner.²⁴² Judge Kavanaugh has not ruled on any death penalty cases. He has, however, signaled his views by praising Chief Justice Rehnquist’s jurisprudential support of the death penalty; he celebrated the fact that “Rehnquist’s call for the Court to remember its proper and limited role in the constitutional scheme has so far proved enduring in the death penalty context.”²⁴³

Particularly in that light, one case touching on the rights of a person on death row raises concerns. In *Roth v. DOJ*, a person on death row filed a Freedom of Information Act (FOIA) request seeking information he hoped would exculpate him (specifically, information bearing on whether three other men committed the crime for which he was convicted).²⁴⁴ The FBI had refused to confirm or deny whether it had the records the prisoner sought, but the majority of a D.C. Circuit panel said that it must. The majority reasoned that “(1) 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 (2) that interest outweighs the three men’s privacy interest in having the FBI not disclose whether it possesses any information linking them to the murders.”²⁴⁵ Judge Kavanaugh dissented in relevant part, explaining he would have struck the balance differently and upheld the FBI’s refusal. Notably, Judge Kavanaugh dismissively described the majority opinion as creating a “death penalty exception” to FOIA.²⁴⁶

We cannot definitively speak on whether Judge Kavanaugh’s views on the death penalty would be regressive, but the limited record suggests they would.

Overall, Judge Kavanaugh’s record on criminal justice is cause for concern. To be sure, his record contains a few bright spots, and the fact-bound nature of many of the cases precludes drawing broad inferences.²⁴⁷ But he is on record as signing on in

²⁴⁰ *Id.* at 923-24.

²⁴¹ *Id.* at 924, 925.

²⁴² *See, e.g., McCleskey v. Kemp*, 481 U.S. 279 (1987) (LDF-litigated case challenging death penalty as inherently racially biased).

²⁴³ *From the Bench*, *supra* note 90, at 12.

²⁴⁴ 642 F.3d 1161, 1166 (D.C. Cir. 2011).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1190 (Kavanaugh, J., dissenting).

²⁴⁷ *See also, e.g., United States v. Williams*, 836 F.3d 1, 19–20 (D.C. Cir. 2016) (Kavanaugh, J., concurring) (joining the overturning of a murder conviction because the jury was improperly

substantial part to Chief Justice Rehnquist’s anti-criminal-justice agenda. And nothing in his opinions as a sitting Judge provide any indication that he would act differently if confirmed to the Supreme Court.

D. ECONOMIC JUSTICE: EMPLOYMENT DISCRIMINATION & WORKERS’ RIGHTS

A significant portion of Judge Kavanaugh’s judicial record concerns economic justice, and particularly the rights of workers. On the D.C. Circuit, Judge Kavanaugh has ruled on cases where individual employees allege that they have suffered discrimination based on protected characteristics under Title VII, and cases where employees have attempted to exercise their rights under the National Labor Relations Act to organize and bargain collectively. Unfortunately, Judge Kavanaugh’s record on workers’ rights to organize and not to be discriminated against demonstrates the same disturbing trends as other parts of his jurisprudence: a willingness to trust and value the actions of institutional parties over individuals, and a tendency to stray from his self-professed textualism when doing so serves corporate interests or political ends.

Judge Kavanaugh’s record on these issues is consistent with the very reasons given by the Trump Administration for his nomination, i.e., that he is “anti-regulation,”²⁴⁸ and has overruled federal agencies at least 75 times, including when addressing consumer protection and anti-pollution regulations.²⁴⁹ Given his record, and the ideological school from which he hails, we are deeply concerned that Judge Kavanaugh, if confirmed, will roll back important civil rights and economic protections, especially for communities of color. These trends are particularly troubling given the ongoing project of conservative legal institutions and scholars to dismantle the disparate impact doctrine and, in doing so, to reverse decades of progress on civil rights.

instructed); *United States v. Burwell*, 690 F.3d 500, 527–529 (D.C. Cir. 2015) (Kavanaugh, J., dissenting) (en banc) (dissenting “emphatically” from the holding that no proof of knowledge that a weapon was automatic was necessary to impose an automatic-weapon sentencing enhancement resulting in a thirty-year mandatory sentence).

²⁴⁸ Lorraine Woellert, *Trump Asks Business Groups for Help Pushing Kavanaugh Confirmation*, POLITICO, July 9, 2018, <https://www.politico.com/story/2018/07/09/brett-kavanaugh-business-groups-trump-705800>.

²⁴⁹ Matthew Goldstein, *Brett Kavanaugh Likely to Bring Pro-Business Views to Supreme Court*, N.Y. TIMES, July 10, 2018, <https://www.nytimes.com/2018/07/10/business/kavanaugh-supreme-court-business-regulation.html>.

i. Disparate Impact

The disparate impact theory is a legal theory of liability for discrimination. Whereas some discrimination theories require an aggrieved party to show that they were intentionally discriminated against based on a protected characteristic, parties suing under a disparate impact theory can prove that a *facially neutral* policy or practice nonetheless has discriminatory effects. This allows discrimination victims and advocacy groups to contest practices that have the effect of excluding people based, *inter alia*, on their race, without carrying the heavy evidential burden of showing that the discrimination was intentional. This also helps “smoke out” discriminatory purpose that may have been intentionally hidden behind facial neutrality.²⁵⁰

Since the Supreme Court’s 1971 decision in *Griggs v. Duke Power Company*, the disparate impact doctrine has been an essential element of anti-discrimination law in the United States.²⁵¹ In *Griggs*, which was argued by LDF’s then-Director-Counsel Jack Greenberg, a class of African American power company workers challenged the company’s new employment requirements—a high school education or a passing score on a standardized “general intelligence” test. In an 8-0 decision, the Supreme Court held that Duke Power Company’s high school degree requirement and standardized test violated Title VII because they had the effect of excluding African Americans from employment opportunities for which they were otherwise qualified, *i.e.* the requirements had discriminatory effects and were not necessary for finding qualified job candidates. In the Court’s words, the Civil Rights Act “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”²⁵²

In *Griggs*, the Supreme Court unanimously confirmed that the nation’s landmark civil rights statutes reach not only overt, explicit discrimination, but also policies and practices that have discriminatory effects. And, since *Griggs*, Congress and the courts have employed the concept of disparate impact to combat discrimination in nearly every sphere of economic and political life.²⁵³ The disparate

²⁵⁰ See, e.g., Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 498–99 (2003).

²⁵¹ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²⁵² *Id.* at 431.

²⁵³ Twenty years after *Griggs*, Congress codified the disparate impact theory for employment discrimination in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k)(1)(A). Congress has also codified the disparate impact theory in the Americans with Disabilities Act, 42 U.S.C. § 12112(b), and the Voting Rights Act, 52 U.S.C. § 10301(b). Since *Griggs*, courts have recognized that the disparate impact theory is cognizable under the Fair Housing Act, see *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), the Equal Credit Opportunity Act, see *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006) (assuming without deciding that disparate impact claims are

impact theory recognizes and directly confronts basic facts about discrimination in American life: that it is often institutional and/or implicit. And the process for litigating disparate impact claims, sketched in *Griggs* and re-affirmed in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,²⁵⁴ balances the need to root out discriminatory practices with the reality that sometimes policies with discriminatory effects will nonetheless be necessary to achieve legitimate goals

Despite the long historical pedigree of the disparate impact theory, beginning with the unanimous Supreme Court decision in *Griggs* and spanning multiple codifications by Congress, the theory has long been in the crosshairs of the conservative legal movement. We laid out some of the evidence for that claim in Part III.B. And the consequently shifting ground under our foundational anti-discrimination provisions is evident in the Supreme Court’s most recent Title VII and Fair Housing cases. Whereas *Griggs* was unanimous in affirming disparate impact liability, the Court’s more recent decisions have been sharply divided along ideological grounds. For example, Justice Scalia’s concurrence in *Ricci v. DeStefano* calls into question the disparate impact theory, claiming that it “sweep[s] too broadly” and “fail[s] to provide an affirmative defense for good-faith (*i.e.*, nonracially motivated) conduct”²⁵⁵ Of course, that attacks the very aspect of disparate impact that makes it an essential tool in combatting discrimination—its ability to reach conduct that has discriminatory effects but is not necessarily motivated by explicit racial animus, or for which the racial animus has been successfully hidden.

Most recently, in *Inclusive Communities*, a sharply divided Court held that disparate impact is a cognizable theory under the Fair Housing Act.²⁵⁶ Justice Thomas, in his dissent, claimed that the “disparate-impact doctrine defies not only the statutory text, but reality itself.”²⁵⁷ Justice Alito, in his dissent joined by Chief Justice Roberts and Justices Scalia and Thomas, claimed that “[t]he Fair Housing Act does not create disparate-impact liability, nor do this Court’s precedents.”²⁵⁸

Both the Department of Housing and Urban Development and the Consumer Financial Protection Bureau, since coming under the leadership of Secretary Ben

cognizable under the ECOA), the Age Discrimination in Employment Act, *see Smith v. City of Jackson*, 544 U.S. 228 (2005), and Title VI of the Civil Rights Act, *see Alexander v. Sandoval*, 532 U.S. 275 (2001) (recognizing that Title VI permits government enforcement of disparate impact claims). States have also used disparate impact theories in their own statutes. *See, e.g.*, CAL. GOV’T CODE § 12955.8 (2018).

²⁵⁴ 135 S. Ct. 2507 (2015).

²⁵⁵ *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

²⁵⁶ *See* 135 S. Ct. at 2507, 2525 (2015).

²⁵⁷ *Id.* at 2529 (Thomas, J., dissenting).

²⁵⁸ *Inclusive Communities*, 135 S. Ct. at 2533 (Alito, J., dissenting).

Carson and Acting Director Mick Mulvaney respectively, have announced plans to reconsider their use of disparate impact theory under the Fair Housing Act and the Equal Credit Opportunity Act.²⁵⁹ The upcoming Supreme Court terms will undoubtedly prove a pivotal time for the disparate impact theory, and therefore for the effectiveness of our nation's most important civil rights laws.

ii. Judge Kavanaugh's Record on Disparate Impact

Although Judge Kavanaugh has not authored any opinions on disparate impact, he has joined one decision that indicates he could join the conservative Justices on the Court in striking down the disparate impact theory. In *Greater New Orleans Fair Housing Action Center v. United States Department of Housing & Urban Development*, the plaintiffs challenged a post-Katrina grant program as having a disparate impact on African American homeowners.²⁶⁰ The challenged grant program paid hurricane victims who had lost their homes the lesser of two amounts: (1) the value of their home; or (2) the cost of repairing their home.²⁶¹ The plaintiffs alleged that the grant program had a disparate effect on African American homeowners because their grants were capped at the value of their homes, which were often less than the cost to repair, whereas white grant recipients' home values were often more than their cost to repair.²⁶² This meant that African American recipients had a greater "resource gap," i.e., a greater difference between what they received from the grant and their actual cost of rebuilding, and were less likely to be able to rebuild than their white counterparts.

The district court held that the plaintiffs in *Greater New Orleans* stated a sufficient *prima facie* case for disparate impact and, after denying the plaintiffs' first request for a preliminary injunction, granted narrower injunctive relief.²⁶³ However, in an opinion joined by Judge Kavanaugh, the D.C. Circuit reversed.²⁶⁴ The D.C. Circuit dismissed the resource gap formulation, noted that any formula would have

²⁵⁹ See Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 83 Fed. Reg. 28,560 (proposed June 20, 2018), <https://www.federalregister.gov/documents/2018/06/20/2018-13340/reconsideration-of-huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>; Statement of the Bureau of Consumer Financial Protection on Enactment of S.J. Res. 57 (May 21, 2018), <https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57/>.

²⁶⁰ 639 F.3d 1078 (D.C. Cir. 2011).

²⁶¹ *Id.* at 1080-81.

²⁶² *Id.*

²⁶³ *Id.* at 1082.

²⁶⁴ *Id.* at 1089.

aspects that favored and disfavored different racial groups, and held that the plaintiffs had not sufficiently demonstrated that they could win the case.²⁶⁵

Perhaps most disturbing about the opinion Judge Kavanaugh joined here is its unnecessary *dicta* pondering various aspects of disparate impact liability not properly before the court. As noted by Judge Rogers in concurrence, the opinion joined by Judge Kavanaugh “meanders into disparate impact theory,” unnecessarily “speculates that white recipients might have disparate impact claims,” and sets up suppositions only to reject them “without record evidence on either side” and “while ignoring support for the plaintiffs’ evidentiary proffer.”²⁶⁶ Judge Rogers continues: “One might well wonder what purpose these meanderings have other than to posit hurdles for future disparate impact claims.”²⁶⁷ Ultimately the opinion joined by Judge Kavanaugh reversed the district court and found, on an undeveloped and incomplete record, that the plaintiffs could not succeed on a disparate impact claim in the case.

iii. Employment Discrimination

Judge Kavanaugh has reviewed numerous employment discrimination cases. Unfortunately, Judge Kavanaugh’s decisions usually come out against workers who claim they were discriminated against. Worse still, Judge Kavanaugh’s decisions frequently uphold the disposition of workers’ claims at the summary judgment stage, where judges decide what a “reasonable jury” could find, thus preventing alleged discrimination victims from ever presenting their cases to a jury. Judge Kavanaugh’s decisions in employment discrimination cases show that he tends to regard businesses’ and institutional defendants’ decisions as reasonable and entitled to the benefit of the doubt. Judge Kavanaugh also tends to allow the government a great deal of leeway in its employment practices, often shielding federal employers from discrimination claims. The result is that Judge Kavanaugh rarely lets employees make their cases to a jury.

One way that Judge Kavanaugh’s anti-employee bias reveals itself in employment discrimination cases is in what he accepts as a legitimate, nondiscriminatory reason for an employment action versus what he views as a pretext for discrimination. Courts often employ a burden-shifting analysis when considering claims of employment discrimination. The analysis originated in a Supreme Court case called *McDonnell Douglas Corp. v. Green*.²⁶⁸ Under *McDonnell Douglas* burden-shifting, plaintiffs must first make out a *prima facie* case that they were discriminated against. While it has been stated in many different ways, this generally requires showing that the plaintiffs are part of a protected class or

²⁶⁵ See generally *id.*

²⁶⁶ *Id.* at 1093.

²⁶⁷ *Id.*

²⁶⁸ 411 U.S. 792 (1973).

otherwise are entitled to some protection under antidiscrimination law, that they suffered some sort of adverse employment action (such as being rejected for a job), that they were qualified for the job, and that some evidence exists that the rejection was illegitimate (e.g., the position remained open or the employer sought other employees).²⁶⁹ The employer may then offer their own legitimate, nondiscriminatory reason for the complained-of (adverse) action.²⁷⁰ After the employer offers evidence of a legitimate, nondiscriminatory reason, the plaintiff can present evidence that this was not the true reason, that the employer's offered reason is merely a pretext for discrimination.²⁷¹ Whether the employer's reason is a pretext is a question for the trier-of-fact, i.e., the jury in most cases.

Judge Kavanaugh has been critical of this burden-shifting approach. In *Brady v. Office of Sergeant at Arms*, Judge Kavanaugh made clear his assumption that in nearly every individual employment discrimination case, the employer will be able to offer evidence of a legitimate and nondiscriminatory reason for the contested action.²⁷² In Judge Kavanaugh's view, the only appropriate question for courts to ask in deciding whether discrimination claims should go to a jury or whether the employer will win on summary judgment is whether "the employee has produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin[.]"²⁷³ But this formulation transforms a back and forth process that takes each party seriously at each step into a one-step question of whether the employee has produced enough evidence to convince a jury that the employer is lying. This can lead to undeveloped records, which hurts plaintiffs, who have the burden of proof in these cases. Unfortunately, Judge Kavanaugh rarely finds that employees have met this burden.

Take *Jackson v. Gonzalez*, where an African American man alleged that he was denied a promotion based on his race.²⁷⁴ The employer's proffered legitimate reason for instead promoting a white woman was that she had more experience with a system that was not mentioned in the job announcement or job description.²⁷⁵ As Judge Rogers noted in dissent, Mr. Jackson presented evidence that the employer

²⁶⁹ See *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493 & n.1 (D.C. Cir. 2008).

²⁷⁰ *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000).

²⁷¹ *Id.* at 143.

²⁷² 520 F.3d at 493 ("And by the time the district court considers an employer's motion for summary judgment or judgment as a matter of law, the employer ordinarily will have asserted a legitimate, non-discriminatory reason for the challenged decision—for example, through a declaration, deposition, or other testimony from the employer's decisionmaker.")

²⁷³ *Id.* at 494.

²⁷⁴ 496 F.3d 703 (D.C. Cir. 2007).

²⁷⁵ *Id.* at 706.

had changed its characterization of the job requirements between the time that it posted the job and the time it offered its justification for denying Mr. Jackson the promotion.²⁷⁶ Nonetheless, Judge Kavanaugh ruled that *no reasonable jury* could find that the employer’s stated reason was a pretext, and affirmed summary judgment for the employer.²⁷⁷ Judge Kavanaugh reached the same conclusion—that *no reasonable jury* could find that the employer’s reason was a pretext for discrimination—in *Baloch v. Kempthorne*.²⁷⁸

In *Jackson* and other cases, Judge Kavanaugh often emphasizes that the inquiry ends if “the employer honestly and reasonably believed” that the supposedly nondiscriminatory basis for firing the employee actually occurred—irrespective of whether the underlying event actually occurred.²⁷⁹ He applied that reasoning to throw out a plaintiff’s case in *Vatel v. Alliance of Automobile Manufacturers*.²⁸⁰ But the “reasonableness” of an employer’s belief is a quintessential question of fact; indeed, one particularly relevant fact to the reasonableness of the belief is whether the supposed basis for firing occurred, or occurred in the way that the employer claims. This is yet another example of Judge Kavanaugh’s solicitude towards employers in these cases.

Judge Kavanaugh’s deference toward defendants in employment discrimination cases is even stronger when there is a governmental interest arguably at stake. We therefore worry that Judge Kavanaugh may significantly weaken discrimination protections for executive and legislative federal workers.

For example, in *Howard v. Office of the Chief Administrative Officer of the United States House of Representatives*, Ms. Howard, an African American woman, alleged that she was demoted and then terminated due to her race and retaliation.²⁸¹ The defendant claimed that she was demoted and fired due to job duties that constituted “legislative acts,” and that its reasons for demoting and firing her were therefore shielded from scrutiny by the Speech or Debate Clause in the Constitution.²⁸² The D.C. Circuit, siding with Ms. Howard, held that her claims concerned her job performance and a particular assignment and could be explored without questioning the legislative activities of the House.²⁸³ Judge Kavanaugh dissented. In his view, “[o]nce we conclude (as we must here) that the employer’s

²⁷⁶ *Id.* at 712–13.

²⁷⁷ *Id.* at 705.

²⁷⁸ 550 F.3d 1191 (D.C. Cir. 2008); *see also Vatel v. Alliance of Auto. Mfrs.*, 627 F.3d 1245, 1245–49 (D.C. Cir. 2011).

²⁷⁹ *See, e.g., Vatel*, 627 F.3d at 1248 (citing *Brady*, 520 F.3d at 496).

²⁸⁰ *Id.* at 1247–48.

²⁸¹ 720 F.3d 939, 941 (D.C. Cir. 2013).

²⁸² *Id.* at 941–942.

²⁸³ *Id.* at 953.

asserted reason for the decision involves legislative activity protected by the Speech or Debate Clause, I believe (unlike the majority opinion) that the case must come to an end.”²⁸⁴ The implication of this extreme view is that the legislative branch could escape employment discrimination liability simply by invoking legislative activities, and that courts should dismiss any such case and may not question whether there was any actual legislative activity at issue. That is, Judge Kavanaugh’s view would give the legislative branch a judicial-review-proof excuse for all potentially discriminatory employment actions.

Howard is not the only case in which Judge Kavanaugh has stretched to accept the government’s position. In *Miller v. Clinton*, Mr. Miller, a State Department employee, was required by the State Department to retire on his sixty-fifth birthday.²⁸⁵ Mr. Miller sued under the Age Discrimination in Employment Act, claiming that his forced retirement was age-based discrimination.²⁸⁶ The State Department admitted Mr. Miller was being forced out due to his age, but claimed the Basic Authorities Act gave it the power to discriminate based on age despite the ADEA.²⁸⁷ The D.C. Circuit disagreed, holding that the ADEA is “but part of a wider statutory scheme, including Title VII and the ADA, enacted to protect employees in the workplace nationwide,” and that, if Congress had decided to exempt the State Department from the ADEA’s anti-discrimination provisions, it would have done so “clearly” and not “hidden those decisions in obscure references.”²⁸⁸ Judge Kavanaugh, however, dissented. He said that the case was “not a close call,” and that the State Department should therefore be free to fire Mr. Miller due to his age, despite the ADEA and our strong national policy against age discrimination.²⁸⁹

The final example in this category is *Rattigan v. Holder*, in which a jury found that the FBI retaliated against Mr. Rattigan for filing complaints that it had discriminated against him based on his race and nationality.²⁹⁰ The FBI’s retaliation consisted of referring him for a security clearance review.²⁹¹ The jury found that this security clearance referral was a retaliatory action in violation of Title VII and awarded Mr. Rattigan \$300,000 in damages.²⁹² The FBI sought to have the verdict dismissed on the grounds that courts may not review security clearance decisions.²⁹³ The D.C. Circuit reversed the jury’s verdict but held that Mr. Rattigan could succeed

²⁸⁴ *Id.* at 955.

²⁸⁵ 687 F.3d 1332, 1335 (D.C. Cir. 2012).

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 1336.

²⁸⁸ *Id.* at 1352 (internal quotation marks omitted).

²⁸⁹ *Id.* at 1357.

²⁹⁰ 689 F.3d 764, 765 (D.C. Cir. 2012).

²⁹¹ *Id.* at 766.

²⁹² *Id.*

²⁹³ *Id.*

in his claim if he could show that the reports of security concerns were “knowingly false.”²⁹⁴

In his dissent, Judge Kavanaugh explained that he would have granted even more leeway to the FBI.²⁹⁵ Judge Kavanaugh would have dismissed the case altogether, meaning that even where referrals for security review are malicious, false, and made in retaliation for discrimination complaints, courts still may not question them and employees must suffer the consequences.

To be sure, not all of Judge Kavanaugh’s opinions on employment discrimination have been so troubling. We previously discussed his praiseworthy concurrence in *Ayissi-Etoh v. Fannie Mae*, which recognized that a single use of the word “nigger” could constitute a hostile work environment (we noted, however, that a recognition of the abhorrence of the word ought to be a bare judicial minimum).²⁹⁶ And, in his concurrence in *Ortiz-Diaz v. United States Department of Housing & Urban Development*, Judge Kavanaugh opines—again, correctly—that a denial of lateral transfer based on race should be considered an adverse employment action under Title VII.²⁹⁷

However, Judge Kavanaugh’s record on employment discrimination makes clear that in most cases, where there is some dispute as to whether conduct was the result of discrimination or a legitimate and nondiscriminatory reason, Judge Kavanaugh frequently decides that the employers’ reasons are so obviously superior that no reasonable jury could find discrimination. In an economy pervaded by institutional and implicit racism, and in a legal system premised on the right to a jury, Judge Kavanaugh’s record in these cases is disturbing.

iv. Workers’ Rights

Judge Kavanaugh’s seat on the D.C. Circuit results in his participation in a substantial number of cases on review from the National Labor Relations Board (NLRB). These decisions, like his decisions regarding discrimination and access to justice, further demonstrate Judge Kavanaugh’s tendency to side with institutional and corporate interests over the interests of individuals and those with less institutional power.

Racial justice and civil rights have long been connected with workers’ rights. As we explained in an amicus brief last year, “[f]ederal labor law honors” what should be an “unwavering commitment to equal opportunity . . . by guaranteeing workers

²⁹⁴ *Id.* at 773.

²⁹⁵ *Id.*

²⁹⁶ See *supra* note 168 (discussing *Ayissi-Etoh*).

²⁹⁷ See 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

the right to challenge workplace discrimination through concerted activity[.]”²⁹⁸ The right to organize is part of the tapestry of statutory rights critical to ensuring a socially and economically just society. It helps victims of discrimination feel safe to speak out, and it helps workers striving for economic security to pursue fairer wages (and, because of the labor force composition, disproportionately aids workers of color).²⁹⁹ Indeed, Dr. Martin Luther King, Jr. was assassinated in Memphis while supporting an action by sanitation workers seeking the right to organize.³⁰⁰ But this right is, like so many others, under attack today.³⁰¹ Judge Kavanaugh’s record in labor law cases indicates that he will do nothing to thwart that attack.

Judge Kavanaugh’s tendency to rule against workers is starkly displayed in his opinions in *Venetian Casino Resort v. NLRB*³⁰² and *Southern New England Telephone v. NLRB*.³⁰³ In *Venetian Casino*, the casino used its private security to enact citizens’ arrests on lawful union demonstrators, and the casino also asked local police to issue criminal citations to the demonstrators.³⁰⁴ The NLRB found that the casino’s attempts to have lawful demonstrators cited for criminal trespass was an unfair labor practice.³⁰⁵ But Judge Kavanaugh disagreed. His majority opinion concluded that the First Amendment right to petition the government shields employers from labor law liability when they use police to disrupt lawful demonstrations.³⁰⁶ Judge Kavanaugh’s holding in *Venetian Casino* constitutes an expansion of the right to petition, historically limited to outreach on policy issues, and serves to immunize employers from liability for using police action to threaten and intimidate workers exercising their own first amendment and labor rights.

²⁹⁸ Brief for NAACP Legal Defense & Educational Fund, Inc. Impact Fund, and 30 Civil Rights Organizations as Amici Curiae Supporting Respondents in Nos. 16-285 & 16-300 and Petitioner in No. 16-307, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Nos. 16-285, 16-300, 16-307), 2017 WL 3588728, at *2.

²⁹⁹ See, e.g., *id.* at *11–13 (discussing how concerted action “promote[s] employee collaboration” and noting the “sense of shared commitment among African-American workers” that “helped to catalyze the class action that led to” the LDF-litigated *Griggs* decision); Caleb Gayle, *Unions Brought Black Americans into the Middle Class. They’re Now Being Decimated*, GUARDIAN, Aug. 14, 2018, https://amp.theguardian.com/global/2018/aug/14/unions-brought-black-americans-into-the-middle-class-theyre-now-being-decimated?CMP=share_btn_tw&_twitter_impression=true (explaining how “[r]ecent efforts to undercut the US labor movement will disproportionately affect African Americans”).

³⁰⁰ For more on the deep historical ties between workers’ rights and civil rights, and Dr. King’s vision of economic justice for workers, see MICHAEL K. HONEY, GOING DOWN JERICHO ROAD: THE MEMPHIS STRIKE, MARTIN LUTHER KING’S LAST CAMPAIGN (2007).

³⁰¹ See, e.g., *Janus v. Am. Fed. of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (holding that union agency fees for non-member public sector workers violate the First Amendment).

³⁰² 793 F.3d 85 (D.C. Cir. 2015).

³⁰³ 793 F.3d 93 (D.C. Cir. 2015).

³⁰⁴ 793 F.3d at 88.

³⁰⁵ *Id.* at 88–89.

³⁰⁶ *Id.* at 92.

Where *Venetian Casino* expansively interpreted employers’ speech rights, *Southern New England Telephone* greatly constricted the speech rights of workers. In *Southern New England Telephone*, employees exercised their right to wear union-associated clothing at work by wearing shirts that said “Inmate” and “Prisoner of AT&T.”³⁰⁷ The employer, AT&T Connecticut, banned these shirts, and the NLRB found that doing so was an unfair labor practice.³⁰⁸ Here, Judge Kavanaugh found the burden on speech immaterial. Writing for the majority, he held that employers could prohibit employees from wearing union-associated clothing where the employer “could reasonably believe that the message may harm its relationship with customers or its public image.”³⁰⁹ Judge Kavanaugh thought it obvious that these shirts would harm customer relationships and/or AT&T’s public image, and therefore overruled the NLRB and held that the employer had done nothing wrong.³¹⁰

Venetian Casino and *Southern New England Telephone*, read together, lay bare Judge Kavanaugh’s tendency to side with employers over workers. Employers are protected by the First Amendment when they call the police to break up lawful demonstrations, but workers can be banned from wearing union-associated clothing on the mere finding that it *may* hurt the company’s public image.

Judge Kavanaugh’s tendency to side with employers over workers is not limited to questions of speech. The record is shockingly one-sided. Take *Agri Processor Co., Inc. v. National Labor Relations Board*, for example.³¹¹ There, he dissented to insist that undocumented workers are not “employees” under the National Labor Relations Act—and thus not entitled to labor rights and protections—despite binding Supreme Court precedent holding that they *are* employees under the statute.³¹² Ironically, given his professed textualism and respect for precedent, the majority chastised Judge Kavanaugh for attempting to “abandon” the text of the governing statute as interpreted by the Supreme Court.³¹³

He stretched again in *Island Architectural Woodwork, Inc. v. National Labor Relations Board*.³¹⁴ The National Labor Relations Board had found that a company set up a separate shell company to avoid its labor-law requirement to bargain with a union.³¹⁵ Despite substantial evidence of that fact—and a standard of review requiring high deference to the Board’s findings—Judge Kavanaugh dissented. He

³⁰⁷ 793 F.3d at 94.

³⁰⁸ *Id.* at 95.

³⁰⁹ *Id.* at 97.

³¹⁰ *Id.*

³¹¹ 514 F.3d 1 (D.C. Cir. 2008).

³¹² *Id.* at 10 (Kavanaugh, J., dissenting).

³¹³ *Id.* at 7 (majority opinion).

³¹⁴ 892 F.3d 362 (D.C. Cir. 2018).

³¹⁵ *Id.* at 366–67.

would have overruled the NLRB, ignoring that the companies were owned by the same family and used the same equipment without charging each other, and that the CEO of one of the companies had lied about their relationship.³¹⁶

This list goes on. Judge Kavanaugh also would have held that workers have no right to union representation outside of formal disciplinary processes, even when they are being investigated for substandard conduct,³¹⁷ and that the Department of Labor had no right to fine SeaWorld for failing to keep its trainers safe from a whale with a history of violent behavior.³¹⁸ Writing for the majority in *Johnson v. Interstate Management Company, LLC*, Judge Kavanaugh held that, when employers retaliate against employees for reporting unsafe working conditions to the Occupational Safety and Health Administration, those employees have no private cause of action to sue.³¹⁹ In *Trump Plaza Associates v. National Labor Relations Board*, the NLRB found that the Trump Plaza Casino violated labor law in refusing to negotiate with a union.³²⁰ Trump Plaza challenged the NLRB's order, contending that the union was not validly elected.³²¹ The D.C. Circuit, in an opinion joined by Judge Kavanaugh, agreed with Trump Plaza and ordered the NLRB to reassess the union's validity.³²²

Judge Kavanaugh's dissent in *National Federation of Federal Employees-IAM v. Vilsack*, previously discussed in Part IV.C, further illuminates his extreme positions on federal workers' rights.³²³ In *Vilsack*, a union challenged the U.S. Forest Service's policy of randomly drug testing its Job Corps Civilian Conservation Center employees without the individualized suspicion required by the Fourth Amendment.³²⁴ The D.C. Circuit found the policy unconstitutional, stating that there was "no foundation for concluding there is a serious drug problem among staff" and characterizing the policy as "a solution in search of a problem."³²⁵ But Judge Kavanaugh dissented. In his view, not only should the Forest Service be allowed to randomly drug test its employees without any individual suspicion, but "it would seem negligent not to test."³²⁶

Judge Kavanaugh's labor law record is concerning and of a piece with his pro-employer leanings in classic employment discrimination cases. Taken together, we

³¹⁶ See *id.* at 368, 374; but see *id.* at 377 (Kavanaugh, J., dissenting).

³¹⁷ *Midwest Div.-MMC, LLC v. Nat'l Labor Relations Bd.*, 867 F.3d 1288, 1303 (D.C. Cir. 2017).

³¹⁸ *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1216 (D.C. Cir. 2014).

³¹⁹ 849 F.3d 1093, 1095 (D.C. Cir. 2017).

³²⁰ 679 F.3d 822, 824 (D.C. Cir. 2012).

³²¹ *Id.* at 829.

³²² *Id.* at 831–832.

³²³ 681 F.3d 483 (D.C. Cir. 2012).

³²⁴ *Id.* at 485.

³²⁵ *Id.* at 486.

³²⁶ *Id.* at 502.

have grave concerns that a Justice Kavanaugh would limit workers' rights to obtain redress for employment discrimination, while rolling back their ability to band together for mutual protection.

E. POLITICAL PARTICIPATION

LDF's commitment to ensuring African Americans have the opportunity to participate equally in the political process long predates the Voting Rights Act 1965 (VRA). In 1944, LDF won the landmark case *Smith v. Allwright*,³²⁷ in which the Supreme Court struck down the all-white primary in Texas as unconstitutional. Since the VRA's enactment in 1965, LDF has been involved in nearly all the precedent-setting cases about minority political representation and voting rights before federal and state courts.³²⁸ LDF was counsel of record and argued for Black voters in *Shelby County, Ala. v. Holder*,³²⁹ in which the Supreme Court invalidated a core provision of the VRA. Since that decision, LDF has documented the proliferation of voter suppression efforts aimed at Black and Latino voters around the country.³³⁰ Moreover, through the Prepared to Vote campaign, LDF equips voters with information about election laws that LDF has or is currently challenging in federal court. This information aims to mitigate confusion about onerous photo identification laws that disproportionately harm communities of color.³³¹ Currently, LDF is counsel of record in the challenge to Texas's voter photo identification law, which the Fifth Circuit Court of Appeals struck down in 2016,³³² and in a challenge to Alabama's voter photo identification law.³³³

³²⁷ 321 U.S. 649 (1994).

³²⁸ See, e.g., *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); and *White v. Regester*, 422 U.S. 935 (1975) (per curiam).

³²⁹ 570 U.S. 529 (2013).

³³⁰ NAACP Legal Defense & Educ. Fund (LDF), *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder*, <http://www.naacpldf.org/press-release/democracy-diminished-ldf-releases-report-state-and-local-threats-voting-rights>.

³³¹ See Zoltan L. Hajnal, Nazita Lajevardi, and Lindsay Nielson, *Do Voter Identification Laws Suppress Minority Voting? Yes. We did the Research*, WASH. POST, Feb. 15, 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/?utm_term=.b29322177ecd. For more information about LDF's Prepared to Vote campaign and target states in the 2018 midterm elections, see *Prepared to Vote* (2018), <http://www.naacpldf.org/case-issue/prepared-vote>.

³³² *Veasey v. Abbott*, 830 F.3d 216, 264-65 (5th Cir. 2016) (en banc).

³³³ LDF, *Democracy Diminished*, *supra* note 330, at 6.

The Supreme Court continues to play a critical role in protecting voting rights for people of color. Yet, in *Shelby County*,³³⁴ the Court effectively gutted Section 5 of the VRA in a 5–4 decision. Under Section 5’s preclearance process, jurisdictions with a history of racial discrimination in voting were required to seek permission from DOJ or a three-judge federal court in Washington, D.C. before implementing any new voting changes. Because of the Court’s decision in *Shelby County*, in 2016, the United States held its first presidential election in over 50 years without these Section 5 protections, which had blocked countless voter suppression efforts.

Since *Shelby County*, numerous states, counties, and municipalities have enacted and implemented discriminatory voting measures that LDF and other civil rights groups have challenged. Before the change in the presidential administration, LDF and these groups relied on DOJ as an ally to block discriminatory voting laws from being implemented.³³⁵ Indeed, the DOJ partnered with LDF and other civil rights groups to challenge Texas’s discriminatory voter photo identification law. But under Attorney General Jefferson Sessions, DOJ reversed its position and asked the court to enforce a voter photo identification law that had previously been found discriminatory.³³⁶

There is little doubt the Supreme Court will continue to address important voting rights cases, including racial gerrymandering claims, challenges to discriminatory voter photo identification laws, and redistricting litigation. Indeed, the Supreme Court this term decided several voting cases.³³⁷ These decisions will dictate the scope and the extent to which communities of color have access to the political process.

Judge Kavanaugh has a relatively limited record in voting rights cases, but a much more substantial one in campaign finance cases. Both parts of his record provide cause for serious concern.

³³⁴ 570 U.S. 529 (2013).

³³⁵ Michael Wines, *Voting Rights Advocates Used to Have an Ally in the Government. That’s Changing*, N.Y. TIMES, Aug. 12, 2018, <https://www.nytimes.com/2018/08/12/us/voting-rights-voter-id-suppression.html>.

³³⁶ See *Veasey v. Perry*, 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014), *aff’d in part, rev’d in part*, *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (holding that the voter identification law was racially discriminatory under Section 2), *cert denied*, *Abbott v. Veasey*, 137 S. Ct. 612 (2017), on remand *Veasey v. Abbott*, 249 F. Supp. 3d 868 (S.D. Tex. 2017) (finding discriminatory intent), *rev’d as to remedy*, 888 F.3d 800 (5th Cir. 2018).

³³⁷ *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018); *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018).

i. Voting Rights

In his one³³⁸ notable voting rights case, *South Carolina v. United States*, Judge Kavanaugh precleared a voter photo identification law that DOJ deemed a threat to the voting rights of tens of thousands of minority citizens.³³⁹ In *South Carolina* Kavanaugh served on a three-judge district court panel to review a declaratory judgment action under Section 5 of the VRA.³⁴⁰ After DOJ denied preclearance of South Carolina’s voter photo identification law, the state sought review from the D.C. district court. Writing for the majority, Judge Kavanaugh held that South Carolina’s proposed voter identification law did not violate the VRA, concluding that it both did “not have a discriminatory retrogressive effect” and “was not enacted for a discriminatory purpose.”³⁴¹

Along with a number of other civil rights organizations, LDF intervened in the case because we shared DOJ’s concerns that South Carolina’s proposed voter identification law violated the VRA. DOJ and Defendant-Intervenors submitted evidence showing that South Carolina’s law disproportionately and materially burdened voters of color and that the state had not met its burden of showing that its voter photo ID law had neither a discriminatory purpose or effect. For example, expert evidence showed that Black registered voters in South Carolina were more than twice as likely as white voters not to possess one of the required forms of identification.³⁴²

Judge Kavanaugh, however, disregarded this evidence and reasoned that an expansive interpretation of the law’s reasonable impediment provision would eliminate *any* of the concerns about disproportionate effect or material burden.³⁴³ He rejected the argument that casting a provisional ballot may create a material burden because it may “take a few more minutes than the regular ballot.”³⁴⁴ In addition,

³³⁸ Although not discussed in this report, Judge Kavanaugh authored a three-judge district court panel opinion holding that a school district’s action seeking declaratory judgment that its redistricting plan and other voting changes for school board elections were in accordance with Section 5 of the Voting Rights Act. *Beaumont Independent School District v. United States*, 944 F. Supp. 2d 23 (D.D.C. 2013). The case is not discussed in more detail here because unique procedural aspects make it not instructive for evaluating Judge Kavanaugh’s voting-rights record.

³³⁹ Letter from Thomas E. Perez, Ass’t Attorney General, Civil Rights Division, U.S. Dep’t of Justice, to C. Havird Jones, Jr., Ass’t Deputy Attorney General, South Carolina Office of the Attorney General, No. 2011-2495 (Dec. 23, 2011), <https://www.justice.gov/crt/voting-determination-letter-65>.

³⁴⁰ 898 F.Supp.2d 30 (D.D.C. 2012).

³⁴¹ *Id.* at 32.

³⁴² Def. Intervenors’ Trial Brief at 10, *South Carolina v. United States*, No. 12-cv-00203 (CKK, BMK, JDB) (D.D.C. Aug. 20, 2012), ECF 206. Expert analysis showed that over 60,000 African American active registered voters did not have the required identification.

³⁴³ *South Carolina*, 898 F. Supp. 2d at 41.

³⁴⁴ *Id.* at 41–42.

Judge Kavanaugh’s opinion lacks any discussion of how a reasonable impediment affidavit being challenged on election day could create burdens. For example, if a voter’s reasonable impediment affidavit was challenged, he or she would be required to attend a hearing at the voter’s county election commission office, in turn creating additional burdens and expenses relating to time and travel. The South Carolina Election Commission executive director conceded that these concerns were possible.³⁴⁵ Perhaps most revealing, Judge Kavanaugh mainly credited assurances made by elected officials for the first time as the trial unfolded to minimize the well-documented evidence submitted by DOJ and Defendant-Intervenors. This shows Judge Kavanaugh’s willingness to discount evidence demonstrating a discriminatory effect.

Judge Kavanaugh also readily downplayed evidence showing the law was enacted with discriminatory purpose. Despite (1) significant evidence showing the law’s discriminatory impact, (2) the legislators’ awareness of the impact when they passed the law, (3) legislators’ departures from normal legislative procedure, and (4) evidence that the justifications offered for the law were pretextual (to name just some of the evidence), he concluded that if South Carolina had intended to enact a discriminatory voting law, it would have enacted either a “race-based law” or “a race-neutral law with discriminatory effects” and that neither was the case here.³⁴⁶

Some of the most compelling evidence involved an email exchange between Ed Koziol, a Republican who supported the law, and the law’s chief author, State Representative Alan Clemmons. After the bill passed, Koziol wrote Rep. Clemmons saying African Americans “would be like a swarm of bees going after a watermelon” if they were offered a hundred-dollar bill to obtain a voter ID card with their picture.³⁴⁷ In response, Rep. Clemmons enthusiastically wrote, “Amen, Ed. Thank you for your support of voter ID.”³⁴⁸ Although Judge Kavanaugh wrote that the exchange “troubled” the court, he undersold the legislator’s response as merely a “failure to immediately denounce” how the constituent “referred disparagingly to African-American voters” rather than a clear endorsement.³⁴⁹ Failing to appreciate

³⁴⁵ Andrew Cohen, *In South Carolina, Shockingly Candid Talk about Voter Discrimination*, THE ATLANTIC, Aug. 30, 2012, <https://www.theatlantic.com/national/archive/2012/08/in-south-carolina-shockingly-candid-talk-about-voter-discrimination/261760/>.

³⁴⁶ South Carolina, F. Supp. 2d at 44.

³⁴⁷ Luke Johnson, *Alan Clemmons, South Carolina Rep, Admits ‘Poorly Considered’ Reply to Racist Email on Voter ID Law*, HUFFPOST, Aug. 29, 2012, https://www.huffingtonpost.com/2012/08/29/alan-clemmons-voter-id-law_n_1839375.html. Judge Kavanaugh’s opinion does not include the email’s racist language, instead referring to it as “an email exchange between a South Carolina constituent and one House member in which the constituent referred disparagingly to African-American voters who do not have photo IDs.” *South Carolina*, 898 F. Supp. 2d at 45.

³⁴⁸ *Id.*

³⁴⁹ *South Carolina*, 898 F.Supp.2d at 45.

the significance of the statements, Judge Kavanaugh concluded that any inferences from the email exchange “do not speak for the two Houses of the South Carolina Legislature, or the South Carolina Governor.”³⁵⁰

Equally concerning is Judge Kavanaugh’s willingness to accept voter fraud as a legitimate interest without evidence to support such a claim. South Carolina legislators claimed that the two primary goals of the photo identification law were to deter voter fraud and enhance public confidence in the electoral system.³⁵¹ The State, neither before nor during trial, introduced any evidence or incidents of in-person voter fraud in South Carolina. Still, even without this evidence, Judge Kavanaugh found these goals to be legitimate and could not be “deemed pretextual merely because of an absence of recorded incidents.”³⁵²

Yet elected officials throughout the country falsely allege voter fraud without offering any evidence. These baseless allegations are part of an ongoing trend to use voter-fraud justifications as a pretext to suppress African American and Latino votes. Indeed, LDF filed a lawsuit in federal court challenging President Trump’s Election Integrity Commission as illegal and unconstitutional.³⁵³ Although LDF’s lawsuit and others prompted President Trump to disband the Commission, elected officials—both in the federal and state government—continue to peddle the voter fraud myth. The tactics provide justification to create burdensome and discriminatory obstacles to vote as a solution to a problem that does not exist.

For LDF’s clients and the communities we serve, the burdens stemming from a proliferation of new voter suppression laws are not abstract. People of color disproportionately bore and continue to bear obstacles to registering to vote, obtaining the required identification, and casting ballots. Judge Kavanaugh, however, is willing to discount the prevalence and impact of these burdens. Along the same lines, he also appears unwilling to ascribe a discriminatory purpose without explicit examples of racism. Yet explicit forms of discrimination rarely present as such, especially in the voting context. Instead, racism manifests in subtler ways. Judges at all levels thus must have the real-world expertise that permits them to appreciate and credit the significance of this type of evidence. Judge Kavanaugh, however, appears more willing to downplay, rather than recognize, evidence of discriminatory effect and purpose.

³⁵⁰ *Id.*

³⁵¹ *Id.* at 43.

³⁵² *Id.* at 44.

³⁵³ Compl., *NAACP Legal Def. and Educ. Fund, Inc. v. Trump*, No. 17-CV-5427 (S.D.N.Y. Jul. 17, 2017) ECF. 1..

It is difficult to overstate the importance of the VRA protections to our modern democracy. In *South Carolina*, Judge John Bates felt compelled to write a separate concurrence, with which Judge Colleen Kollar-Kotelly joined, in which he recognized the VRA’s continued utility and vitality: “[O]ne cannot doubt the vital function that Section 5 of the Voting Right Act has played here. Without the review process under the Voting Rights Act, South Carolina’s voter photo ID law certainly would have been more restrictive.”³⁵⁴ Tellingly, Judge Kavanaugh was silent on this point.

We earlier discussed Judge Kavanaugh’s admiration for his first judicial hero Chief Justice Rehnquist, whose career was marked by strong hostility toward protecting civil rights. That admiration is relevant here. Recall Rehnquist’s memo as a Supreme Court clerk to Justice Robert Jackson, in which he wrote that “in the long run it is the majority who will determine what the constitutional rights of the minority are.”³⁵⁵ This memo, of course, asserted that *Plessy v. Ferguson* was correctly decided and should be reaffirmed.³⁵⁶ And in a law review article that was praised by Judge Kavanaugh, Rehnquist questioned the current relevance of the Reconstruction Amendments, hypothesizing that their Framers would not have designed these Amendments “to solve problems society might confront a century later.”³⁵⁷ As a Supreme Court Justice, Rehnquist championed ideology that weakened the VRA and rolled back voter-protection gains for communities of color. To be sure, Judge Kavanaugh has offered the general caveat that he did not agree with all of Rehnquist’s opinions and views.³⁵⁸ Yet Rehnquist’s ideology and judicial approach are so contrary to the ideals of civil rights and racial justice that LDF maintains that it is critical that Judge Kavanaugh be pressed at his hearing on his affinity for Rehnquist’s ideology and judicial approaches.

Judge Kavanaugh’s past support for “colorblindness” rhetoric heightens our concerns.³⁵⁹ “Colorblindness,” as he advanced it in his *Rice* amicus brief, would discourage him from acknowledging how the lingering effects and manifestations of racism continue to restrict access to the ballot box. Of equal concern is Judge Kavanaugh’s praise for Rehnquist’s law review article questioning the applicability of the Reconstruction Amendments to solving modern problems. The vitality of the VRA depends on a strong commitment to fairly and fully enforcing its protections.

³⁵⁴ 898 F. Supp. 2d at 53 (Bates, J., concurring).

³⁵⁵ Memorandum from William H. Rehnquist to Justice Robert H. Jackson, Supreme Court of the United States, A Random Thought on the Segregation Cases 324-25, <https://www.gpo.gov/fdsys/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-CHRG-REHNQUIST-4-16-6.pdf>, (on file with the U.S. Government Publishing Office), (hereinafter “Rehnquist Memo”).

³⁵⁶ *Id.*

³⁵⁷ Rehnquist, *The Notion of a Living Constitution*, *supra* note 92, at 700-01.

³⁵⁸ See *From the Bench*, *supra* note 90, at 6. The first opinion to come to his mind, however, was *Morrison v. Olson*, which he finds inconsistent with his executive-power maximalism. See *id.*

³⁵⁹ See Part IV.B.

Judge Kavanaugh's record thus raises serious concerns about Judge Kavanaugh's understanding of the congressionally recognized importance of the VRA in coming years.

Over the next couple of decades, the Supreme Court will again be called upon to defend voting rights. LDF and other civil rights organizations will continue to challenge laws designed to undermine democratic principles enshrined in the VRA and Fourteenth and Fifteenth Amendments. The VRA and these Amendments are vital to challenging laws that states and local jurisdictions enact that restrict minority voters' ability to participate in the democratic process.

With that in mind, LDF considers Judge Kavanaugh's *South Carolina* approach particularly concerning. Under Section 5, the state has the burden of showing that a challenged voting practice "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."³⁶⁰ Although his opinion paid lip service to that rule, Judge Kavanaugh's opinion in practice held South Carolina to far too low of a standard, particularly given the evidence of discriminatory purpose and effect. He effectively treated the question as if it was the voters' burden, not the state's. This approach has continued relevance despite the Supreme Court's *Shelby County* decision.³⁶¹ Under Section 3, courts may require jurisdictions to satisfy Section 5's standards if the court finds that the Fourteenth or Fifteenth Amendment has been violated.³⁶² That means that a Justice Kavanaugh may still have an opportunity to construe and apply Section 5 in particular, along with the other aspects of our voting rights laws.

LDF, therefore, considers how a justice understands his or her role in interpreting the VRA and the Fourteenth and Fifteenth Amendments to be of paramount importance. In the absence of countervailing evidence, Judge Kavanaugh's record and views about one of the nation's most effective civil rights statutes are troubling. For these reasons, Judge Kavanaugh must be questioned to determine whether he would vigorously enforce VRA protections and the Constitution to protect the most fundamental right: voting. Further, prior to Judge Kavanaugh's confirmation hearing, Congress must release relevant voting rights documents related to his tenure in the White House, especially in his role as Assistant to the Present and White House Staff Secretary during a significant portion of the process surrounding the reauthorization of the VRA before his departure in 2006.

³⁶⁰ *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997); *Florida v. United States*, 885 F. Supp. 2d 299, 310 (D.D.C. 2012).

³⁶¹ The Court struck down the formula that makes Section 5 generally operational, not Section 5 itself.

³⁶² See 52 U.S.C. § 10302(c); Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992, 2006 (June 2010).

ii. Campaign Finance

Following the Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*,³⁶³ the amount of money spent on political campaigns has risen substantially, raising serious concerns about whether significant disparities in wealth lead to corresponding disparities in political participation.³⁶⁴ In addition, the 2016 election also revealed concerns about who is spending money to influence U.S. elections. For example, during the 2016 election cycle, foreign actors purchased social media ads to sow discord by exploiting racial and religious division in the United States.³⁶⁵ These troubling trends reveal how foreign actors and nations can influence and undermine our elections. No doubt the Supreme Court will continue to hear disputes over the constitutionality of campaign finance regulations and donor disclosure requirements, as well as the scope of laws intended to limit and bar foreign actors from influencing elections. Any future justice will therefore need to consider the role of money in politics.

Judge Kavanaugh’s consistent refusal to uphold campaign finance restrictions is apparent in *Emily’s List v. Federal Election Commission*.³⁶⁶ In the aftermath of the 2004 presidential elections, the FEC enacted regulations to limit an influx of spending from outside groups to nonprofits. Judge Kavanaugh reversed the lower court’s opinion and struck down these regulations on First Amendment grounds. Relying on Supreme Court precedent, Judge Kavanaugh held that contributions and expenditures constituted speech, and thus are afforded First Amendment protection. Accordingly, he reasoned that the sole basis for regulating campaign contributions and expenditures is to prevent actual or apparent corruption.³⁶⁷ He thus rejected the regulation of nonprofits because it is “implausible” that mere donation and contributions to such groups are corrupting.³⁶⁸ For these reasons, he held that nonprofit groups are “constitutionally entitled to raise and spend unlimited money in

³⁶³ 558 U.S. 310 (2010).

³⁶⁴ See Adam Lioz, *Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and Our Economy*, Demos (July 23, 2015), reporting that the role of corporate money and private wealth in our political system is “especially exclusionary for people of color, who are severely underrepresented in the “donor class[.]” *Id.* at 3. For example, of the \$1.38 billion in itemized contributions to the 2012 presidential campaigns (to candidates of both parties) less than three percent came from African American neighborhoods, whereas more than 90% came from white neighborhoods. *Id.* at 20–21. While direct data on the race of individual campaign donors is not available, in 2012, the top ten Republican donors (who collectively donated over \$130 million) and top ten Democratic donors (who collectively donated \$43.3 million), were white. *Id.*

³⁶⁵ See, e.g., Sheera Frenkel & Katie Benner, *To Stir Discord in 2016, Russians Turned Most Often to Facebook*, N.Y. TIMES, Feb. 17, 2018, <https://www.nytimes.com/2018/02/17/technology/indictment-russian-tech-facebook.html>.

³⁶⁶ 581 F.3d 1 (D.C. Cir. 2009).

³⁶⁷ *Id.* at 12.

³⁶⁸ *Id.* at 11.

support of candidates for elected office,” foreshadowing the holding in *Citizens United v. Federal Election Commission* decision the next year.³⁶⁹

Judge Kavanaugh’s reasoning is troubling for two reasons. First, his view that anti-corruption rationale is the only basis for campaign finance restrictions would limit Congress’ ability to respond to concerns about money in politics. As one example, Judge Kavanaugh would reject any attempt to limit campaign contributions and expenditures if evidence shows that disparities in wealth lead to corresponding disparities in political participation. Indeed, he asserted that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment” as “perhaps the most importance sentence” in the Supreme Court’s campaign finance jurisprudence.³⁷⁰ His narrow *quid pro quo* definition would also limit the applicability of campaign finance regulations. Judge Kavanaugh would likely use the First Amendment to strike down FEC regulations that do not conform to the very limited definition of actual or apparent corruption.

Second, Judge Kavanaugh too easily downplays how massive spending through nonprofits could—and has been shown—to corrupt the political process. For example, he asserted that mere donations to “nonprofit groups cannot corrupt candidates and officeholders.”³⁷¹ Evidence contradicts this notion. In recent years, politicians have relied on nonprofits’ ability to accept unlimited money to advance their agenda, especially post-election. He also rejects the notion that some activities nonprofits engage in—such as get-out-the-vote efforts—“may generate gratitude from and influence from officeholders and candidates.”³⁷² For Judge Kavanaugh the “regulation of non-profits does not fit within the anti-corruption rationale.” Judge Kavanaugh’s self-described “commonsense proposition,” however, rests on a misunderstanding of how politicians have come to rely on nonprofits. Judge Kavanaugh’s strong views about nonprofits may prevent him from accepting evidence that has emerged to contradict this notion.

Beyond the concerns about his reasoning, Judge Kavanaugh’s willingness to reach out unnecessarily to strike down campaign finance restrictions is also disconcerting. As the concurrence argued, *Emily’s List* could have been decided on statutory grounds, thereby avoiding the constitutional question relating to the First Amendment.³⁷³

³⁶⁹ *Id.* at 17.

³⁷⁰ *Id.* at 5.

³⁷¹ *Id.* at 11.

³⁷² *Id.* at 11.

³⁷³ *Id.* at 25 (Brown, J., concurring) (internal quotation marks and citations omitted) (advocating application of constitutional-avoidance doctrine).

The unanimous en banc opinion Judge Kavanaugh joined in *SpeechNow.org v. Federal Election Commission*³⁷⁴ may also reflect his skepticism toward campaign finance restrictions. Plaintiff—a political organization engaged in express advocacy—sought declaratory judgment about the constitutionality of the Federal Election Campaign Act (FECA) as applied to them. The FEC concluded that SpeechNow.org was defined as a political committee under the FEC. As a political committee, SpeechNow.org was subject to several restrictions in its operations, including limits on independent—as opposed to direct—campaign contributions.³⁷⁵ The opinion, authored by then-Chief Judge David Sentelle, primarily relied on *Citizens United*, which the Supreme Court decided between the FEC’s initial conclusion and before the en banc ruling. Citing *Citizens United*, the D.C. Circuit held that the government lacked an anti-corruption interest in limiting contributions to independent expenditure-only groups—colloquially known as “Super PACs”—like SpeechNow.org.³⁷⁶ The court simultaneously upheld reporting requirements for SpeechNow.org, finding that such requirements were not a hindrance to free speech.³⁷⁷

Even in cases when Judge Kavanaugh upheld a campaign finance restriction, his narrow interpretation left the door open for foreign actors to influence U.S. elections. In *Bluman v. Federal Election Committee*,³⁷⁸ the plaintiffs, foreign nationals who had not been admitted as lawful permanent residents to the United States, challenged a federal statute that prohibited them from making political contributions. Writing for a three-judge district court panel, Judge Kavanaugh granted the FEC’s motion to dismiss.³⁷⁹ Judge Kavanaugh interpreted the law to bar express-advocacy expenditures—that is, an expenditure that is an appeal to vote for or against a specific candidate. In *dictum*, Judge Kavanaugh clarified that the panel did not interpret the statute to bar issue-advocacy expenditures—that is, an expenditure that does not expressly advocate the election or defeat of a specific candidate.³⁸⁰ As a final point, Judge Kavanaugh cautioned the government regarding the difficulty of meeting its evidentiary burden when it sought criminal penalties for violating this provision; “many aliens in this country who no doubt are unaware of the statutory ban on foreign *expenditures*, in particular.”³⁸¹

³⁷⁴ 599 F.3d 686 (D.C. Cir. 2010).

³⁷⁵ *Id.* at 697.

³⁷⁶ *Id.* at 692-93.

³⁷⁷ *Id.* at 699.

³⁷⁸ 800 F.Supp.2d 281 (D.D.C. 2011).

³⁷⁹ *Id.* at 292.

³⁸⁰ *Id.* at 284.

³⁸¹ *Id.* at 290.

Judge Kavanaugh’s narrow interpretation of federal law would allow foreign actors to exploit racial and religious tensions to create division, both leading up to and after elections. Under Judge Kavanaugh’s interpretation, federal law would bar foreign actors from purchasing ads that directly expressed support for any particular candidate in 2020. But these types of express-advocacy expenditures did not constitute a majority of the ads foreign actors purchased leading up to the 2016 elections. Instead, foreign actors relied on issue-specific expenditures that were designed to inflame racial and religious tensions.³⁸² These types of issue-specific advocacy ads, which could include statements “Muslims Hate the United States” and “Immigrants Want Your Job,” would be permissible under the statute based on Judge Kavanaugh’s reasoning. It should therefore not come as a surprise that a Russian firm indicted in the ongoing Special Counsel investigation relied on *Bluman* in its motion to dismiss.³⁸³ Citing *Bluman*, the firm contended that it did not make unlawful expenditures because “foreign nationals are not barred from issue advocacy through political speech such as what is described in the Indictment.”³⁸⁴

In *Republican National Committee v. Federal Election Commission*,³⁸⁵ as in *Bluman*, Judge Kavanaugh upheld a campaign finance restriction. The plaintiffs, comprising national, state, and county committees of the Republican Party and the Chairperson of the Republican National Committee, challenged federal limits on contributions to political parties known as soft-money bans. Judge Kavanaugh rejected the plaintiffs’ assertion that soft-money limits violated the First Amendment. The opinion, however, should not be construed as illustrating Judge Kavanaugh’s support for soft-money bans. Judge Kavanaugh described the RNC’s as-applied argument as carrying “considerable logic and force” to distinguish the Supreme Court’s decision in *McConnell v. Federal Election Commission*, which upheld soft-money limitations.³⁸⁶ But he asserted that the court did not believe it possessed the “authority to clarify or refine *McConnell* in the fashion advocated by the RNC, or to otherwise get ahead of the Supreme Court.”³⁸⁷

If given the chance to accept this invitation as a justice, Judge Kavanaugh may well strike down the ban on soft money as it relates to political parties. Indeed, in

³⁸² Nick Penzenstadler, Brad Heath, and Jessica Guynn, *We Read Everyone One of the 3,517 Facebook Ads Bought by Russians. Here’s What We Found*, USA TODAY, May 13, 2018, <https://www.usatoday.com/story/news/2018/05/11/what-we-found-facebook-ads-russians-accused-election-meddling/602319002/>.

³⁸³ Def.’s Mot. to Dismiss the Indictment at 7 n.4, *United States v. Internet Research Agency, LLC*, No. 18-CR-00032(DLF) (D.D.C. July 16, 2018), ECF No. 46, <https://www.courthousenews.com/wp-content/uploads/2018/07/US-Concord-MTD.pdf>.

³⁸⁴ *Id.*

³⁸⁵ 698 F. Supp. 2d 150 (D.D.C. 2010).

³⁸⁶ 540 U.S. 93 (2003).

³⁸⁷ *Republican National Committee*, 698 F. Supp. 2d at 160.

Republican National Committee, Judge Kavanaugh wrote that the Supreme Court would have the opportunity to clarify or refine ambiguous aspects of *McConnell* as they applied to this as-applied challenge.³⁸⁸ Moreover, Judge Kavanaugh appears to doubt the evidence the Court relied on in *McConnell* to uphold an across-the-board ban on national parties raising and spending money for any purpose. Unprompted, in a speech at the American Enterprise Institute, Judge Kavanaugh expressed concern that outside groups' ability to raise large sums of money puts parties at a disadvantage, claiming this is attributable to the Supreme Court's jurisprudence on campaign finance reform.³⁸⁹ Judge Kavanaugh thus appears willing to reconsider the soft-money limits for political parties.

Judge Kavanaugh's campaign finance record provides four overarching themes. First, Judge Kavanaugh appears hostile to campaign finance regulations, seeming to be unwilling to uphold regulations beyond a narrow anti-corruption rationale. Second, Judge Kavanaugh's BCRA interpretation about the scope of issue-advocacy expenditures would allow foreign actors to engage in thinly veiled "issue advocacy" that deepens racial and religious division leading up to elections. Such a narrow interpretation of the BCRA prevents it from barring foreign actors who influence U.S. elections in concrete ways and increases the likelihood of the use of these racial appeals during the next federal election, an important tool of suppressing the votes of communities of color. Third, as evident in *Emily's List*, Judge Kavanaugh appears willing to reach out unnecessarily to decide issues in this context. Fourth, Judge Kavanaugh would likely revisit the soft-money limits on contributions to political parties as justice.

Judge Kavanaugh's concerning record on voting rights, coupled with a host of "hands off" opinions in the campaign finance space, indicates that his political participation jurisprudence would run counter to LDF's principles.

F. OTHER CIVIL & HUMAN RIGHTS

In addition to Judge Kavanaugh's extensive and troubling record on core civil rights issues, his judicial record also contains significant opinions that reflect staunchly conservative and partisan views on reproductive rights, immigrant rights, gun control, and other human rights.

i. Reproductive Rights

Among Judge Kavanaugh's most high-profile recent opinions is the dissent he authored in *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir 2017) (en banc). *Garza* was an

³⁸⁸ *See id.*

³⁸⁹ *The Court: Power, Policy, and Self-Government*, AM. ENTER. INST. (Mar. 31, 2016), at 42:25-44:52, <https://www.aei.org/events/the-court-power-policy-and-self-government/>.

emergency lawsuit filed on behalf a seventeen-year-old, unaccompanied minor, Jane Doe, who entered the United States at the Texas border. Jane Doe was detained upon arrival and soon after discovered she was eight weeks pregnant. While in the custody of the Office of Refugee Resettlement (ORR), Jane Doe decided she wanted to have an abortion. When the ORR Director denied the abortion, Jane Doe filed suit and the district court issued a temporary restraining order requiring the government to allow Jane Doe to be transported to an abortion provider. The D.C. Circuit initially, in a per curiam order, vacated the temporary restraining order.³⁹⁰ Judge Kavanaugh was on that panel, but wrote nothing. Judge Millett dissented.³⁹¹

An en banc panel of the D.C. Circuit overturned that decision and allowed Jane Doe to proceed with an abortion.³⁹² In response, Judge Kavanaugh forcefully dissented, opining that permitting continued delay was not an undue burden. He stated that the initial panel’s decision “followed from the Supreme Court’s many precedents holding that the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion.”³⁹³ Furthermore, he admonished the majority for creating “a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand,” which he thought was “radically inconsistent with 40 years of Supreme Court precedent.”³⁹⁴ This is a notable example of how the right to choose can be diminished without overruling the right to abortion itself.

Oddly, Judge Kavanaugh wrote an opinion effectively permitting abortion upon the demand of a third party—the District of Columbia. The case in question was *Doe ex rel. Tarlow v. District of Columbia*, which involved a challenge to the District of Columbia’s policy for authorizing non-emergency surgical procedures for intellectually disabled persons who are in the District’s care and have been determined as not having the mental capacity to make medical decisions for themselves. The plaintiffs included two women with intellectual disabilities who wanted to carry their pregnancies to term but on whose behalf the District of Columbia had given its consent to perform an abortion.³⁹⁵ The plaintiffs argued that the District of Columbia performed non-emergency surgical procedures on them without the authority to do so and challenged the statute in question under D.C. law and the Due Process Clause. Here, Judge Kavanaugh concluded that the policy was consistent with D.C. law and due-process principles, and further concluded that the

³⁹⁰ *Garza v. Hargan*, No. 17-5236, 2017 WL 9854552, at *1 (D.C. Cir. Oct. 20, 2017).

³⁹¹ *See id.*

³⁹² *See Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017), *vacated as moot*, *Azar v. Garza*, 138 S. Ct. 1790 (2018).

³⁹³ *Id.* at 752 (Kavanaugh, J., dissenting).

³⁹⁴ *Id.*

³⁹⁵ *Does I through III v. District of Columbia*, 593 F. Supp. 2d 115 (D.D.C. 2009).

plaintiffs had no right to be consulted about the decision to subject them to an abortion and terminate their pregnancies. Quoting an opinion by Chief Justice Rehnquist, Judge Kavanaugh concluded that they had “not shown that consideration of the wishes of a never-competent patient is ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [the asserted right] were sacrificed.’”³⁹⁶

Both these cases line up with Judge Kavanaugh’s affinity for Chief Justice Rehnquist. In his remarks last year praising Rehnquist, he praised his jurisprudence, including his dissent in *Roe v. Wade*.³⁹⁷ Specifically, he said, “Rehnquist’s dissenting opinion . . . stated that under the Court’s precedents, any such unenumerated right had to be rooted in the traditions and conscience of our people.”³⁹⁸ Rehnquist, of course, did not view abortion as such a right. Turning to *Washington v. Glucksberg*—the Rehnquist case he quoted in *Doe*—Judge Kavanaugh noted that opinion’s inconsistency with the reasoning underpinning *Roe* and *Planned Parenthood v. Casey*.³⁹⁹ The upshot, according to Judge Kavanaugh, was that Rehnquist “was successful in stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.”⁴⁰⁰ He left no doubt that he thought this was a good thing.

ii. Immigrants’ Rights

With respect to immigrants’ rights, a number of Judge Kavanaugh’s opinions discussed above also provide some significant insight into how Judge Kavanaugh might approach cases where, as a justice, he would have to determine whether immigrants, and non-citizens in particular, are protected by the Constitution. For example, in *Agri Processor Co. v. NLRB*, Kavanaugh dissented from the majority opinion recognizing that the National Labor Relations Act applies to undocumented workers, and instead opined, “I would hold that an illegal immigrant worker is not an ‘employee’ under the NLRA for the simple reason that, ever since 1986, an illegal immigrant worker is not a lawful ‘employee’ in the United States.” In turn, the majority was rightly critical of Kavanaugh’s dissent and noted concerns that “[l]eaving undocumented workers without the NLRA’s protections would ‘create[] a subclass of workers...”⁴⁰¹ Additionally, in Judge Kavanaugh’s dissent in *Fogo de Chao* raises concerns that he favors restrictions on legal immigration; there, he

³⁹⁶ *Doe ex rel. Tarlow*, 489 F.3d 376, 383 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

³⁹⁷ See *From the Bench*, *supra* note 90, at 15–16.

³⁹⁸ *Id.* at 15.

³⁹⁹ See *id.* at 16 (referencing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

⁴⁰⁰ *Id.* at 16.

⁴⁰¹ 514 F.3d at 8 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984)).

disagreed with the majority opinion and instead supported the government's argument that the "specialized knowledge" necessary to acquire a certain type of visa cannot be based on one's country of origin or cultural background.⁴⁰²

iii. Gun Control

After the Supreme Court's decision in *Heller v. District of Columbia* found an individual right to possess firearms, Judge Kavanaugh sat on a panel that considered whether D.C.'s gun-registration requirements, its ban on assault weapons, and its ban on high-capacity magazines were constitutional.⁴⁰³ The majority said they were (with a limited remand to develop the record for some of the registration requirements). Judge Kavanaugh disagreed with the conclusion regarding assault weapons and registration requirements, arguing that semi-automatic rifles "have not traditionally been banned and are in common use" (which in his view made a ban unconstitutional) and that registration "of all lawfully possessed guns" was "highly unusual" and thus was unconstitutional.⁴⁰⁴ His justification for these conclusions was that Second Amendment cases require a "history-and-tradition-based test," which seems in practice to mean that anything that hasn't been done before is unconstitutional.⁴⁰⁵ That approach, if added to the Supreme Court bench, would make common sense gun regulations nearly impossible to achieve.

iv. Habeas at Guantanamo Bay

Judge Kavanaugh has authored several opinions addressing *habeas* petitions submitted by people detained at Guantanamo Bay. His record demonstrates opposition to granting petitioners relief. In *Ali v. Obama*, Judge Kavanaugh reaffirmed the denial of a *habeas* petition, reasoning that any error committed by the government in failing to disclose evidence that would have undermined the credibility of witnesses linked to Abdul Razak Ali was harmless.⁴⁰⁶ Similarly, in *Barhoumi v. Obama*, Judge Kavanaugh joined a D.C. Circuit panel in affirming the denial of a *habeas* petition for Sufyian Barhoumi, relying in part on hearsay evidence that is admissible in these types of *habeas* proceedings.⁴⁰⁷ And, in *Al-Bihani v. Obama*,⁴⁰⁸ Judge Kavanaugh joined a D.C. Circuit panel that rejected the detainee's claim that the international laws of war applied, reasoning that their "lack of

⁴⁰² 769 F.3d at 1152.

⁴⁰³ See *Heller v. District of Columbia*, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

⁴⁰⁴ *Id.* at 1269–70.

⁴⁰⁵ *Id.* at 1270.

⁴⁰⁶ 736 F.3d 542 (D.C. Cir. 2013).

⁴⁰⁷ 609 F.3d 416 (D.C. Cir. 2010).

⁴⁰⁸ 590 F.3d 866 (D.C. Cir. 2010).

controlling legal force and firm definition render their use both inapposite and inadvisable” when courts determine the President’s war powers.⁴⁰⁹

Thus, Judge Kavanaugh appears hostile to granting *habeas* petitions submitted by people detained at Guantanamo Bay. These opinions are consistent with his strong deference to the Executive Branch, national security interests, and law enforcement. Many of these issues preoccupied the Bush Administration during Judge Kavanaugh’s time in the White House. This is further reason that a proper evaluation of Judge Kavanaugh’s merits requires the release and review of his time as White House Counsel and Staff Secretary. The American people need to know what input and opinions he offered on the critical human-rights issues raised by the decisions the Bush Administration made after 9/11.

G. ADMINISTRATIVE LAW

Since the change in administrations, agencies ranging from the Department of Education, to the Department of Housing and Urban Development (HUD), to the Department of Homeland Security (DHS), to the Environmental Protection Agency (EPA) have reversed or attempted to reverse recent progressive agency actions.⁴¹⁰ It should be unsurprising that agencies are consequential. Modern society’s complexity and fast pace have required Congress to create agencies within the Executive Branch to which it can delegate the responsibility of applying expertise to new problems. Every day, regulatory agencies—derided by conservatives as the “administrative state”—handle issues as diverse as education equity, worker and consumer

⁴⁰⁹ *Id.* at 872.

⁴¹⁰ See, e.g., Moriah Balingit, *Education Department No Longer Investigating Transgender Bathroom Complaints*, WASH. POST, Feb. 12, 2018, https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/?noredirect=on&utm_term=.2e6a02d783cb; Alex Guillén & Emily Holden, *Fuzzy Math Could Doom Trump’s Attack on Obama Climate Rule*, POLITICO, Aug. 16, 2018, <https://www.politico.com/story/2018/08/16/trump-climate-change-obama-cost-benefits-740455> (describing EPA’s plan to roll back various Obama-era climate regulations); Kriston Capps, *How HUD Could Reverse Course on Racial Discrimination*, CITYLAB, June 21, 2018, <https://www.citylab.com/equity/2018/06/how-hud-could-reverse-course-on-racial-discrimination/563402/> (noting HUD’s notice that it will revisit Obama-era rule banning “more subtle forms of discrimination” in housing); Yamiche Alcindor, *NAACP Legal Defense Fund Sues Over Trump’s Decision to Rescind Protected Status for Haitians*, PBS, Jan. 24, 2018, <https://www.pbs.org/newshour/politics/naacp-sues-over-trumps-decision-to-rescind-protected-status-for-haitians> (recounting LDF’s suit against the Department of Homeland Security’s rescission of protected status for Haitian immigrants). Additionally, the Department of Education has recently considered reversing an Obama-era civil-rights guidance that attempts to address racially disproportionate school discipline. See Evie Blad & Alyson Klein, *Betsy DeVos Weighing Action on School Discipline Policy*, EDUCATION WEEK, Apr. 10, 2018, <https://www.edweek.org/ew/articles/2018/04/11/betsy-devos-weighing-action-on-school-discipline.html>.

protection, environmental preservation, workplace equal opportunity, and food and drug safety. And—to oversimplify—courts have recognized agencies’ importance and thus given them substantial deference when they apply that expertise and make decisions rooted in the law.⁴¹¹

This state of affairs, however, has become public enemy number one in conservative legal thought. One of the leading recent texts on the point, by Professor Philip Hamburger, sets forth the position in a blunt, not-quite-rhetorical title: “Is Administrative Law Unlawful?”⁴¹² It has been a popular tome among judges skeptical of the administrative law status quo,⁴¹³ including Judge Kavanaugh.⁴¹⁴ Last year, LDF noted then-Judge Gorsuch’s admiration for this philosophy, in particular his long opposition to the longstanding administrative law *Chevron* doctrine (*Chevron* and its benefits are discussed in more detail below).⁴¹⁵ As we predicted, Justice Gorsuch has continued to hint towards his readiness to dispose of *Chevron*.⁴¹⁶

Judge Kavanaugh fits into this picture neatly. On top of his dislike of *Chevron*, our review has revealed that he has applied it in a way that takes advantage of the reality that lower court judges who cannot overrule a doctrine can still neuter its effect through the way they follow it. Finally, beyond *Chevron*, his overall approach to administrative law raises serious concerns in the civil rights sphere.

i. Judge Kavanaugh and Chevron

The iconic case *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* established that courts must defer to an agency’s interpretation of a statute that is ambiguous regarding the question at issue, as long as the interpretation is

⁴¹¹ See *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).

⁴¹² See generally PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (Univ. of Chi. Press 2014).

⁴¹³ See *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1242, 1254–55 (2015) (Thomas, J., concurring) (citing Hamburger and attacking “a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (citing Hamburger and arguing that current administrative law doctrines “concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design”).

⁴¹⁴ See *Lorenzo v. SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citing Hamburger and criticizing deferential judicial review applied to agency resolutions of judicial disputes as in “tension” with the Constitution).

⁴¹⁵ See *Chevron*, 467 U.S. at 842–43; LDF, *The Civil Rights Record of Judge Neil M. Gorsuch* (Mar. 16, 2017), at 1, 10–15, <http://www.naacpldf.org/files/about-us/LDF-Report-on-the-Civil-Rights-Record-of-Neil-Gorsuch-FINAL-3.16.2017.pdf>.

⁴¹⁶ See *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (majority opinion of Gorsuch, J.) (“[W]hether *Chevron* should remain is a question we may leave for another day.”); *Scenic Am., Inc. v. Dep’t of Transp.*, 138 S. Ct. 2, 2 (statement of Gorsuch, J., respecting the denial of certiorari) (“assuming (without granting) the correctness of the justifications given for *Chevron*”).

reasonable.⁴¹⁷ *Chevron*'s justifications are many, but one of the most important is that when Congress writes a statute, it cannot foresee all the ways in which its language may be ambiguous generally or as applied to a particular situation. And it is often "apparent" from context (such as the agency's general authority over the area in question) that Congress *wanted* the agency to resolve those sorts of ambiguities.⁴¹⁸ Why? Because at least where the statute does not unambiguously *foreclose* it, it is better for the experts who understand the complex field and the complexities of their assigned statutes to announce the "best" interpretation. This appreciates that legal issues are often—and sometimes must—be partially driven by values.⁴¹⁹ And this is considered more democratic because it permits the decision to be made by representatives of the President, who is more accountable to the people than the judiciary.⁴²⁰

Chevron matters for civil rights. It promotes regulation and enhances agency power and flexibility to address changing circumstances. Accordingly, it prevents governmental stagnation from blocking needed change and thwarts those who want to obtain *de facto* deregulation by grinding government to a halt. In LDF's experience, hands-on federal involvement and regulation is an invaluable tool for racial justice. Deregulation has rarely led to good results. On the whole, limiting agency power disproportionately burdens African Americans and other communities of color because it is these communities who most often need assertive government regulation.⁴²¹

To be sure, *Chevron* is a tool that any agency can wield, whether the President is for or against civil rights.⁴²² But that does not make it totally neutral. *Chevron* works in the context of preexisting statutes. The statutes administered by the

⁴¹⁷ See 467 U.S. at 842–43; *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).

⁴¹⁸ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

⁴¹⁹ See *Chevron*, 467 U.S. at 866 ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."); Michael C. Dorf, *Judge Gorsuch's Misguided Quest to End Judicial Deference to Administrative Agencies*, VERDICT.JUSTIA, Feb. 8, 2017, <https://verdict.justia.com/2017/02/08/judge-gorsuchs-misguided-quest-end-judicial-deference-administrative-agencies>.

⁴²⁰ See *Chevron*, 467 U.S. at 865 ("Judges are not experts in the field, and are not part of either political branch . . . [w]hile agencies are not directly accountable to the public, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.").

⁴²¹ See, e.g., NAACP & Clean Air Task Force, *Fumes Across the Fence Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities* (Nov. 2017), at 3–5, <http://www.catf.us/resources/publications/files/FumesAcrossTheFenceLine.pdf> (outlining the disproportionate impact of environmental pollution on communities of color and calling for regulatory solutions).

⁴²² See Joshua Matz, *The Imminent Demise of Chevron Deference?*, TAKECAREBLOG, June 21, 2018, <https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference> (reviewing these arguments).

agencies composing the administrative state are in large part progressive statutes created to achieve progressive goals (for example, HUD and EPA). Limiting those agencies' access to *Chevron* burdens a progressive agenda more, because that agenda relies on active agencies more. Put another way, a progressive agenda has more to lose from calcified agencies.

Like Justice Gorsuch, Judge Kavanaugh dislikes *Chevron*. He has called it “an atextual invention by courts” and a “judicially orchestrated shift of power from Congress to the Executive Branch.”⁴²³ And he has argued that it “should be reined in[.]”⁴²⁴ Still, his critique of the doctrine itself has not been as extensive as then-Judge Gorsuch's. Rather, he has focused on ways to limit it, two of which are worth noting.

First, Judge Kavanaugh is aggressive in declaring statutes unambiguous. *Chevron* requires a judgment call about whether a statute is “unclear enough” to be “ambiguous.” He believes the statute is unambiguous—precluding *Chevron*—as long as one possible reading is even slightly better than the alternatives.⁴²⁵ Without questioning the doctrine's core, this approach makes it inapplicable in a wide swath of cases. For example, in *Bais Yaakov of Spring Valley v. FCC*, he held that federal communications law unambiguously barred an FCC rule requiring businesses to include an opt-out notice on solicited fax advertisements.⁴²⁶ The relevant statute required an opt-out notice on unsolicited advertisements, but said nothing about whether such a notice could be required for solicited advertisements.⁴²⁷ Judge Kavanaugh thought it enough to assert that the law “did not require (or give the FCC authority to require)” such notices.⁴²⁸ But, as the dissent pointed out, this begs the question: it treats the absence of an *explicit* grant of authority as if that *clearly* forecloses the possibility of statutory ambiguity indicating that Congress wanted the agency to decide whether the law allowed it to require such notices.⁴²⁹ In other words, it treats Congressional failure to anticipate and speak to the precise question at issue

⁴²³ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016).

⁴²⁴ *Federal Courts and Public Policy*, C-SPAN (Mar. 31, 2016), at 20:55, <https://www.c-span.org/video/?407491-1/discussion-politics-supreme-court> (“I think [*Chevron*] should be reined in[.]”) (Interview of Judge Brett Kavanaugh at American Enterprise Institute event).

⁴²⁵ *The Role of the Judiciary*, *supra* note 76, at 5 (“I probably apply something approaching a 65/35 or 60/40 rule. In other words, if it is 60/40 clear, it is not ambiguous[.]”).

⁴²⁶ 852 F.3d 1078, 1080–82 (D.C. Cir. 2017).

⁴²⁷ *Id.* at 1082.

⁴²⁸ *Id.*

⁴²⁹ *See id.* at 1085 (Pillard, J., dissenting) (“The majority . . . maintains that the FCC stepped over the ‘line’ that Congress ‘drew’ separating unsolicited ads . . . from solicited ads But Congress drew no such line The majority appears to assume that, by banning unsolicited ads, Congress implicitly forbade regulation of ostensibly solicited ads[.]”). The dissent explained that requiring opt-out notices on “solicited ads” was a reasonable (and statutorily permissible) way for the FCC to ensure that recipients actually *were* consenting to the faxes and that they could withdraw such consent when they wished. *See id.* at 1084–85.

as a conscious Congressional choice that removes all ambiguity. It acts as if *Chevron* does not exist.

Another example occurred in the previously discussed *PHH Corp. v. Consumer Financial Protection Bureau*, which also concerned certain provisions of the Real Estate Settlement Procedures Act (RESPA).⁴³⁰ As background, the CFPB had concluded that the mortgage lender PHH was receiving payments for referrals to mortgage insurers in violation of RESPA's prohibition on giving or receiving a thing of value in return for referrals unless the payment is "bona fide . . . compensation or other payment for goods or facilities actually furnished or for services actually performed."⁴³¹ When PHH referred customers to mortgage insurers, it required the insurers to purchase reinsurance from PHH.⁴³² The CFPB found that this arrangement violated RESPA because the insurers would not have otherwise purchased reinsurance, and so the arrangement was purely a way to mask impermissible referral fees and therefore not bona fide.⁴³³ Judge Kavanaugh disagreed. In his view, "bona fide" unambiguously meant only that the payments for services have to match the market value of those services and so the payment is bona fide compensation as long as it is market value—even if the services themselves are unnecessary or unwanted.⁴³⁴ So, he rejected the CFPB's interpretation as impermissible, thus making *Chevron* inapplicable.⁴³⁵ But as Judge Tatel pointed out, "bona fide" in the statute is not unambiguous; indeed, a pure "market value" definition is a stretch.⁴³⁶ The dictionary definition of "bona fide" includes, for example, "[m]ade in good faith without fraud or deceit"⁴³⁷ Finding that the statute unambiguously excused *required* payments for services *not actually desired* so long as those services do not cost more than market rates might have been contrary to the text of the statute. It certainly was not unambiguously required, and it allowed mortgage service providers to easily evade RESPA's clear prohibition on kickbacks.

Judge Kavanaugh casts his approach to ambiguity as promoting neutral judging, because statutory ambiguity can be subjective and thus open the door for judicial policy preferences to influence the determination.⁴³⁸ But it is unclear how his approach solves that problem. The same policy preferences that might influence an initial finding of ambiguity will influence whether—and in what direction—a judge

⁴³⁰ See *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 111 (D.C. Cir. 2018) (en banc) (*PHH Corp. II*) (Tatel, J., concurring).

⁴³¹ 12 U.S.C. § 2607; see also *PHH Corp. II*, 881 F.3d at 111 (Tatel, J., concurring).

⁴³² *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 40 (D.C. Cir. 2016) (*PHH Corp. I*).

⁴³³ See *PHH Corp.*, 881 F.3d at 111 (Tatel, J., concurring).

⁴³⁴ *PHH Corp.*, 839 F.3d at 41.

⁴³⁵ *Id.* at 43.

⁴³⁶ *PHH Corp.*, 881 F.3d at 111 (Tatel, J., concurring).

⁴³⁷ *Id.*

⁴³⁸ *The Role of the Judiciary*, *supra* note 76, at 5–6 ("I probably apply something approaching a 65/35 or 60/40 rule. In other words, if it is 60/40 clear, it is not ambiguous[.]").

finds a statute to be clear. The real upshot of this move seems to be to move the value-based choices among possible statutory readings from agencies to the judiciary. But simply changing who makes the choice does not make it less value-based. It just makes it less likely to reflect expertise and less responsive to the needs of everyday Americans.

Second, Judge Kavanaugh has constructed a complex *Chevron*-related presumption against agency action. As background: in a select few cases, the Supreme Court has emphasized the “importance” of the statutory question as a reason that the agency cannot rely on *Chevron*. In these “major questions” cases, the Court says, “had Congress wished to assign th[e] question to an agency [to decide authoritatively], it surely would have done so expressly.”⁴³⁹ There has been substantial academic debate about the doctrine, but what matters here is that Judge Kavanaugh has seized it as an opportunity to cabin *Chevron* in a way these cases do not require.

Consider *United States Telecom Ass’n v. FCC*, which upheld the Obama Administration’s FCC’s “net neutrality” rule over Judge Kavanaugh’s objection.⁴⁴⁰ Relying on major-questions cases, Judge Kavanaugh would have invalidated the rule because “Congress did not clearly authorize the FCC to issue” it.⁴⁴¹ Why? Because Congress must “clearly authorize” all “major agency rules of great economic and political significance.”⁴⁴² This “major rules doctrine” (as Judge Kavanaugh has rebranded it) is not easy to see in these cases, which generally center on questions of the meaning of arguably ambiguous statutory language. When it addresses these questions in these cases, the Court gives the agency no deference.⁴⁴³ But we do not

⁴³⁹ See *King v. Burwell*, 135 S. Ct. at 2489; Mila Sohoni, *King’s Domain*, 93 NOTRE DAME L. REV. 1419, 1424 (Mar. 2018) (“[T]he ‘major questions exception to *Chevron* [is] the idea that Congress does not delegate authority to answer questions of major economic and political significance implicitly, but instead does so explicitly”); Kevin O. Leske, *Major Questions About the “Major Questions” Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 484–85 (2016); Asher Steinberg, *Another Addition to the Chevron Anticanon: Judge Kavanaugh on the “Major Rules” Doctrine*, THE NARROWEST GROUNDS, May 7, 2017 <http://narrowestgrounds.blogspot.com/2017/05/another-addition-to-chevron-anticanon.html>.

⁴⁴⁰ 855 F.3d 381, 382-85 (D.C. Cir. 2017) (en banc) (Srinivasan, J., concurring in the denial of rehearing en banc); *id.* at 418 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

⁴⁴¹ *Id.* at 417, 420 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

⁴⁴² *Id.* at 419; see also *id.* at 421 (“If an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . Congress must clearly authorize an agency to take such a major regulatory action.”).

⁴⁴³ See, e.g., *King*, 135 S. Ct. at 2487, 2489, 2491 (considering whether the Affordable Care Act permitted the government to make federal tax credits available in all states); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2438, 2442-44 (2014) (considering whether the Clean Air Act authorized EPA to apply certain permitting requirements to potential emitters of greenhouse gases); *Gonzales v. Oregon*, 546 U.S. 243, 248, 258, 262 (2006) (considering whether the Controlled Substance Act allowed the DOJ to prohibit doctors from prescribing drugs for use in physician-assisted suicide); *FDA v. Brown*

see in the Court’s analyses the sweeping anti-regulatory presumption against significant regulations that Judge Kavanaugh asserts.

The cases never assert that they turn on how “major” the agency action was and the degree of “clear” authorization for it. Rather, they say things like “Congress could not have intended to delegate a decision of such economic and political significance to an agency *in so cryptic a fashion*.”⁴⁴⁴ They suggest a much less dramatic rule than Judge Kavanaugh’s: *Chevron*’s assumption—that an ambiguity in an agency-administered statute is an implicit Congressional instruction to the agency to resolve it—may not apply where the text and context make that instruction difficult to infer. One piece of context is how momentous the proposed agency action is relative to what the statute plainly covers. In other words, the major-questions doctrine concerns what statutes permit, and whether the agency’s view on what they permit gets deference. The scale of the problem the agency wants to solve may be relevant to the last part of the inquiry and may be more relevant where there is a significant mismatch between the text that the agency relies upon and its solution. That is different from Judge Kavanaugh’s view that what matters is how big the solution is—that if the problem is too large the agency likely lacks power to address it.⁴⁴⁵ His analysis seems to transform a relevant but non-dispositive case fact (the agency solutions were significant) into the single dispositive principle.

To be sure, these are complex cases about which experts disagree. Judge Kavanaugh’s view may even be consistent with the cases. But it is surely not the only possible view, which raises the question of why he strained to frame it as such. One explanation is what this does to *Chevron*. The “major rules” doctrine undermines *Chevron*’s baseline principle that problems that a statute does not explicitly contemplate may be legitimately within an agency’s power to resolve because

& Williamson Tobacco Corp., 529 U.S. 120, 125-26, 133, 160 (2000) (considering whether the Food, Drug, and Cosmetic Act permitted the FDA to regulate tobacco products); *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220, 228-29 (1994) (considering whether a statute permitting the FCC to “modify” a tariff requirement allowed it to eliminate the requirement); *see also* Steinberg, *supra* note 439 (describing cases as involving statutes that are “linguistically ambiguous”).

⁴⁴⁴ *Brown & Williamson*, 529 U.S. at 160 (emphasis added); *see also Gonzales*, 546 U.S. at 262 (finding it “anomalous” to suggest that DOJ’s authority to “de-register” physicians on “public interest” provided grounds to criminalize “an entire class of activity”); *MCI*, 512 U.S. at 231 (stressing how “unlikely” it would be for Congress to authorize dramatic changes in industry regulation “through such a subtle device”); *see also infra* note 445.

⁴⁴⁵ *Utility Air*’s language comes closest to Judge Kavanaugh’s “major rules” principle, but the case cuts against it in the end. True, one of the reasons the statute in *Utility Air* didn’t permit EPA’s interpretation was that “it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.” 134 S. Ct. at 2444. But the question was simply whether a generally “open-ended statute,” *id.* at 2448, was nevertheless inconsistent with that massive expansion, *id.* at 2442. Answering that question yes does not mean that all significant regulatory moves are per se suspect.

Congress *implicitly* authorized it.⁴⁴⁶ Worse, his view neuters *Chevron* by placing the most important agency actions presumptively outside its reach. Finally, this “major rules” doctrine would have severe consequences. In practice, it would bar most attempts to address important issues, because it essentially requires past Congresses to have predicted the unpredictable problems that might arise in the future and specifically grant authorization to an agency to address them. It is a rule that presumes that agencies should not do important things.

As in other areas, Judge Kavanaugh’s treatment of *Chevron* raises substantial concerns about his respect for precedent and how he would treat critical precedent if confirmed. It also confirms that he shares with many of the current justices the general hostility for the regulatory regime that helps protect so many civil and human rights.

ii. Judge Kavanaugh’s Administrative Law Record in Practice: Concerning Environmental Justice Record

Our review reveals further cause for concern beyond *Chevron*’s doctrinal intricacies. Because administrative law cases constitute the majority of the D.C. Circuit’s docket, this report certainly cannot comprehensively recount all of Judge Kavanaugh’s cases in this field. Instead—as is generally true throughout—we have focused on cases that directly illuminate the approach that a Justice Kavanaugh would bring to the key administrative law cases of particular interest to LDF. Therefore, we have not focused on the many administrative law cases of his that do not provide insight into his approach to racial justice or civil rights. Note, also, that the breadth of the administrative law docket means that many of his cases sounding in this field are covered elsewhere.⁴⁴⁷

Applying this approach, we found that the most noteworthy part of his administrative law record arises in the environmental justice space. As noted previously, environmental justice is a racial justice issue.⁴⁴⁸ Accordingly, LDF has a long legacy of involvement in environmental justice cases, often utilizing Title VI of the Civil Rights Act of 1964.

Although his cases tend to not explicitly foreground racial justice aspects of environmental law, Judge Kavanaugh’s cases are generally negative here, in ways

⁴⁴⁶ *Mead Corp.*, 533 U.S. at 229 (“[S]ometimes the legislative delegation to an agency on a particular question is implicit.” (quoting *Chevron*, 467 U.S. at 844)).

⁴⁴⁷ For example, the executive-power cases previously discussed are all classified as “administrative law” cases. Indeed, Judge Kavanaugh’s executive-power views would threaten large parts of the administrative state. So are all the labor cases covered in our discussion of workers’ rights, see discussion *supra* Part IV.D.iv.

⁴⁴⁸ See, e.g., *Fumes Across the Fence Line*, *supra* note 421, at 3–5 (outlining the disproportionate impact of environmental pollution on communities of color and calling for regulatory solutions).

suggesting that he would be unfriendly to the environmental justice cases that LDF brings. He often seeks to diminish EPA regulations, as seen most notably in his dissents from panel rulings or denials of rehearing en banc. It is worth noting at the outset that Judge Kavanaugh has had a successful track record in this area, at least as measured by ultimate affirmance or reversal by the Supreme Court. That, however, is not the only measure of quality, particularly given the makeup of the Court since Judge Kavanaugh took the bench. Finally, these cases are invariably highly complex, and so the summaries here by necessity oversimplify to a degree.

The first notable case is *EME Homer City Generation, L.P. v. EPA*.⁴⁴⁹ EPA there was faced with how to regulate air pollution from “upwind” states that blows to “downwind” states, causing the downwind states to violate federal air quality regulations.⁴⁵⁰ This is the sort of problem that demands a nationwide solution, because the “upwind” states have no real internal incentive to deal with pollution that doesn’t harm their residents. This case had significant public health implications for all Americans, and in particular communities of color. For example, asthma—which can be aggravated by air pollution—causes death in African American children at ten times the rate that it does in white children and sends African American children to the hospital at four times the rate that it does white children.⁴⁵¹

A Clean Air Act provision requires states to prevent their in-state pollution from causing other states to violate air quality regulations.⁴⁵² EPA relied on that provision to promulgate its “Transport Rule,” which enforced the statute by laying out a method for measuring upwind pollution and imposing mandates on upwind states for reducing that pollution.⁴⁵³ Notably, the method pegged the amount of pollution that a state had to eliminate to how much eliminating the pollution would cost.⁴⁵⁴ At the Circuit, Judge Kavanaugh struck the rule down as inconsistent with the Act. He reasoned that, by pegging the amount of required reduction to cost, the rule required the reduction of pollution in ways and in amounts that the statute unambiguously forbade and that it imposed federal standards before giving states a statutorily mandated chance to fix the problems themselves.⁴⁵⁵

The Supreme Court reversed him 6-3. Notably, given Judge Kavanaugh’s proclaimed adherence to neutral textualism, the Court agreed with the panel dissent—multiple times—that Judge Kavanaugh had overread the text of the Clean

⁴⁴⁹ 696 F.3d 7 (D.C. Cir. 2012), *rev’d and remanded*, 134 S. Ct. 1584, 188 L. Ed. 2d 775 (2014).

⁴⁵⁰ *Id.* at 11.

⁴⁵¹ See U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. OF MINORITY HEALTH, ASTHMA AND AFRICAN AMERICANS (Jan. 9, 2018), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=15>.

⁴⁵² See *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1592 (2014).

⁴⁵³ See *EME Homer City*, 696 F.3d at 11.

⁴⁵⁴ See *id.* at 23, 25.

⁴⁵⁵ *Id.* at 11-12.

Air Act to reach his desired result.⁴⁵⁶ This was a case, the Court said, of an ambiguous statute warranting *Chevron* deference—indeed, this case “b[ore] a notable resemblance” to *Chevron*.⁴⁵⁷ Contrary to Judge Kavanaugh’s claims of unambiguity, the statute did “not require EPA to disregard costs” in determining how much “upwind” states had to reduce their pollution.⁴⁵⁸ Its silence on the question was, under *Chevron*, a Congressional instruction to EPA to develop a reasonable answer.⁴⁵⁹ It is hard not to see Judge Kavanaugh’s failure to recognize as much as being driven by anti-regulatory, pro-industry intuitions.

His vehement insistence that the *EME Homer* statute unambiguously barred EPA from pegging its regulation to the cost of compliance is in some tension with his dissent in a later Clean Air Act case called *White Stallion Energy Center, LLC v. EPA*.⁴⁶⁰ EPA sought there to require coal-fired and oil-fired power plants to control hazardous air pollutant emissions.⁴⁶¹ One key question was whether language directing EPA to regulate the power plants when it found it “appropriate and necessary” (after completing a public health study) *required* EPA to consider cost when making the initial decision whether to regulate.⁴⁶² To a degree, this inverted *EME Homer*: here, environmentalists and EPA argued that cost need not be considered; the industry argued that it had to be. The majority agreed with EPA. Judge Kavanaugh thought this was unambiguously wrong.⁴⁶³ He thought it was “common sense” that EPA had to consider cost, because “determining whether it is appropriate to regulate requires consideration of costs.”⁴⁶⁴

In fairness, the Supreme Court agreed with him this time. But in this complex case, Judge Kavanaugh’s certainty that cost had to be considered was perhaps overstated. That is particularly so given the tension between his treatment of cost here versus his treatment of cost in *EME Homer*. Of course, the statutory provisions were different. But they were both complex provisions in the same incredibly

⁴⁵⁶ See, e.g., *EME Homer City*, 134 S. Ct. at 1600 (criticizing Judge Kavanaugh for finding an “unwritten exception” to the statute and warning that courts must “apply the text . . . not . . . improve upon it); *id.* at 1604 (disagreeing with Judge Kavanaugh “that the Act speaks clearly”); *EME Homer City*, 696 F.3d at 49 (Rogers, J., dissenting) (pointing out that the majority was “rewriting the [Clean Air Act’s] plain text”).

⁴⁵⁷ *EME Homer City*, 134 S. Ct. at 1603.

⁴⁵⁸ *Id.* at 1610; see also *id.* at 1606-07 (explaining that the statute permits the consideration of cost in crafting pollution-reduction mandates).

⁴⁵⁹ See *id.* at 1604.

⁴⁶⁰ 748 F.3d 1222 (D.C. Cir. 2014).

⁴⁶¹ *White Stallion Energy Center, LLC v. E.P.A.*, 748 F.3d 1222, 1259-60 (D.C. Cir. 2014) (Kavanaugh, J., dissenting), *rev’d sub nom.* *Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015)

⁴⁶² See *id.* at 1235-38 (majority opinion). Notably, EPA undisputedly considered cost at a subsequent stage when deciding what power plants had to do to control the pollutants. See *id.* at 1238-40.

⁴⁶³ See *id.* at 1260-61; see also 1264 (claiming this violates the “clear statutory scheme”).

⁴⁶⁴ *Id.* at 1261.

complicated and technical statute. Surely a deep belief that the *White Stallion* statute unambiguously required considering cost because cost considerations are intrinsic to regulatory decisions should have given him pause before declaring that the *EME Homer* statute unambiguously foreclosed consideration of cost.

Similarly, we grant that the Supreme Court later agreed with his dissenting position in *Coalition for Responsible Regulation* that EPA lacked the power to apply its Prevention of Significant Deterioration program to motor-vehicle emissions of greenhouse gases.⁴⁶⁵ But reasonable minds differed, as then-Chief Judge Sentelle's opinion explained.⁴⁶⁶ Indeed, Judge Kavanaugh himself acknowledged that there "were two plausible readings" of the key statutory language, but declared the one he disliked to be impermissible because it would be "absurd[.]"⁴⁶⁷ According to Judge Kavanaugh, the absurdity was that the broader reading he disliked would result in a "low trigger" for the program, causing "dramatically higher numbers of facilities [to] fall within the program and hav[ing] to obtain pre-construction permits."⁴⁶⁸ Beyond the complex statutory haggling, the real problem seems to have been that the disfavored interpretation would be too burdensome and expensive for industry.⁴⁶⁹ That reasoning is somewhat contrary to what one would expect from a dedicated textualist. All this makes it unclear how much credit Judge Kavanaugh should get for ultimately prevailing with an interpretation that hampered EPA's power to combat climate change. In considering this, it should be remembered that the effects of climate change will fall first and hardest on the poor and communities of color.⁴⁷⁰

In sum, Judge Kavanaugh has a series of cases which demonstrate an eagerness to limit EPA regulation.⁴⁷¹ He has been unsympathetic towards

⁴⁶⁵ See *Coal. for Responsible Regulation v. EPA*, No. 09-1322, 2012 WL 6621785, at *15 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denials of rehearing en banc). The Supreme Court later adopted part of his reasoning in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014).

⁴⁶⁶ See *Coal. for Responsible Regulation*, 2012 WL 6621785, at *1 (Sentelle, C.J., concurring in denials of rehearing en banc).

⁴⁶⁷ *Id.* at *18 (Kavanaugh, J., dissenting from denials of rehearing en banc).

⁴⁶⁸ *Id.* at *15.

⁴⁶⁹ *Cf. id.* at *18 (complaining that the disfavored interpretation would "impose enormous costs on tens of thousands of American businesses").

⁴⁷⁰ See, e.g., Vann R. Newkirk II, *The Victims of Climate Change Are Already Here*, THE ATLANTIC, Aug. 22, 2018, <https://www.theatlantic.com/politics/archive/2018/08/climate-change-global-climate-action-summit/568069/>.

⁴⁷¹ To be sure, Judge Kavanaugh has upheld EPA before. See *National Min. Ass'n v. McCarthy*, 758 F.3d 243, 246–47 (D.C. Cir. 2014) (holding that "EPA and the [Army] Corps [of Engineers] acted within their statutory authority" in adopting a process to screen mining permits under the Surface Mining Control and Reclamation Act and the Clean Water Act); see also *Energy Future Coal v. EPA*, 793 F.3d 141, 143 (2015) (rejecting biofuel producers' arbitrary-and-capricious attack on EPA's test fuel regulation, which required vehicle manufactures to conduct emissions testing with a test fuel commercially available). It would be a stretch, however, to cast him as pro-regulatory or even neutral to regulation given all that we know about the general thrust of his writings and ideology.

environmental protection and apprehensive about industry regulation. If confirmed, he would further entrench the anti-regulatory, anti-environmental agenda that has gained traction in recent years. That, of course, would disproportionately affect African American communities and other communities of color, since minority communities suffer most from industrial pollution,⁴⁷² and hazardous waste sites target minority and low-income neighborhoods,⁴⁷³ resulting in minorities being most likely to be affected by the industries that EPA and environmental protection statutes seek to regulate. This also provides insights into how he would treat matters related to, and challenges to regulations governing, civil rights protections in education, housing, and the workplace.

H. ACCESS TO JUSTICE

“Access to justice” refers to the meaningful ability of individuals—especially those who are most marginalized—to petition the courts for vindication of their legal rights. This is critical in the civil rights context, and cuts across a wide range of statutes and issue areas. The concept of “Equal Justice Under Law”—engraved on the facade of the Supreme Court—means ensuring that civil rights and other laws must be enforced even when invoked by the politically powerless against the politically powerful. Without access to courts and judicial remedies, fundamental rights cannot be vindicated. And a right without a remedy is meaningless. Indeed, the right to sue is itself fundamental, as the Supreme Court has held that “the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government[.]”⁴⁷⁴

The courthouse doors can be shut by a variety of means, including pre-trial motions to dismiss and motions for summary judgment; prohibitive filing, transcript, or discovery fees; restrictions on the use of class actions that prevent plaintiffs from aggregating claims to challenge systemic civil rights violations; arbitration clauses that divert claims from courts into private, one-sided proceedings; and challenges to a litigant’s standing to bring suit.⁴⁷⁵ Many of these issues involve the application of

⁴⁷² David Pace, *Minorities Suffer Most from Industrial Pollution*, NBC NEWS, Dec. 14, 2005, http://www.nbcnews.com/id/10452037/ns/us_news-environment/t/minorities-suffer-most-industrial-pollution/#.W3zEeOhKiUk.

⁴⁷³ Paul Mohai & Robin Saha, *Which Came First People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 2015 ENVIRON RES. LETT. 10, Nov. 18, 2015, <http://iopscience.iop.org/article/10.1088/1748-9326/10/11/115008?fromSearchPage=true>.

⁴⁷⁴ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896–97 (1984).

⁴⁷⁵ Indeed, these procedural obstacles further exacerbate the significant socio-economic barriers and systemic inequities that already limit access to the justice system and courts to racial minorities and low-income communities. See Am. Bar Ass’n Comm’n on the Future of Legal Servs., *A Report on the Future of Legal Services in the United States* (2016) (reporting that most people living in poverty do

highly subjective standards—whether a “reasonable jury” could find in the plaintiff’s favor, for example. That means that conscious and unconscious values play a critical role.

It is no coincidence that many of the Supreme Court’s most important cases in these areas involve the claims of civil rights plaintiffs.⁴⁷⁶ These are also areas in which, through a series of closely divided cases, the Supreme Court has done substantial harm in the last decade. Take, for example, *Wal-Mart Stores, Inc. v. Dukes*,⁴⁷⁷ a 5–4 decision that weakened class actions and raised the bar for civil rights plaintiffs to pursue claims of widespread discrimination—essentially creating a *de facto* “too big to be sued” defense for defendants who discriminate on a large enough scale. The Roberts Court has also endorsed a broad view of the Federal Arbitration Act (“FAA”),⁴⁷⁸ a law that corporations have used essentially to opt out of the civil justice system and force claims into private arbitration proceedings that are stacked in favor of corporate defendants.⁴⁷⁹ In both *AT&T v. Concepcion*⁴⁸⁰ and *American Express Co. v. Italian Colors Restaurant*,⁴⁸¹ the Court allowed corporate defendants to dismantle class actions and force claims into individual arbitration proceedings that were effectively “a fool’s errand.”⁴⁸² In light of these cases, corporations have used arbitration clauses in the fine print of standard employee and consumer agreements to avoid lawsuits of all kinds, including those alleging racial discrimination.⁴⁸³ And, in the last Supreme Court term, a five-justice majority again weaponized the FAA. This time, it was used to nullify the collective action rights of

not receive the legal help they need, and that bias, discrimination, complexity, and lack of resources undermine access to legal services and the justice system). *See also generally* Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (May 2016).

⁴⁷⁶ *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Conley v. Gibson*, 355 U.S. 41 (1957); *Hansberry v. Lee*, 311 U.S. 32 (1940).

⁴⁷⁷ 564 U.S. 338 (2011).

⁴⁷⁸ 9 U.S.C. §§ 2 *et seq.*

⁴⁷⁹ *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015,

<https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

⁴⁸⁰ 563 U.S. 333 (2011).

⁴⁸¹ 570 U.S. 228 (2013).

⁴⁸² *Id.* at 240 (Kagan, J., dissenting).

⁴⁸³ *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that arbitration clause in employee agreement was enforceable and barred employment discrimination lawsuit under California’s Fair Employment and Housing Act); *Selden v. Airbnb, Inc.*, No. 16-cv-00933, 2016 WL 6476934 (D.D.C. Nov. 1, 2016) (holding that arbitration clause barred class action alleging racial discrimination in services provided by Airbnb).

workers guaranteed by the National Labor Relations Act, thus permitting companies to force wronged employees to proceed in ineffective individual arbitrations.⁴⁸⁴

i. Standing

Standing comprises the most substantial access-to-justice aspect of Judge Kavanaugh’s record. The Supreme Court has concluded that Article III of the Constitution’s reference to “Cases” and “Controversies” establishes a jurisdictional requirement of “standing” that plaintiffs must satisfy before having their claims heard.⁴⁸⁵ The Court says that this “justiciability” requirement “helps differentiate those disputes which are appropriately resolved through the judicial process from policy disputes that are appropriately addressed by the elected branches” by limiting judicial review to instances when the plaintiff can show a concrete injury caused by the defendant that a judicial ruling can correct.⁴⁸⁶ In practice, however, this requirement has often worked to shut the courthouse doors to civil rights and other public interest plaintiffs, regardless of whether their claim is meritorious.⁴⁸⁷ Conversely, business interests have often found it relatively easy to convince courts that they have been sufficiently “injured” to deserve a day in court. Unfortunately, Judge Kavanaugh’s record generally follows this trend.

Start with cases where plaintiffs seek to protect the public interest or constitutional rights, such as one involving Protestant Navy chaplains who wanted to sue the Navy for discriminating in favor of Catholic chaplains in its retirement system.⁴⁸⁸ Judge Kavanaugh characterized the chaplains’ claimed injury as “mere personal offense to government action” that could not support standing, warning that accepting plaintiffs’ theory would “wedge open the courthouse doors” for Establishment Clause plaintiffs.⁴⁸⁹ A dissenter disagreed on the grounds that Kavanaugh had disregarded a long line of cases endorsing plaintiffs’ ability to sue for the stigmatic injury of being treated as “less than” (including *Brown v. Board of Education*, which rested in large part on the stigmatic injury segregation imposed on Black children).⁴⁹⁰ Or consider two cases involving the public-interest group Public Citizen’s claim that a governmental car-safety standard was insufficiently

⁴⁸⁴ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622–24, 1632 (2018); *id.* at 1641–48 (Ginsburg, J., dissenting).

⁴⁸⁵ *Coal. For Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1278 (D.C. Cir. 2012) (Kavanaugh, J.).

⁴⁸⁶ *Id.* at 1278–79 (summarizing and quoting Supreme Court reasoning).

⁴⁸⁷ See, e.g., *Allen v. Wright*, 468 U.S. 737, 739–40 (1984) (employing standing to deny parents of Black children the ability to bring a class-action challenging the IRS’s failure to deny tax benefits to racially discriminatory private schools).

⁴⁸⁸ *In re Navy Chaplaincy*, 534 F.3d 756, 758, 760 (D.C. Cir. 2008)

⁴⁸⁹ *Id.* at 763–65.

⁴⁹⁰ See *id.* at 769 & n. 9.

protective.⁴⁹¹ Although he initially gave Public Citizen an opportunity to supplement the record to bolster its standing claims based on future possible injuries, Judge Kavanaugh spent most of his time criticizing the circuit precedent that mandated that opportunity.⁴⁹² The same panel subsequently found Public Citizen’s attempt insufficient and reiterated its skepticism of the doctrine that even permitted the attempt.⁴⁹³

Conversely, Judge Kavanaugh has been relatively laissez-faire regarding business interests’ standing. For example, he dissented twice to argue that trade groups representing the petroleum and corn product industries ought to have standing to challenge EPA’s introduction of an ethanol-based fuel.⁴⁹⁴ In his view, “Economics 101” dictated that the corn product makers had standing because ethanol use would increase the price of corn, and the petroleum industries would be forced to incur costs to comply with the new mandate.⁴⁹⁵ Notable here is the degree of empathy he showed for the “two enormous American industries” being prevented from having their day in court.⁴⁹⁶ We see a similar approach in *Carpenters Industrial Council v. Zinke*, which involved a timber trade organization’s challenge to a governmental designation of forest as protected endangered-species habitat.⁴⁹⁷ The district court thought the trade association had made insufficient conclusory allegations of future economic harm to support its standing.⁴⁹⁸ Judge Kavanaugh disagreed, because “common sense and basic economics” tells us that a company suffers an economic harm if its supply of raw material is in any way impinged.⁴⁹⁹

We cannot review every standing case here. Nor are we claiming that Judge Kavanaugh *invariably* rules against public-interest plaintiffs or for industry plaintiffs.⁵⁰⁰ Not even the judges most hostile to standing display that sort of record;

⁴⁹¹ See *Public Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1283–84 (D.C. Cir. 2007) (*Public Citizen I*); *Public Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 513 F.3d 234, 238 (D.C. Cir. 2008) (*Public Citizen II*).

⁴⁹² See *Public Citizen I*, 489 F.3d at 1293–95.

⁴⁹³ See *Public Citizen II*, 513 F.3d at 241. Judge Kavanaugh likely wrote this opinion, since Judge Sentelle wrote separately and Judge Randolph has a distinctive writing style, but we cannot be sure.

⁴⁹⁴ See *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 172, 181 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); (*Grocery Mfrs. I*); *Grocery Mfrs. Ass’n v. EPA*, 704 F.3d 1005, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting from denial of rehearing en banc) (*Grocery Mfrs. II*).

⁴⁹⁵ *Grocery Mfrs. I*, 639 F.3d at 181–82, 188–90.

⁴⁹⁶ See *id.* at 181.

⁴⁹⁷ 854 F.3d 1, 2–4 (D.C. Cir. 2017).

⁴⁹⁸ *Id.* at 4–5.

⁴⁹⁹ *Id.* at 6; see also *id.* at 7 (“Unless the company can fully replace the source of supply at zero additional cost to the company . . . then the company has suffered an economic harm.”).

⁵⁰⁰ Compare *Howard R.L. Cook & Tommy Shaw Found. ex. Rel Black Emps. of Library of Cong., Inc. v. Billington*, 737 F.3d 767, 770–73 (D.C. Cir. 2013) (plaintiff members of organization combatting racial discrimination had standing to sue the Library of Congress), and *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 876–79 (D.C. Cir. 2006) (plaintiffs who enjoyed swans on their property

standing is too nuanced for that. But we do think the opinions—both in their results and in their rhetoric—place Judge Kavanaugh squarely within his legal movement’s view of standing: stringent when it comes to public interest and impact litigation, lax when it comes to the vindication of economic interest.⁵⁰¹ And they demonstrate a sliding scale of empathy matching those results.

ii. Ripeness

Ripeness, like standing, is a justiciability doctrine. While related to standing, it is often described inconsistently across cases, and has permutations not relevant here. For our purposes, what matters is that it generally turns on whether not ruling in the case would impose hardship on the parties and whether there is some reason the issues in the case are not yet “fit” for judicial review.⁵⁰² This can be another mechanism to deny plaintiffs a day in court.

Our review of Judge Kavanaugh’s record revealed one significant ripeness case. Two environmental organizations wished to challenge a final Federal Communications Commission decision as insufficiently protecting birds from collisions with communications towers.⁵⁰³ The panel majority agreed that the decision was illegal, but Judge Kavanaugh disagreed on the grounds that the case was not ripe because the Commission was “re-examining these environmental issues” in a separate rulemaking proceeding.⁵⁰⁴ Importantly, Judge Kavanaugh raised this issue totally on his own—the FCC had not made the argument.⁵⁰⁵ And ripeness, at least the form of ripeness relied on here, is not the sort of jurisdictional argument that courts are required to raise *sua sponte*. In other words, Judge Kavanaugh reached out to find a justiciability bar to deny the plaintiffs their day in court. That is concerning. Moreover, as the majority noted, it was not accurate to say that the issues were being reexamined elsewhere; the separate rulemaking proceeding simply had not placed at issue the questions petitioners sought to have reviewed.⁵⁰⁶

had standing to challenge Maryland’s grant of permits to kill swans), *with Public Citizen I*, 489 F.3d at 1283 (holding that a tire-industry group lacked standing to challenge government car-safety standard). Notably, however, the public-interest plaintiffs who showed standing in those cases both lost on the merits.

⁵⁰¹ See, e.g., ERWIN CHEMERINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* 201, 211–15 (Simon and Schuster 2010) (arguing that restrictive standing doctrine is “one of the most pernicious aspects of the conservative assault on the Constitution”).

⁵⁰² *Sabre, Inc. v. Dept. of Transp.*, 429 F.3d 1113, 1119–1120 (D.C. Cir. 2005).

⁵⁰³ *See Am. Bird Conservancy, Inc. v. F.C.C.*, 516 F.3d 1027, 1029–1031 (D.C. Cir. 2008) (per curiam).

⁵⁰⁴ *Id.* at 1035–36 (Kavanaugh, J., dissenting) (analogizing case to “a situation in which a petitioner comes to court to challenge an agency order while the agency is still considering a petition for reconsideration”).

⁵⁰⁵ *See id.* at 1031 n.1 (majority opinion).

⁵⁰⁶ *Id.*

The use of ripeness doctrine in this way furthers our concerns about Judge Kavanaugh’s approach to justiciability issues.

iii. Motions to Dismiss and Motions for Summary Judgment

Civil cases are often resolved before ever reaching a jury because of motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) and motions for summary judgment under Rule 56.⁵⁰⁷ Motions to dismiss argue that the facts alleged in the complaint simply fail to set out circumstances entitling the plaintiff to legal relief. Motions for summary judgment are generally filed later—after parties conduct fact-finding through discovery—and will be granted when it would be inappropriate for a jury to hear the case because one party is entitled to win as a matter of law.⁵⁰⁸ While Judge Kavanaugh’s motion to dismiss record is limited, our review did reveal one concerning case. His summary judgment record essentially arises in the employment discrimination context and is discussed in that portion of this report.⁵⁰⁹

a. Motions to Dismiss

Surprisingly, we found only one (somewhat unique) case touching on Rule 12(b)(6) issues. *Rollins v. Wackenhut Services, Inc.* concerned a mother who sought to hold two pharmaceutical companies and her son’s employer liable for his suicide (she alleged that the companies’ drugs caused the suicide and that the employer, a security agency, negligently issued him a gun).⁵¹⁰ The question was whether the district court properly granted the defendants’ motions to dismiss her complaint. Everyone agreed that it had, but Judge Kavanaugh wrote separately to raise a technical but concerning procedural point.

A complaint can be dismissed with or without prejudice. A dismissal without prejudice generally permits the plaintiff to “try again,” ideally by fixing the reason the complaint was dismissed.⁵¹¹ For example, it may be that the plaintiff failed to include in the complaint things that actually happened that would have allowed her to survive a motion to dismiss. Even the best law firms sometimes make this mistake, and individuals without the resources to hire such law firms often do. Conversely, a dismissal *with* prejudice rejects “the plaintiff’s claims on the merits” and so generally

⁵⁰⁷ Fed. R. Civ. P. 12(b)(6); Fed. R. Civ. P. 56.

⁵⁰⁸ *Ross v. United States Capitol Police*, 195 F. Supp. 3d 180, 192 (D.D.C. 2016).

⁵⁰⁹ See Part IV.D.iii.

⁵¹⁰ 703 F.3d 122, 125–26 (D.C. Cir. 2012).

⁵¹¹ See *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (“The primary meaning of ‘dismissal without prejudice’ . . . is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim.”); *Brewer v. District of Columbia*, 891 F. Supp. 2d 126, 134 (D.D.C. 2012).

will prevent the plaintiff from litigating those claims further.⁵¹² This may be appropriate where the claims are simply not legally cognizable, or where a plaintiff has had multiple opportunities to put together a sufficient complaint. But it would threaten access-to-justice principles to be too aggressive with such dismissals in the Rule 12(b)(6) context. For that reason, the D.C. Circuit has disfavored Rule 12(b)(6) dismissals with prejudice, stating that it is “warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.”⁵¹³

Judge Kavanaugh wrote separately in *Rollins* to challenge that legal framework. He noted correctly that Federal Rule of Civil Procedure 41(b) states that a dismissal under Rule 12(b)(6) is a dismissal on the merits “[u]nless the dismissal order states otherwise[.]”⁵¹⁴ But he then took an unnecessary step. He argued that Rule 41(b) is in tension with the D.C. Circuit’s caselaw that disfavors Rule 12(b)(6) dismissals with prejudice.⁵¹⁵ His argument essentially was that, since Rule 41(b) establishes with-prejudice dismissals as the “default,” it is anomalous to disfavor them. But that does not necessarily follow. As this situation itself demonstrates, there may be good reasons that a default rule should in practice be disfavored. Nothing about Rule 41(b)’s text, in our view, precludes the D.C. Circuit’s plaintiff-protective position towards with-prejudice dismissals.

This is a technical issue, and we do not detect any particular malice in Judge Kavanaugh’s position. What we do detect, however, is a failure to appreciate the many different forms in which meritorious claims present themselves. The D.C. Circuit’s current rule prevents honest mistakes from permanently denying a plaintiff with a meritorious claim her day in court. Judge Kavanaugh’s position—unrequired by the text—would lead to many more honest mistakes becoming irreversible traps for the unwary. This exemplifies our concerns about the sorts of legal values Judge Kavanaugh would bring to the Court, if confirmed.

b. Motions for Summary Judgment

Our analysis of Judge Kavanaugh’s summary-judgment record revealed that his relevant cases arise essentially exclusively in the employment discrimination context.⁵¹⁶ Those cases are discussed above in Part IV.D.iii.

⁵¹² See *Dismissal of action with or without prejudice distinguished*, 21A Fed. Proc., L. Ed. § 51:255.

⁵¹³ *Rollins*, 703 F.3d at 131; see also *id.* (calling with-prejudice dismissals “the exception, not the rule”).

⁵¹⁴ *Id.* at 132 (quoting Fed. R. Civ. P. 41(b)).

⁵¹⁵ *Id.*

⁵¹⁶ A notable exception is the First Amendment case *Moore v. Hartman*, 644 F.3d 415 (D.C. Cir. 2011), where Judge Kavanaugh silently concurred in a summary-judgment grant based on qualified immunity. *Id.* at 426–27. The Supreme Court later vacated the opinion as potentially inconsistent with a subsequent Supreme Court opinion. See *Hartman v. Moore*, 567 U.S. 901 (2012).

iv. Pro Se Plaintiffs

How a judge treats pro se plaintiffs matters. Few can afford the most expensive and skilled lawyers, yet everyone deserves to have their claims treated with respect.

Angellino v. Royal Family Al-Saud provides some insight on Judge Kavanaugh’s approach.⁵¹⁷ The plaintiff sought to sue the Saudi royal family for breach of contract.⁵¹⁸ But he then got caught in a web of complicated procedural barriers. A statute outlined multiple methods of serving an agent of a foreign state, with the preferred method being the delivery of the summons and complaint “in accordance with any special arrangement for service between” the plaintiff and the agent.⁵¹⁹ Angellino thought this meant mailing those materials to the Saudi embassy, because he had generally communicated with the royal family through that medium.⁵²⁰ But the embassy refused the mailing. And when he then tried to file the proof of service form with the district court, it rejected the filing because he mistakenly sent the forms to the individual judge’s chambers instead of the clerk of court’s office.⁵²¹ The rejection did not tell Angellino that his submission was defective beyond being sent to the wrong location, so he sent the proof of service forms to the clerk’s office.⁵²²

Several months later, he received a court order requiring him to explain why the action should not be dismissed for “failure to prosecute[.]”⁵²³ Still believing that the “special arrangement” rule meant service at the embassy, Angellino did his best to explain his actions, but the district court concluded that he had not complied with the order because he had not shown the necessary “special arrangement” or otherwise satisfied the Federal Rules, and again ordered him to explain why the action should not be dismissed.⁵²⁴ Probably confused, Angellino essentially submitted the same materials again, and the district court dismissed his complaint.⁵²⁵

These facts are convoluted, but so are the procedural mazes pro se plaintiffs often face. Understanding this, the majority reversed the dismissal, observing there was a “reasonable probability” that Angellino could accomplish service through one of the statute’s other permitted methods.⁵²⁶ The majority appreciated that Angellino

⁵¹⁷ 688 F.3d 771 (D.C. Cir. 2012).

⁵¹⁸ *Id.* at 772.

⁵¹⁹ *Id.* at 773.

⁵²⁰ *Id.* at 774.

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Id.*

⁵²⁴ *See id.* at 774–75.

⁵²⁵ *Id.* at 775.

⁵²⁶ *Id.* at 776–777.

had been doing his best to comply with provisions that are unclear to non-lawyers, and concluded that he had not been given the legally required fair notice of his failure to comply or alternative means to do so.⁵²⁷ In a terse dissent, Judge Kavanaugh disagreed, claiming that Angellino had received “ample opportunity to pursue the suit.”⁵²⁸ That reveals an unfortunate lack of empathy for pro se plaintiffs, and raises unfortunate questions about how a Justice Kavanaugh would treat pro se (and other politically powerless) parties at the Court.

v. *Class Actions and Forced Arbitration*

Class actions are essential in remedying civil rights violations.⁵²⁹ As evinced by landmark class action civil rights cases including *Brown v. Board of Education* and *Griggs v. Duke Power Company*, class actions have been an indispensable tool for dismantling segregation and discrimination and promoting equal opportunity.⁵³⁰ Indeed, class action litigation has led to significant civil rights advances in almost every sphere of American society, including employment, education, public accommodations, and housing.⁵³¹ These collective actions have established legal precedents that have shaped and given full meaning to our antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964⁵³² and the Fair Housing Act.⁵³³

Class actions can remedy civil rights violations in circumstances where individuals are unlikely to proceed alone because of insufficient resources or fear of retaliation. Class actions also serve broader public interests by exposing, remedying, and deterring civil rights violations, especially systemic discrimination. In contrast, individual claims might not proceed because of the time and resources necessary, and when they do proceed, the relief provided rarely extends past the named plaintiffs.

⁵²⁷ *Id.* at 777–78.

⁵²⁸ *Id.* at 779 (Kavanaugh, J., dissenting).

⁵²⁹ Hon. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2184 (June 1989).

⁵³⁰ See Hon. Jack B. Weinstein, et al., *Some Reflections on the ‘Abusiveness’ of Class Actions*, 58 F.R.D. 299, 304 (1973) (recognizing that the “impact of class suits in civil rights cases is substantial”) and Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 577 (Summer 1997) (“Civil rights and class actions have an historic partnership.”).

⁵³¹ See Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 KANSAS L. REV. 325, 329 (2017).

⁵³² See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); see also *Int’l Union v. Johnson Controls, Inc.* 499 U.S. 187 (1991); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

⁵³³ See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

The Supreme Court has recognized that the class action mechanism was created for the “vindication of rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”⁵³⁴ Nonetheless, as recently as this past term, the Court has, by narrow margins, weakened class actions and made it increasingly more difficult for plaintiffs to collectively seek justice. In the previously discussed *Epic Systems Corp. v. Lewis*, in a 5–4 opinion written by Justice Gorsuch, the Supreme Court held that employment contracts that require employees to pursue individualized arbitration proceedings for employment related disputes and prohibit them from banding with other workers to bring a class action are enforceable.⁵³⁵ The holding in *Epic Systems* is in line with the Court’s opinions in cases like *AT&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*, where it upheld arbitration clauses with a class action waiver in the consumer arena.⁵³⁶ Such mandatory arbitration agreements are increasingly commonplace and essentially bar employees and consumers from forming any class and having their claims heard before any legal forum. Given the Supreme Court’s trend towards undermining class actions, there is heightened concern regarding this nominee’s approach to and views of class action claims and plaintiffs.

While Judge Kavanaugh’s judicial record includes few class actions and no opinions interpreting Rule 23, the dissent he authored in *Cohen v. United States* suggests that he supports limiting the use of class actions.⁵³⁷ In *Cohen*, taxpayers brought putative class actions against the United States, challenging the refund mechanism that the Internal Revenue Service (IRS) established for levy of telephone excise taxes. This was a Multidistrict Litigation (MDL) made up of three consolidated cases before the U.S. District Court for the District of Columbia. The district court dismissed the cases after concluding that plaintiffs had failed to exhaust administrative remedies for their refund claims and failed to state valid claims under federal law. A divided panel of the Court of Appeals reversed the district court and remanded the cases. On rehearing, the en banc panel affirmed in part and reversed in part, holding that the establishment of the IRS refund mechanism was an agency action that could be reviewed.⁵³⁸ Judge Kavanaugh forcefully disagreed with the majority’s holding that it had jurisdiction to hear plaintiffs’ claim.

In his dissenting opinion in *Cohen*, Judge Kavanaugh reasoned that the class of plaintiffs could not maintain a lawsuit under the Administrative Procedure Act

⁵³⁴ *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

⁵³⁵ 138 S. Ct. 1612 (2018).

⁵³⁶ See *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁵³⁷ 650 F.3d 717, 736 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

⁵³⁸ *Id.*

(APA) because (1) “plaintiffs have an adequate alternative judicial remedy, namely tax refund suits”; and (2) plaintiffs’ claim was not ripe because they must file individual refund claims with the IRS before filing a lawsuit.⁵³⁹ Before reaching this conclusion, he chastised the plaintiffs, stating:

Plaintiffs’ ultimate objectives are class certification and a court order that the U.S. Government pay *billions* of dollars in additional refunds to millions of as-yet-unnamed individuals who never sought refunds from the IRS or filed tax refund suits. It seems that plaintiffs have deliberately avoided filing individual refund claims with the IRS and filing tax refund suits because they think they have a better chance of obtaining class certification if they don’t take those steps. And class certification is a necessary prerequisite to the class-wide jackpot plaintiffs are seeking here.⁵⁴⁰

Judge Kavanaugh’s unnecessary derision of the plaintiffs in *Cohen* evinces a general hostility towards plaintiffs in class actions. As the majority rightly notes in response to Judge Kavanaugh’s dissent, his framing of the plaintiffs’ objectives being monetary is “misleading,” because “[a]lthough [plaintiffs] may *ultimately* seek additional refunds if [the challenged IRS process] is invalidated and they succeed in substituting more ‘effective’ (and perhaps more fruitful) refund mechanism...[plaintiffs] APA suit...offers no monetary relief, tax refund or otherwise...[a]nd [plaintiffs] are not raiders in pursuit of an unwarranted windfall; they are aggrieved citizens in search of accountability.”⁵⁴¹

Notably, Judge Kavanaugh’s Senate Judiciary Committee Questionnaire states that from 2001–2003, during his time as Associate Counsel and Senior Associate Counsel at the White House, he “assisted on legal policy issues affecting the tort system, such as airline liability, victims’ compensation, terrorism insurance, medical liability, and class action reform.” The very limited set of records that have been released and open to inspection from Judge Kavanaugh’s tenure at the White House Counsel’s Office indicate that he worked on President George W. Bush’s efforts related to the Class Action Fairness Act of 2005, including drafting letters and speeches and advising on legislative language.⁵⁴² The legislation sparked concerns that shifting class action litigation from state to federal court would impact federal

⁵³⁹ *Id.* at 737.

⁵⁴⁰ *Id.*

⁵⁴¹ 650 F.3d at 731 n.12.

⁵⁴² See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 (2005). The legislation was signed into law by President George W. Bush in February 2005. The Class Action Fairness Act extended federal diversity jurisdiction over class actions with the intent to shift some class action litigation from state to federal court, restricted the practice of coupon settlements, and changed the procedures for settling class actions in federal courts.

courts' dockets and procedures. Civil rights advocates, in particular, were concerned that the removal of state class actions to federal courts would clog the federal courts with state law cases and make it more difficult to have federal civil rights cases heard, deter people from bringing class actions, and impose barriers and burdens on settlement of class actions.⁵⁴³

Overall, we see Judge Kavanaugh's record on access to justice as cause for concern. With minor exceptions, it fits into the general hostility of his legal movement towards seeing the courts as an avenue for social change and correction of social injustice.⁵⁴⁴

I. WHAT WE STILL DON'T KNOW

As noted at the beginning of this report, the rushed nomination process has deprived LDF and the entire public of the full and appropriate access needed to understand substantively Judge Kavanaugh's White House record. Most egregiously, the Judiciary Committee majority has refused to facilitate access to any of Judge Kavanaugh's materials from his time as White House Staff Secretary from June 2003 through May 2006.⁵⁴⁵ The following critical legal and social events occurred during that period:

- *Grutter v. Bollinger*⁵⁴⁶ and *Gratz v. Bollinger*,⁵⁴⁷ which together affirmed the permissibility of the consideration of race in higher-education admissions;
- The 2006 reauthorization of the Voting Rights Act, which was finalized in June 2006⁵⁴⁸;
- The proposal of various hate-crimes legislation;⁵⁴⁹

⁵⁴³ See Leadership Conference on Civil Rights (LCCR) Sign-on Letter to the Senate Urging Opposition to S. 274, The Class Action Fairness Act of 2003, <https://www.aclu.org/letter/leadership-conference-civil-rights-lccr-sign-letter-senate-urging-opposition-s-274-class>.

⁵⁴⁴ Compare *The Role of the Judiciary*, *supra* note 76, at 4 (“Don’t make up new constitutional rights that are not in the Constitution. . . . Changing policy within constitutional bounds is for the legislatures.”), with Rehnquist, *supra* note 92, at 706 (attacking as “corrosive” a view of the constitution that permits “judges to impose . . . a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution[.]”).

⁵⁴⁵ See Kim, *supra* note 34.

⁵⁴⁶ 539 U.S. 306 (2003).

⁵⁴⁷ 539 U.S. 244 (2003). John Payton, LDF's then-President and Director-Counsel, argued this case.

⁵⁴⁸ See *Bush Signs Voting Rights Act Extension*, NBCNEWS (July 27, 2006), <http://www.nbcnews.com/id/14059113/ns/politics/t/bush-signs-voting-rights-act-extension/#.W3oxOtJKhPY> (discussing reauthorization process).

⁵⁴⁹ See Jason A. Abel, *Americans Under Attack: The Need for Federal Hate Crime Legislation in Light of Post-September 11 Attacks on Arab Americans and Muslims*, 12 ASIAN L.J. 41, 46 (Apr. 2005) (discussing hate-crimes legislation that failed in 2004); *ACLU Endorses Federal Hate Crimes*

- Hurricanes Katrina and Rita;
- The Class Action Fairness Act;
- President Bush’s call for a constitutional amendment banning same-sex marriage;⁵⁵⁰
- Debates over the use of torture and the President’s ability to ignore Congressional restrictions on its use.⁵⁵¹

The degree of Kavanaugh’s involvement in these issues is relevant to his fitness to serve as a Supreme Court Justice. We know he was involved in at least some. For example, he “conveyed to the White House President Bush’s instructions on an affirmative action case[.]”⁵⁵² This is not a clerical position; substantive input is expected and required.⁵⁵³ Because the public was unable to examine these topics through his materials before his hearing, LDF suggests that these are legitimate topics for questions at the hearing.

Nor have sufficient documents from Judge Kavanaugh’s White House Counsel years been made available. These are the only documents that Chairman Grassley requested from the National Archives. But the National Archives will not be able to complete its review and production until the end of October at the earliest. And though a private lawyer for President George W. Bush is conducting his own review and production of those documents, that unprecedented procedure can provide no assurance that the most substantive documents are in fact being released. Specifically, as indicated by the ten Democratic members of the Senate Judiciary Committee, 97 percent of Judge Kavanaugh’s White House record is being withheld from the public and more than 94 percent is being withheld from the Senate.⁵⁵⁴

Legislation for First Time, Says Conyers Proposal Properly Addresses Free Speech Concerns, ACLU, May 26, 2005, <https://www.aclu.org/news/aclu-endorses-federal-hate-crimes-legislation-first-time-says-conyers-proposal-properly> (discussing hate-crimes legislation proposed in 2005).

⁵⁵⁰ See David Stout, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 24, 2004, <https://www.nytimes.com/2004/02/24/politics/bush-backs-ban-in-constitution-on-gay-marriage.html>.

⁵⁵¹ See Charlie Savage, *Bush Claimed Power to Override a Torture Ban. What Did Brett Kavanaugh Think About That?*, N.Y. TIMES, July 29, 2018, <https://www.nytimes.com/2018/07/29/us/brett-kavanaugh-signing-statements.html>.

⁵⁵² Shane, *supra* note 61.

⁵⁵³ See Savage, *supra* note 551; Shane, *supra* note 61 (“Mr. Kavanaugh [as Staff Secretary] had to ensure that every word of proposed executive orders or speeches was vetted by the relevant agencies before going to the president, sometimes trying to reconcile competing views.”).

⁵⁵⁴ Letter from Ranking Member Dianne Feinstein and Sens. Patrick J. Leahy, Richard J. Durbin, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Richard Blumenthal, Mazie Hirono, Cory A. Booker, & Kamala D. Harris, to Jud. Comm. Chairman Charles E. Grassley, (Aug. 24, 2018), https://www.feinstein.senate.gov/public/_cache/files/7/0/705493b3-8ee8-4448-bda1-d0400c99d752/6C9970DC7BC7AB0315B2994B50EDE36A.letter-to-grassley-on-kavanaugh-delay.pdf

In sum, this process has deprived the American people of legitimate basis for questioning Judge Kavanaugh on his fitness for the highest court in the land. It is inexcusable and is reason alone to delay this hearing.

CONCLUSION

We end where we began. The context of this nomination is not normal and should give all Senators pause before proceeding to a vote.

The most conventional thing about this nomination may be Judge Kavanaugh's conventionally stellar credentials. And impressive schools and clerkships, a collegial manner, and good legal writing can serve a judge well. No one doubts that. But that is not enough to qualify a judge to sit on the Supreme Court. Values matter—in particular, the degree to which the judge understands the scope of equal justice and the need to give full meaning to the civil rights laws for which so many have given so much. Perhaps Justice O'Connor said it best in her tribute to Justice Thurgood Marshall: “[T]he law is not an abstract concept removed from the society it serves, and . . . judges, as safe-guarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality.”⁵⁵⁵

Our review of Judge Kavanaugh's entire record and ideology leaves us with no choice but to conclude that he will not sufficiently live up to that standard. In our view, if he is confirmed, his jurisprudence will solidify the civil rights retrenchment with devastating consequences for the constitutional and legal protections of those who are most marginalized in our society for decades to come. We must oppose his confirmation to the Supreme Court of the United States.

⁵⁵⁵ O'Connor, *supra* note 57, at 1218.