



# The Record of Brett M. Kavanaugh on Critical Legal Rights for Women

**Confirms Trump's Promises - and  
Women's Worst Fears**

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## **I. Introduction**

On June 29, 2018, Justice Anthony Kennedy announced his retirement from the United States Supreme Court, launching a confirmation process that has tremendous stakes for women and girls. The Supreme Court has an enormous impact on women's ability to live their lives with dignity and equality. It affects individual liberty, including women's right to make decisions about their own bodies and to determine who and how people love. The Court's decisions determine whether the Constitution's guarantee of Equal Protection has meaning for millions across the country or is simply a hollow promise. And the Court can affirm or eviscerate the ability of Congress and the states to address discrimination, ensure access to health care, and create equal opportunity in the workplace and school. In recent years, many cases involving issues of critical importance to women have been decided by the Supreme Court with narrow margins and often by just one vote, with Justice Kennedy often the key decision maker. The next Justice to join the Supreme Court thus could shift the balance of the Court on these issues for a generation.

President Trump nominated D.C. Circuit Court of Appeals Judge Brett M. Kavanaugh on July 9, 2018. Over the last two months the National Women's Law Center has examined Kavanaugh's publicly available record. In reviewing a nominee's record, the National Women's Law Center focuses, in particular, on the constitutional right to liberty and personal decision-making, including the rights to abortion and birth control, and on antidiscrimination protections, including prohibitions against sex discrimination under the Equal Protection Clause or statutory provisions that protect against discrimination in education and employment, and beyond. In addition, protections of women's health and safety, social welfare, access to justice and public benefits represent areas of importance to women, and thus to the Center. In light of the record available, we conclude that Kavanaugh should not be confirmed to a lifetime appointment on the Supreme Court.

Kavanaugh has a very limited view of the right to liberty and the Constitution's protections for women's personal decision-making, including the right to abortion and contraception. He has consistently taken positions that would undermine access to quality, affordable health care. He has routinely ruled to cut entire classes of working people out of labor and employment laws, leaving these workers vulnerable to workplace discrimination and abuses without crucial workplace protections. Moreover, Kavanaugh's approach to the law has regularly distorted—or even ignored—Supreme Court precedent, while consistently erasing the individuals involved in these cases. In many of his decisions, Kavanaugh fails to adequately consider the impact his decision will have on their lives even when the law explicitly requires it. But the law does not compel judges to ignore the people at the heart of a case and the effects the law will have on their lives – it requires the exact opposite. A Supreme Court Justice that does not consider the lived experiences of the individuals who come before the Court is a danger to all of us.

Kavanaugh's publicly available record makes clear he should not be the next Justice to join the Supreme Court, and when paired with the extraordinary circumstances of his nomination, we are left with the firm view that the confirmation process should not move forward.

a. *Kavanaugh's nomination and confirmation process are irreparably tainted.*

Not only is Kavanaugh's record deeply troubling, but our concerns are exacerbated by the unprecedented circumstances surrounding Kavanaugh's nomination and confirmation process.

First, Trump's nomination process directly contravened historical and democratic norms surrounding the nomination of a Supreme Court Justice. Trump repeatedly committed to nominate only individuals who would vote to overturn *Roe v. Wade* and dismantle the Affordable Care Act (ACA), even declaring that if he were elected *Roe* would be overturned "automatically." He also said that he would nominate a Justice "in the mold" of the late Justice Scalia, a Justice who, in addition to consistently voting to overturn *Roe v. Wade*, voted to strip legal and constitutional antidiscrimination protections from women and girls at work, at school, and in their communities.

Additionally, Trump promised to select only someone who appeared on lists approved by the Heritage Foundation and the Federalist Society—in effect, outsourcing the vetting of his Supreme Court nominees to these right-wing groups. Kavanaugh, in turn, effectively auditioned to have his name added to this short list. He gave a speech signaling his hostility to the Constitution's protections for personal liberty in September 2017. Then in October, he voted to allow the Trump Administration to block a young, immigrant woman from getting an abortion, resorting to language used by extremist anti-abortion groups in his opinion. The very next day, Kavanaugh gave a speech criticizing the Affordable Care Act. Three weeks after sending these clear signals that he would meet Trump's litmus test, Kavanaugh's name was added to the short list.

Second, it is critical that all senators thoroughly scrutinize Kavanaugh's record in order to properly fulfill their constitutional duty of advice and consent on this highly unusual nomination—this is even more true given the stakes. And the public deserves to know Kavanaugh's full record to have as clear of an understanding as possible about what kind of Justice he would be if confirmed. In particular, it is crucial to understand what role Kavanaugh played in the Bush Administration, which trampled on civil rights and liberties during Kavanaugh's tenure. However, Senate Republicans have made this impossible. Chairman of the Senate Judiciary Committee, Senator Grassley, and other Senate Republicans refused to even ask for Kavanaugh's full record from his time in the White House, eliminating three years when he held the critical position of Staff Secretary. And the National Archives has stated that it cannot fill the already limited document request made by Senator Grassley until the end of October. Yet, Kavanaugh's hearing was scheduled to begin less than two months after he was nominated during the week of September 4. By that date, only a fraction of Kavanaugh's record will have been made available.

Finally, this nomination is being expedited in the shadow of an ongoing criminal investigation involving President Trump. A special counsel has been appointed, and in the last month Michael Cohen, former personal attorney to President Trump, has indicated under oath that Trump is a co-conspirator to a federal crime. Any nominee confirmed under this extraordinary process carries the taint of this illegality and confirmation of such a nominee in this moment would taint the Supreme Court itself. This is made even more problematic by the nominee in question's views on presidential power. Kavanaugh has repeatedly said the President can be above the law, arguing the president can halt an investigation in his presidency and that the sitting-president can

never be indicted. Under these circumstances, and considering what is at stake, the confirmation process cannot continue.

*b. The next Supreme Court Justice will likely rule on issues of profound importance to women.*

The next Supreme Court Justice will have the opportunity to reaffirm our most cherished legal protections—or to weaken women’s core constitutional rights. In the next few years, the Supreme Court is poised to hear cases that could shape women’s legal rights for generations to come.

If Kavanaugh is confirmed, a newly constituted Supreme Court could dramatically shift women’s ability to access quality, affordable health care, including birth control and abortion. Despite re-affirming the central premise of *Roe v. Wade* only two years ago in *Whole Woman’s Health v. Hellerstedt*, the Court could hear an abortion-related case as early as next term. This would give a Supreme Court hostile to reproductive rights the opportunity to overturn *Roe v. Wade* or eliminate access to abortion in other ways. Moreover, cases about whether women will lose access to birth control—because of the Trump Administration’s policies, their employers’ religious beliefs, or other restrictions—are currently working their way through the courts, opening the door for the Supreme Court to increase hurdles to birth control access. In addition, those who want to overturn the ACA continue to bring court challenges. If one of these cases, such as the challenge brought by Texas and 19 other states, works its way up to the Supreme Court, it could provide a newly constituted Court with the opportunity to undermine—or completely get rid of—the ACA.

The next Supreme Court Justice will also decide cases critical to the future of working women and their families. People who face workplace harassment and other forms of discrimination need to be able to hold those who abuse their power and the institutions who cover for them accountable, including in the courts. The Supreme Court shapes how courts approach these claims and what hurdles women will have to overcome in court. In addition, the Supreme Court will likely soon decide the question of whether federal law’s ban on sex discrimination in the workplace prohibits discrimination on the basis of sexual orientation or gender identity, threatening opportunities for LGBTQ individuals.

The Supreme Court could also determine whether all children have the right to be treated with respect in schools. Voices opposed to civil rights have schemed for years to weaken laws that protect girls, women, students with disabilities, LGBTQ students, and other students of color. Title IX prohibits sex discrimination in federally funded educational programs. This prohibition is broad and includes prohibitions on sexual harassment (which includes sexual assault), discrimination based on sex stereotypes (including LGBTQ discrimination), and discrimination against pregnant and parenting students. The next Supreme Court justice could determine whether survivors continue to be treated fairly under Title IX or if anti-women groups succeed in making it harder to fight sexual harassment in school. Additionally, groups opposed to LGBTQ equality are systematically filing lawsuits demanding that schools police transgender and gender nonconforming children in bathrooms. The text of Title IX is purposefully broad to prohibit all types of sex discrimination, including discrimination based on gender identity and sex

stereotypes. A Supreme Court that ignores the breadth of Title IX's scope and application could uphold these transphobic lawsuits, okay policies that out trans students by denying them access to facilities that match their gender identity, and endorse policing based on sex stereotypes.

With so much at stake, women cannot afford for Kavanaugh to be confirmed.

## **II. Kavanaugh's Biographical Background**

Before his appointment to the U.S. Court of Appeals for the D.C. Circuit, Kavanaugh served in the White House under President George W. Bush—first in the White House Counsel's office and later as White House Staff Secretary. During his time in the Bush Administration, Kavanaugh worked on the nomination of several highly contentious judicial nominees. Prior to his time in the Bush Administration, he worked for Independent Counsel Kenneth Starr in the investigation of the Clinton Administration and on then candidate Bush's recount team during the 2000 presidential election—some of the most contentious partisan fights of the last three decades. Kavanaugh also spent some time in private practice at the law firm Kirkland & Ellis. He served as a law clerk for Justice Anthony Kennedy and for Judge Kozinski on the U.S. Court of Appeals for the Ninth Circuit and Judge Stapleton on the U.S. Court of Appeals for the Third Circuit.

## **III. Kavanaugh has Demonstrated Hostility to The Right to Liberty and Personal Decision-Making**

The Supreme Court's decisions have an enormous impact on whether the constitutional right to liberty has meaning for millions across the country. Given Trump's promise to nominate only individuals dedicated to overturning *Roe v. Wade*, it is imperative the Senate only confirm a nominee whose record shows an affirmative commitment to upholding the Constitution's protections for individual liberty, including the rights to birth control and abortion. Yet Kavanaugh's record shows the opposite. Kavanaugh has ruled to restrict access to abortion, flouting precedent, and has ruled to allow people with intellectual disabilities to be operated on without considering their wishes. His decisions demonstrate a narrow view of the Constitutional right to liberty and a profound disrespect for individuals' ability to make fundamental decisions about their bodies and futures.

- a. Kavanaugh signaled his belief that personal liberty rights are not rooted in the Constitution.*

In a keynote address to the American Enterprise Institute on September 18, 2017, Kavanaugh signaled his clear contempt for the Constitution's protections for personal liberty, including the right to abortion.<sup>1</sup> The speech hailed Chief Justice Rehnquist as Kavanaugh's "first judicial

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<sup>1</sup>See *From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist*, AM. ENTERPRISE. INSTIT. (Sept. 18, 2017), transcript available at <https://www.aei.org/wp-content/uploads/2017/08/from-the-bench.pdf>.

hero.”<sup>2</sup> Kavanaugh praised Chief Justice Rehnquist for “stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition”<sup>3</sup> and specifically named Rehnquist’s dissent in *Roe v. Wade* as a primary example.<sup>4</sup> Justice Rehnquist argued in his dissent in *Roe* that there was no constitutional right to abortion.<sup>5</sup> In addition, Kavanaugh praised Rehnquist’s opinion in *Washington v. Glucksberg*, a case where the Supreme Court deviated from precedent and its reasoning in *Roe v. Wade* to hold that patients did not have a fundamental right to death with dignity, as one of Rehnquist’s greatest victories in halting the Supreme Court’s jurisprudence recognizing the right to personal liberty.<sup>6</sup> Kavanaugh cited this case in one of his judicial opinions, *Doe ex rel. Tarlow v. District of Columbia*, as a basis for denying individuals with intellectual disabilities the right to medical decision-making.<sup>7</sup>

*b. Kavanaugh attempted to block a woman from getting an abortion.*

Just one year ago, in *Garza v. Hargan*, Kavanaugh voted to allow the Trump-Pence Administration to continue blocking a young unaccompanied immigrant woman, called “Jane Doe,” from exercising her constitutional right to abortion.<sup>8</sup> After coming to the U.S. in September 2017, Jane Doe was placed in the custody of the Office of Refugee Resettlement (ORR).<sup>9</sup> There, she discovered she was pregnant and decided to have an abortion. Jane Doe had a guardian ad litem and an attorney ad litem who were available to assist her with obtaining an abortion, including transporting her to the appointment, and private funds were raised to pay for the abortion.<sup>10</sup> But ORR instructed the shelter to prohibit Jane Doe from leaving the facility to access abortion.<sup>11</sup> The ACLU sued on Jane’s behalf, seeking injunctive relief to prevent ORR from further interfering or preventing Jane Doe from getting the care she needed.<sup>12</sup> Central to the government’s argument was the assertion that simply allowing Jane Doe to leave the shelter and attend her appointment would constitute “facilitating” her abortion.<sup>13</sup>

The District Court issued a temporary restraining order that prevented the government from continuing to block Jane Doe’s abortion.<sup>14</sup> In response, the Trump Administration asked the D.C. Circuit Court of Appeals – Judge Kavanaugh’s court – to stop the district court’s order and

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<sup>2</sup> See *id.* at 6.

<sup>3</sup> *Id.* at 13.

<sup>4</sup> See *id.*; *Roe v. Wade*, 410 U.S. 113, 171 (1973).

<sup>5</sup> See *id.*

<sup>6</sup> See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>7</sup> See *Doe ex rel. Tarlow v. District of Columbia*, 489 F.3d 376, 383 (2007).

<sup>8</sup> See *Garza v. Hargan*, 2017 WL 4707112, 1 (D.C. Cir. 2017).

<sup>9</sup> See Complaint for Injunctive Relief and Damages at 2, *Garza v. Hargan*, 2017 WL 4707287 (D.C. Cir. 2017) (1:17-cv-02122), available at <https://www.aclu.org/legal-document/garza-v-hargan-complaint-injunctive-relief-and-damages>.

<sup>10</sup> See *id.* at 4.

<sup>11</sup> See *id.*

<sup>12</sup> See, e.g., *id.*

<sup>13</sup> See *id.* at 8; See *Garza v. Hargan*, 2017 WL 4707112 at 4 (Millet, J. dissenting).

<sup>14</sup> See *Garza v. Hargan*, 2017 WL 4707287, 1 (D.D.C. 2017).

further delay Jane Doe’s abortion.<sup>15</sup> A few days later, Judge Kavanaugh – as part of a three-judge panel that issued a divided opinion –, crafted a “solution” that was really an attempt to make an end-run around the Constitution.<sup>16</sup> The order blocked Jane’s abortion for at least another eleven days, under the guise of finding her a sponsor—an individual, usually a parent or relative, to whom ORR releases an unaccompanied person.<sup>17</sup> Pretending that this “solution” was a reasonable compromise, the panel imposed what effectively was a complete ban on Jane Doe’s ability to exercise her constitutional right to abortion since that additional delay would likely have pushed her past the point of being able to have an abortion.<sup>18</sup>

After a rehearing by the entire D.C. Circuit sitting *en banc*, the court overruled the panel’s order on October 24, 2017 so that Jane Doe could exercise her constitutional right to abortion.<sup>19</sup> Kavanaugh dissented. He protested that the majority had “badly erred.” And—adopting the language of anti-abortion extremists—accused the majority of creating a new right for “unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.”<sup>20</sup> Kavanaugh’s statement grossly mischaracterizes Jane Doe’s experience. In order to have an abortion, Jane Doe had to comply with all of Texas’s state-mandated procedures. Because she was younger than 18, Jane Doe was forced to go before a Texas judge and demonstrate her maturity and considered decision-making to obtain the necessary judicial waiver to get an abortion without parental consent.<sup>21</sup> In addition, she was required to receive biased counseling and undergo an additional mandatory delay of twenty-four hours before she could have the procedure.<sup>22</sup> And all of this had to be done before Jane Doe passed the twentieth week of pregnancy, since Texas has an unconstitutional abortion ban after twenty weeks.<sup>23</sup> When referring to the Court’s decision to allow Jane Doe to have an abortion as “abortion on demand” Kavanaugh ignores these critical facts, the U.S. Constitution, and Texas law, instead using incendiary rhetoric meant to inflame passion and outrage against the majority decision.

Throughout his dissent in *Garza*, Kavanaugh claims to be upholding Supreme Court precedent. However, Kavanaugh refrains from committing to precedent. Instead, he makes statements such as, “All parties to this case recognize *Roe v. Wade* and *Planned Parenthood v. Casey* as precedents we must follow.”<sup>24</sup> This is careful and purposeful language that tellingly does not

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<sup>15</sup> Appellants’ Emergency Motion for Stay Pending Appeal at 1, *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (No. 17-5236).

<sup>16</sup> *See id.*

<sup>17</sup> *See Garza v. Hargan*, 2017 WL 9854552 1 (D.C. Cir. 2017).

<sup>18</sup> *See Garza v. Hargan*, 874 F.3d 735, 739 (D.C. Cir. 2017).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 752.

<sup>21</sup> *See* Complaint for Injunctive Relief and Damages at 2-3, *Garza v. Hargan*, 2017 WL 4707287 (D.C. Cir. 2017) (1:17-cv-02122), available at <https://www.aclu.org/legal-document/garza-v-hargan-complaint-injunctive-relief-and-damages>.

<sup>22</sup> *See State Facts About Abortion*, GUTTMACHER INSTIT. (2018), <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-texas>.

<sup>23</sup> *See id.*

<sup>24</sup> *See Garza v. Hargan*, 874 F.3d 735, 753 (D.C. Cir. 2017).

affirm these important precedents but rather signals that Kavanaugh does not view these foundational cases as legitimate.

And Kavanaugh does not actually follow Supreme Court precedent on abortion. Supreme Court precedent on abortion restrictions is clear: the government must have a valid state interest to justify restricting abortion and the restriction cannot impose an undue burden on a woman's constitutional right to abortion.<sup>25</sup> Kavanaugh intentionally distorts precedent to reach the outcome he desired—blocking Jane Doe from receiving an abortion.

First, Kavanaugh advances new state interests to justify effectively banning abortion. One of these is a state interest in “not facilitating abortion,”<sup>26</sup> which has never been accepted as an interest to justify preventing someone from obtaining an abortion.<sup>27</sup> In doing so, Kavanaugh accepts the government's claim that allowing Jane Doe to leave the ORR shelter would amount to facilitating her abortion. But, not only is that not a valid state interest for banning abortion, it is also an unreasonable interpretation. What the Trump Administration was doing was not facilitating Jane Doe's abortion; it merely needed to step out of the way.

Kavanaugh also advances a state interest that was not even proposed by the Trump Administration: ensuring a woman has a sufficient “support network” before she decides to have an abortion.<sup>28</sup> Kavanaugh argues that because Jane Doe lacks a sufficient “support network of friends and family,”<sup>29</sup> the government can infringe on her constitutional right in order “to place [her] in a better place when deciding.”<sup>30</sup> Not only is this reasoning unsound—the government had failed to find a sponsor for weeks already—but it also demonstrates Kavanaugh's disregard for women's decision-making. Jane Doe had already made the decision that was right for her. And she complied with the required state restrictions, including going before a judge and proving that she was mature, well-informed, and capable of making this decision. But Kavanaugh ignores those facts. Instead, he insists the government must have more time to try and find someone to help her make the decision that *he* thinks is the right one: not having an abortion.

Second, Kavanaugh fails to adequately consider the burdens the government imposes on Jane Doe's right to abortion. Just the year before this case, the Supreme Court issued *Whole Woman's Health v. Hellerstedt*, a case that made it clear how courts must consider the harms of abortion restrictions. But Judge Kavanaugh fails to cite or even refer to this decision.<sup>31</sup> Instead, he ignores all of the harms Jane Doe has suffered, including the weeks she has already been forced to delay obtaining the care she needs, that she would have to re-start the litigation, adding more delay, the increased health risks she would face due to delay, and the risk of further delay pushing her past the point of being able to obtain an abortion at all. In other words, he does not acknowledge that the government's delay, combined with the delay he would impose, could operate as a complete

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<sup>25</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

<sup>26</sup> See *Garza v. Hargan* at 755.

<sup>27</sup> In *Roe v. Wade* and *Planned Parenthood v. Casey* the Supreme Court held that permissible state interests include protecting women's health and protecting the “potentiality” of life.

<sup>28</sup> See *Garza v. Hargan*, at 754-756.

<sup>29</sup> *Id.* at 755.

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

barrier to abortion, denying Jane her constitutional right to abortion and forcing her to carry an unwanted pregnancy to term.

Kavanaugh's dissent in *Garza v. Hargan* signals his willingness to change the contours of the right to abortion—either by distorting *Roe*'s protections in order to further restrict access to abortion or by overruling it outright.

c. *Kavanaugh ruled against the right to medical decision-making for individuals with intellectual disabilities.*

Kavanaugh's lack of respect for both precedent and personal decision-making is also apparent in his decision in *Doe ex rel. Tarlow v. District of Columbia*.<sup>32</sup> That case concerned a D.C. policy allowing health care providers to perform medical procedures on individuals with intellectual disabilities without considering the patient's wishes.<sup>33</sup> The plaintiffs were three adult women forced to undergo medical procedures,<sup>34</sup> including one who was forced to have an abortion despite clearly expressing her wishes to carry the pregnancy to term.<sup>35</sup> The district court held that the policy violated the women's liberty interest to accept or refuse medical treatment.<sup>36</sup>

But Kavanaugh upheld the D.C. policy, siding against the women, whom he refers to as “never-competent patients”,<sup>37</sup> and overturned the district court's decision. He asserted that the women “have not shown that consideration of the wishes of a never-competent patient is ‘deeply rooted in this Nation's history and tradition’ or ‘implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would exist if [the asserted right] were sacrificed.’”<sup>38</sup> But this view ignores precedent from the D.C. Circuit and the U.S. Supreme Court, precedent that protects the individual personal liberty right to accept or refuse medical treatment.<sup>39</sup>

Kavanaugh also ignores the impact of this decision on the women whose case came before him. Like the *Garza* decision, the *Tarlow* case shows that Kavanaugh turns a willfully blind eye to the

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<sup>32</sup> 489 F.3d 376, 369 (D.C. Cir. 2007).

<sup>33</sup> *See id.*

<sup>34</sup> *See Jane Does I Through III v. District of Columbia*, 232 F.R.D. 18, 20 (D.D.C 2005).

<sup>35</sup> *See id.*

<sup>36</sup> *See, e.g., Jane Does I Through III v. District of Columbia*, 232 F.R.D. 18, 20 (D.D.C 2005).

<sup>37</sup> *Id.* at 383. In order to reach this outcome, Kavanaugh draws a distinction between individuals who were once “able to make medical decisions for themselves” and then became unable to do so and those individuals “who have never had the mental capacity to make medical decisions.” *Id.* at 369. According to Kavanaugh, those who were once able to make medical decision and then became unable to do so should have their wishes considered. Those who have been deemed to not have “the mental capacity to make medical decisions” should not.

<sup>38</sup> *Doe ex rel. Tarlow* at 383 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotation marks omitted)).

<sup>39</sup> The D.C. Circuit clearly stated its position in *In re A.C.*, that “[e]very person has the right, under the common law and the Constitution, to accept or refuse medical treatment. This right of bodily integrity belongs equally to persons who are competent and persons who are not.” 573 A2d. at 1247. Moreover, the Supreme Court has repeatedly reaffirmed the basic principle from an 1891 case that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 269, (1990) (quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

impact of his reasoning on the ability of individuals to make personal decisions about their bodies and futures, especially when those individuals' personal circumstances do not reflect his own. Combined with his willingness to distort or ignore existing precedent to reach the outcome he wants, these two cases raise the alarm about what Kavanaugh's nomination to the Supreme Court would mean for people's ability to make fundamental decisions about their bodies and futures.

#### **IV. Kavanaugh's Record Shows Consistent Hostility to Critical Health Care Protections**

The Supreme Court's opinions have often dramatically influenced women's ability to access comprehensive, affordable health care. When Kavanaugh has opined on these issues, either from the bench or in speeches, he has taken positions that undermine access to quality health care and failed to recognize the importance of health care and coverage in women's lives. Kavanaugh's record makes evident his hostility to important protections that guarantee critical access to health care.

*a. Kavanaugh voted to allow employer's religious beliefs to override the right to birth control coverage.*

Kavanaugh wrote a dissent in *Priests for Life v. U.S. Department of Health and Human Services* in 2015, in which he would have allowed employers' religious beliefs to dictate their employees' birth control coverage.<sup>40</sup> In this case, employers with religious objections to birth control brought a challenge to the ACA's contraceptive coverage requirement.<sup>41</sup> That requirement ensures that women get no-cost coverage of birth control alongside coverage of other women's preventive services in their health insurance plans.

The objecting employers already had what amounted to an exemption from the contraceptive coverage requirement. The government had created an "accommodation" for them that required them to notify their insurance company or the government of their objection to birth control coverage.<sup>42</sup> If they did so, they did not have to provide or pay for the coverage. Instead, the insurance company separately arranged for employees to get birth control coverage. This process was meant to both respect religious beliefs and to ensure women still get critical birth control coverage.

But some employers were not satisfied; they challenged the notification process as a violation of the Religious Freedom Restoration Act (RFRA), saying that their religious beliefs had been substantially burdened and there was no compelling government interest that could justify that burden.<sup>43</sup>

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<sup>40</sup> *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 808 F.3d 1,14 (Kavanaugh J., dissenting) (D.C. Cir. 2015).

<sup>41</sup> *See Priests for Life v. U.S. Dep't of Health and Human Servs.*, 772 F.3d 229, 144-45 (D.C. Cir. 2014).

<sup>42</sup> *See id.*

<sup>43</sup> *See, e.g., id.*; Religious Freedom Restoration Act 42 U.S.C. § 21b (1993).

Kavanaugh sided with the objecting organizations, holding that their religious beliefs had been substantially burdened.<sup>44</sup> His view was an outlier: eight out of nine federal Circuit Courts of Appeals to consider the issue, including Kavanaugh’s own D.C. Circuit, concluded that there was no substantial burden<sup>45</sup> because the notice does not “trigger” the coverage to which the organizations object, as they claimed. Instead, the ACA requirement exists independently – plans have to provide the coverage to women, whether or not the employer objects.<sup>46</sup> But Kavanaugh’s view was that courts cannot question objecting employers’ claims that their religion was substantially burdened<sup>47</sup> – even if they are “misguided” in thinking that the accommodation made them “complicit” in “wrongdoing.”<sup>48</sup>

As the majority points out, this broad and troubling approach would create a “potentially sweeping, new RFRA prerogative for religious adherents to make substantial-burden claims based on sincere but erroneous assertions about how federal law works.”<sup>49</sup> In other words, Kavanaugh’s view of RFRA could result in some organizations and companies bringing claims that their religious beliefs have been substantially burdened in order to get out of complying with a range of laws. Kavanaugh’s view not only went far beyond the RFRA statute, but also evidenced an unwillingness to recognize important Supreme Court precedent. In considering whether the government had a compelling interest to promote women’s access to birth control, Kavanaugh deliberately downplayed existing Supreme Court precedent. He claimed the Supreme Court “strongly suggests” that guaranteeing birth control coverage is a compelling government interest. But this ignores the Court’s clear statement just one year earlier that “guaranteeing cost-free access to [contraception] is a compelling governmental interest.”<sup>50</sup> His attempts to undermine the force of that precedent signal that he does not agree with it.

Kavanaugh’s dissent in *Priests for Life* demonstrates a deeply concerning willingness to allow incursions into critical legal requirements that ensure access to health care, and to allow religion to dictate patient care.

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<sup>44</sup> *Priests for Life v. U.S. Dep’t of Health and Human Servs.*, 808 F.3d 1, 14 (Kavanaugh J., dissenting) (D.C. Cir. 2015).

<sup>45</sup> *Priests for Life v. Dep’t of Health and Human Servs.*, 808 F.3d 1, 14 (2015); *Geneva Coll., et al. v. U.S. Sec’y Dep’t of Health and Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *Univ. of Notre Dame v. Burwell, et al.*, 786 F.3d 606 (7th Cir. 2015); *Wheaton Coll. v. Burwell, et al.*, 791 F.3d 792 (7th Cir. 2015); *Little Sisters of the Poor Home for the Aged, et al. v. Burwell et al.*, 794 F.3d 1151 (10th Cir. 2015); *East Tex. Baptist Univ. v. Burwell, et al.*, 793 F.3d 449 (5th Cir. 2015); *Catholic Health Care System, et al. v. Burwell, et al.*, 796 F.3d 207 (2d Cir. 2015); *Michigan Catholic Conference and Catholic Family Services, et al. v. Burwell et al.*, 807 F.3d 738 (6th Cir. 2015); *Grace Schools, et al., and Diocese of Fort Wayne-South Bend, Inc., et al. v. Burwell, et al.*, 801 F.3d 788 (7th Cir. 2015); *Eternal World Television Network v. U.S. Dep’t of Health and Human Servs.*, No. 14-12696, 14-12890, 14-13239, 2016 WL 659222 (11th Cir. Feb. 18, 2016). *But see Sharpe Holdings, Inc. v. U.S. Dep’t of Health and Human Servs.*, 801 F.3d 927 (8th Cir. 2015); *Dordt Coll., et al. v. Burwell*, 801 F.3d 946 (8th Cir. 2015).

<sup>46</sup> *See Priests for Life v. Dep’t of Health and Human Servs.*, 808 F.3d 1, 17-22 (2015).

<sup>47</sup> *See id.* at 17-19.

<sup>48</sup> *See id.* at 17-18.

<sup>49</sup> *Id.* at 2.

<sup>50</sup> *Id.* at 15; *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2757 (2014).

*b. Kavanaugh has demonstrated disdain for the Affordable Care Act.*

Despite the fact that the ACA has led to historic gains in health coverage and ended discriminatory practices in health care, President Trump made clear he would only nominate someone who would dismantle the ACA.<sup>51</sup> Kavanaugh's record demonstrates that he would fulfill President Trump's promise.

In two ACA cases that came before him on the D.C. Circuit, *Seven-Sky v. Holder* and *Sissel v. U.S. Department of Health and Human Services*, Kavanaugh expressed contempt for the ACA.<sup>52</sup>

*Seven-Sky v. Holder* was one of the many lawsuits filed against the ACA shortly after it passed in an effort to invalidate the law. In this case, a group of taxpayers brought a challenge to the individual responsibility provision, which requires individuals to have health insurance or pay a penalty.<sup>53</sup> The District Court upheld the requirement as constitutional under the Commerce Clause and Necessary and Proper Clause, and the decision was appealed to the D.C. Circuit.<sup>54</sup> The D.C. Circuit affirmed the lower court's decision<sup>55</sup> after deciding it was not barred from hearing the case under the Anti-Injunction Act—which prohibits courts from hearing pre-enforcement challenges to tax laws—because the requirement is not a tax but a penalty.<sup>56</sup> Kavanaugh dissented.<sup>57</sup> He argued that the court should not have ruled on the constitutionality of the law because the court lacked jurisdiction under the Anti-Injunction Act.<sup>58</sup> In his view, the ACA's individual responsibility provision imposes a tax.<sup>59</sup>

Although deciding this jurisdictional question should have ended the matter, Kavanaugh went on to discuss potential constitutional challenges that could be made to challenge the ACA.<sup>60</sup> For example, Kavanaugh issued a caution about upholding the ACA under the Commerce Clause, arguing to do so, “[W]e would have to uphold a law that is unprecedented on the federal level in American history”<sup>61</sup> and “could usher in a significant expansion of congressional authority with no obvious principled limit.”<sup>62</sup> One of Kavanaugh's law clerks called Kavanaugh's dissent “the roadmap” for those Supreme Court Justices who said the ACA was unconstitutional.<sup>63</sup>

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<sup>51</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 26, 2015, 9:38AM) (“If I win the presidency, my judicial appointments will do the right thing unlike Bush's appointee John Roberts on Obamacare.”), available at <https://twitter.com/realdonaldtrump/status/614472830969880576?lang=en>.

<sup>52</sup> See, e.g., *Seven-Sky v. Holder*, 661 F.3d 1, 21 (D.C. Cir. 2011); *Sissel v. U.S. Dep't of Health and Human Servs.*, 799 F.3d 1035, 1049 (D.C. Cir. 2015).

<sup>53</sup> See *Seven-Sky v. Holder*, at 5.

<sup>54</sup> See, e.g., *Mead v. Holder*, 766 F. Supp. 2d 16, 18 (D.D.C. 2011).

<sup>55</sup> See *Seven-Sky v. Holder*, at 20.

<sup>56</sup> See *id.* at 5-15.

<sup>57</sup> See *id.* at 21.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 22.

<sup>60</sup> See *id.* at 48-49, 51-52.

<sup>61</sup> *Id.* at 51.

<sup>62</sup> *Id.* at 52.

<sup>63</sup> Justin Walker, *Brett Kavanaugh Said Obamacare Was Unprecedented and Unlawful*, THE FEDERALIST (July 3, 2018), <https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful/>.

Furthermore, Kavanaugh argued in his dissent that “the President might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional.”<sup>64</sup> This is an extreme position and one that is particularly troubling considering that the Trump Administration is actively undermining and refusing to enforce key provisions of the ACA and lawsuits challenging the law are working their way through the courts.<sup>65</sup>

*Sissel v. U.S. Department of Health and Human Services* was another challenge to the individual responsibility provision heard by the D.C. Circuit.<sup>66</sup> In that case, a small business owner represented by the Pacific Legal Foundation (PLF) argued that the ACA is a bill for raising revenue and, therefore, should have originated in the House of Representatives.<sup>67</sup> Plaintiffs claimed the ACA originated in the Senate and therefore violated the Origination Clause.<sup>68</sup> A three-judge panel of the D.C. Circuit held that the ACA complies with the Origination Clause because the ACA is not a bill for raising revenue.<sup>69</sup> Its purpose, the panel clarified, was to expand health insurance coverage, as the Supreme Court held in *National Federation of Independent Business v. Sebelius*.<sup>70</sup> After PLF petitioned the entire D.C. Circuit to rehear the case, the full court voted not to do so.<sup>71</sup> Kavanaugh dissented, not because he disagreed with the result, but because he disagreed with the reasoning.<sup>72</sup> Kavanaugh explained his view that the ACA is mostly a bill for raising revenue.<sup>73</sup> By focusing on the ACA as a “massive tax bill,” Kavanaugh blatantly ignores the true purpose of the bill and the important protections it provides for individuals nationwide.<sup>74</sup> Nevertheless, he held, it does not violate the Origination Clause because the bill originated in the House.<sup>75</sup>

Kavanaugh’s contempt for the ACA was not limited to cases that came before him. In a 2017 speech at the Heritage Foundation, given just weeks before he landed on President Trump’s short list of potential nominees, Kavanaugh criticized the Supreme Court’s decision upholding the Affordable Care Act.<sup>76</sup> Kavanaugh signaled his belief that the analysis the Supreme Court

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<sup>64</sup> *Seven-Sky v. Holder*, at 50.

<sup>65</sup> Texas and nineteen other states filed a lawsuit arguing that the health care law should be ruled invalid. The Trump Administration refused to defend the ACA, instead agreeing that key provisions, including the ones that protect individuals with pre-existing conditions, are unconstitutional. *See, e.g.*, Complaint for Declaratory and Injunctive Relief (4:18-cv-00167-O), available at

[https://www.texasattorneygeneral.gov/files/epress/Texas\\_Wisconsin\\_et\\_al\\_v.\\_U.S.\\_et\\_al\\_-\\_ACA\\_Complaint\\_\(02-26-18\).pdf](https://www.texasattorneygeneral.gov/files/epress/Texas_Wisconsin_et_al_v._U.S._et_al_-_ACA_Complaint_(02-26-18).pdf); Sixteen attorneys general filed a motion to intervene in the lawsuit brought by Texas and nineteen other states to defend the Affordable Care Act. *See, e.g.*, Motion to Intervene and Memorandum in Support Thereof (4:18-cv-00167-O), available at [https://oag.ca.gov/system/files/attachments/press\\_releases/Texas%20v.%20HHS%20-%20Motion%20to%20Intervene.pdf](https://oag.ca.gov/system/files/attachments/press_releases/Texas%20v.%20HHS%20-%20Motion%20to%20Intervene.pdf).

<sup>66</sup> *See, e.g.*, *Sissel v. U.S. Dep’t of Health and Human Servs.*, 799 F.3d 1035, 1049 (D.C. Cir. 2015).

<sup>67</sup> *See id.* at 1035-36.

<sup>68</sup> *See Sissel v. U.S. Dep’t of Health and Human Servs.*, 951 F. Supp. 2d 159, 163 (D.D.C. 2013).

<sup>69</sup> *See, e.g.*, *Sissel v. U.S. Dep’t of Health and Human Servs.*, 760 F.3d 1 (D.C. Cir. 2014).

<sup>70</sup> *See id.* at 7-10.

<sup>71</sup> *See, e.g.*, *Sissel v. U.S. Dep’t of Health and Human Servs.*, 799 F.3d 1035, 1049 (D.C. Cir. 2015).

<sup>72</sup> *See id.* at 1049-50.

<sup>73</sup> *See id.* at 1050.

<sup>74</sup> *Id.* at 1053.

<sup>75</sup> *See id.* at 1050.

<sup>76</sup> Brett Kavanaugh, Lecture at the Heritage Foundation: Separation of Powers, C-SPAN (Oct. 25, 2017), <https://www.c-span.org/video/?436265-1/judge-brett-kavanaugh-speaks-separation-powers-2017>.

undertook to reach its decision was flawed and allowed for the personal policy preferences of the Justices to determine the outcome of the case.<sup>77</sup>

In his speeches and cases, Kavanaugh's disdain for the ACA is clear. As one of Kavanaugh's law clerks stated, Kavanaugh has "left no doubt about where he stood. No other contender on President Trump's list is on record so vigorously criticizing the law."<sup>78</sup>

## **V. Kavanaugh's Record Shows He Would Severely Weaken Core Workplace Rights and Antidiscrimination Protections**

The courts' interpretation and enforcement of workplace protections have been critical to women's opportunity and advancement. A number of laws ensure baseline protections for working people to be free from discrimination, abuse, and exploitation. For example, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex, race, national origin, or religion. The Age Discrimination in Employment Act and the Americans with Disabilities Act protect against discrimination on the basis of age or disability at work. The Occupational Safety and Health Act promises safe and healthy workplaces and the National Labor Relations Act protects the rights of workers to form unions and collectively advocate for better working conditions. And the Family and Medical Leave Act provides key rights to time away from work to care for newborn or newly adopted children or address serious health conditions.

Kavanaugh's record demonstrates a disturbing willingness to undermine and limit the reach of these laws and the rights of individuals to enforce them. His narrow reading of antidiscrimination protections and other protections from workplace exploitation, kneejerk deference to employer's asserted rationales, and his willful disregard for the real-world consequences of challenging discrimination in the workplace have led him to side against employees time and time again in their claims.

Kavanaugh's reputation in this regard is undisputed. Indeed, two of the law firms best known for representing big corporations in fights against working people agree. One noted approvingly that "Kavanaugh's opinions over the years typically favored the employer" in discrimination cases. The other gushed that Kavanaugh "routinely rules in favor of employers."<sup>79</sup> Kavanaugh's approach would harm those seeking to enforce their rights at work and suggests a general hostility to discrimination claims, which could mean he would also make it harder to challenge discrimination at school, by health care providers, and elsewhere.

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<sup>77</sup> *See id.*

<sup>78</sup> Sarah E. Pitlyk, *Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism*, NAT'L REV. (July 3, 2018), <https://www.nationalreview.com/2018/07/judge-brett-kavanaughs-impeccable-record-of-constitutional-conservatism/>.

<sup>79</sup> Michael J. Lotito, *A Closer Look at Trump's Latest SCOTUS Nominee: Brett Kavanaugh*, LITTLER (July 9, 2018), <https://www.littler.com/publication-press/publication/closer-look-trumps-latest-scotus-nominee-brett-kavanaugh>; Collin O'Connor Udell et al, *Brett Kavanaugh Nominated to U.S. Supreme Court*, JACKSON LEWIS (July 9, 2018), <https://www.jacksonlewis.com/publication/brett-kavanaugh-nominated-us-supreme-court>.

In an overwhelming sea of employer-friendly cases, Kavanaugh’s record includes a few isolated examples where he has issued rulings that are less overtly hostile to employees. Those cases, however, are insufficient to counteract the clear trend in his record of supporting corporate actors over working people.<sup>80</sup>

a. *Kavanaugh regularly cuts entire classes of working people out of labor and employment laws.*

During his time as a judge, Kavanaugh has routinely ruled against working people, going out of his way to make arguments—often in dissent—that cut entire classes of workers out of legal protections. Kavanaugh’s arguments would deny many people meaningful legal protection from workplace abuses like sexual harassment and other forms of discrimination if adopted as the law of the land.

i. *Kavanaugh’s reasoning gives employers a license to discriminate.*

As a judge on the D.C. Circuit Court of Appeals, Kavanaugh has dissented from the majority time and time again, issuing opinions that would leave core antidiscrimination protections inapplicable or unenforceable for the plaintiffs before him.

For instance, in *Miller v. Clinton*,<sup>81</sup> Kavanaugh dissented from the majority opinion, asserting that certain U.S. citizen State Department employees working abroad had no rights under the Age Discrimination in Employment Act (ADEA) or other civil rights laws. John Miller, a State Department employee, was fired solely because he had turned sixty-five. The State Department argued that the Basic Authorities Act, a broad statute governing the organization and authority of the State Department, empowered it to ignore the protections of the ADEA and other antidiscrimination laws.<sup>82</sup> The majority held that Congress did not intend to deprive employees

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<sup>80</sup> In *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013), Kavanaugh filed a concurring opinion to underscore that case law demonstrates that the use of the “n-word” by a supervisor is enough to establish a hostile work environment. The harm of using of such a derogatory and racist word is well accepted. In fact, underscoring its seriousness is not radical, it is what we should expect as the lowest common denominator for people who are not racist. This is an uncontroversial opinion, necessary but not sufficient to show that Kavanaugh cares about justice for those who experience discrimination. In *Brady v. Office of Sergeant at Arms*, 520 F.3d 490 (D.C. Cir. 2008), Kavanaugh sided with the employer, after an employee who was demoted as a result of violating the employer’s sexual harassment policy brought an action for race discrimination. The plaintiff claimed that the earlier finding that he had violated the employer’s sex harassment policy, was pretext for race discrimination. Although in this instance the result of Kavanaugh’s decision was to leave undisturbed a finding of sexual harassment, he justifies his decision by highlighting his belief that the courts should not “micro-manage” employer policies, evidencing his familiar kneejerk deference for employers. In *Ortiz-Diaz v. United States Dep’t of Hous. & Urban Dev., Office of Inspector Gen.*, 867 F.3d 70 (D.C. Cir. 2017), Kavanaugh wrote a two-paragraph concurrence to state that he believes that discriminatory transfers should be actionable under Title VII. Although Kavanaugh purports to want to expand this element of Title VII, a significant number of his cases adjudicating antidiscrimination matters would deny employees from coming under the protection of the laws themselves as a threshold matter – much less be able to use this expanded protection if it were made into law. We must not allow Kavanaugh to use these decisions to override his record, which shows that he routinely sides with employers and against working people.

<sup>81</sup> 687 F.3d 1332 (D.C. Cir. 2012).

<sup>82</sup> In particular, the State Department cited to Section 2669(c) of the Basic Authorities Act which reads;

working abroad of application of previously enacted antidiscrimination laws. As the majority said, “It would be surprising if Congress had intended to authorize an exemption from the country’s landmark antidiscrimination laws by using ambiguous terms that appear to refer to something else entirely.”<sup>83</sup>

The majority also reasoned that if Congress had intended to cut U.S. citizens out of civil rights laws, it would not have done so with only vague references in the Basic Authorities Act. One such reference proffered by the State Department as justification for exempting workers from civil rights laws was a Conference Report passage discussing the need to ensure that U.S. citizens were competitive with foreign workers. The majority concluded that this passage was insufficient to show that Congress intended for civil rights laws not to apply to U.S. citizen workers. That unlikely interpretation would “require[ ] the assumption that State Department supervisors would prefer to hire employees against whom they are free to discriminate—and that in the absence of a ‘level’ playing field permitting them to discriminate against everyone, those supervisors would decline to hire U.S. citizens.”<sup>84</sup>

However, Kavanaugh dissented. He asserted that the “plain language” of the Basic Authorities Act indicated that Mr. Miller was not protected by federal antidiscrimination law. Kavanaugh pointed to the Conference Report and took up the State Department’s arguments, explaining that “so as not to disadvantage American workers, Congress exempted the State Department from various U.S. employment statutes (from which foreign workers already were exempt) and thereby enabled Americans to better compete with foreigners when seeking positions at embassies abroad.”<sup>85</sup> Kavanaugh’s willingness to create an exception to core civil rights protections based on ambiguous statutory language, as well as his acceptance of the argument that civil rights protections render those covered by such protections less desirable employees, is gravely concerning.

Similarly, in *Howard v. Office of Chief Admin. Officer of U.S. House of Representatives*,<sup>86</sup> Kavanaugh’s position would have blocked an entire class of employees from seeking redress in antidiscrimination cases in the courts. Kavanaugh argued that courts must dismiss discrimination lawsuits brought by congressional employees in many or most instances. In that case, LaTunya Howard, a Black woman who had worked for the Office of the Chief Administrative Officer (OCAO) of the U.S. House of Representatives, was demoted and then fired. She alleged that the demotion and termination were based on her race, that she faced retaliation for prior complaints

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The Secretary of State may use funds appropriated or otherwise available to the Secretary to ...

(c) employ individuals or organizations, by contract, for services abroad, and . . . such contracts are authorized to be negotiated, the terms of the contracts to be prescribed, and the work to be performed, where necessary, without regard to such statutory provisions as relate to the negotiation, making, and performance of contracts and performance of work in the United States. 22 U.S.C. 2669(c).

<sup>83</sup> 687 F.3d at 1352.

<sup>84</sup> *Id.* at 1351. The majority went on to say, “Indeed, while it would be surprising for Congress to assume such callousness on the part of State Department officials, it is more than merely surprising to hear the Department make the same assumption about its own people.”

<sup>85</sup> *Id.* at 1356.

<sup>86</sup> 720 F.3d 939 (D.C. Cir. 2013).

about discrimination, and that she had been paid \$22,000 less than her white male counterparts doing the same job.

The OCAO moved to dismiss the court case, arguing that the real reason for her demotion and termination was her job performance. As a result, OCAO argued, Ms. Howard “could not prove her claims without inquiring into matters protected by the Speech or Debate Clause,”<sup>87</sup> which shields “legislators from liability for all activities within the ‘sphere of legitimate legislative activity.’”<sup>88</sup> The majority concluded that Ms. Howard’s claims could go forward, reasoning that even if the OCAO claimed that Ms. Howard’s performance of job duties related to legislative activity was the basis for demoting and firing her, she could attempt to prove that OCAO was actually motivated by discrimination, as long as the court was not asked to answer the specific question of whether she in fact performed her legislative duties properly.

Kavanaugh, on the other hand, would have denied any relief for Ms. Howard. He stated that a “district court must dismiss a discrimination suit against a congressional employing office if the employer’s stated reason for the employment decision is the plaintiff’s performance of legislative activities.”<sup>89</sup> He would require dismissal of any discrimination case against a congressional office when the office justifies an employment decision, like a termination or a demotion, based on the individual’s performance of activities related to legislative work. It is, of course, very typical for employers to defend against discrimination cases by asserting that any negative employment actions were in fact based on the employee’s job performance. Put simply, this view would make it impossible for congressional staff to challenge employment discrimination in court in many instances.

Kavanaugh continued the trend of carving employees out from antidiscrimination protections in his dissent in *Rattigan v. Holder*.<sup>90</sup> Wilfred Rattigan, a Black FBI employee, asserted that the FBI violated Title VII by launching a review of his security clearance in retaliation for his previous complaints of discrimination. He won his case at trial and the jury awarded him \$300,000.<sup>91</sup> On appeal, the D.C. Circuit held that, while it was not appropriate for the District Court to second guess decisions made by the FBI about when a security clearance should be reviewed or revoked, Mr. Rattigan could succeed in his retaliation claims if he showed that the officials who requested his security clearance review did so on the basis of “knowingly false” allegations.<sup>92</sup> Using this standard, the majority concluded, would present “no serious risk of chill[ing]” FBI employees from raising legitimate security clearance concerns.<sup>93</sup> Importantly, in reaching this conclusion, the majority recognized its duty to “preserv[e] to the maximum extent possible Title VII’s important protections against workplace discrimination and retaliation.”<sup>94</sup>

Kavanaugh, on the other hand, argued in dissent that courts should be completely barred from assessing claims that a security clearance review was initiated for discriminatory reasons, no

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<sup>87</sup> *Id.* at 941-42.

<sup>88</sup> *Id.* at 945 (internal citations omitted).

<sup>89</sup> *Id.* at 956-57.

<sup>90</sup> 689 F.3d 764 (D.C. Cir. 2012).

<sup>91</sup> *Id.* at 766.

<sup>92</sup> *Id.* at 770.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

matter what evidence the employee could bring forward. He would have allowed no path forward for Mr. Rattigan and plaintiffs like him even in the face of proof that the FBI knowingly lied in order to initiate the security clearance review process. Notably, Kavanaugh nowhere acknowledged, in this case or others, his obligation to take steps to preserve Title VII's core protections to the fullest extent possible.

As these cases show, again and again, Kavanaugh has sided with powerful employers and sought to prevent entire classes of working people from accessing the civil rights laws that protect against race discrimination, sexual harassment, pay discrimination, pregnancy discrimination, and other forms of discrimination. He has accepted and adopted the dangerous view that civil rights protections make an employee less desirable. His nomination is deeply concerning for women and all working people.

*ii. Kavanaugh's dissents put vulnerable workers at risk of abuse with no recourse.*

Kavanaugh has not just demonstrated a willingness to cut working people out of antidiscrimination laws, he also has taken the same approach to other baseline labor protections. Most notably, he has advanced the extreme position that undocumented workers have no rights under the National Labor Relations Act (NLRA)—a statute designed to ensure working people are able to advocate for their rights at work without the fear of retaliation. His position would prevent employees who are already uniquely vulnerable to workplace abuse, harassment, and retaliation from accessing core workplace rights and protections under the NLRA. The NLRA protects, among other things, the right to join a union, to negotiate a collective bargaining agreement with an employer, and the right to be protected from retaliation when banding together to ask for workplace safety standards, higher wages, or health benefits. These rights are critical for all workers but are particularly important for women workers and workers of color.<sup>95</sup>

In *Agri Processor Co. v. N.L.R.B.*,<sup>96</sup> Kavanaugh dissented from a decision holding that Agri Processor was required to bargain with its employees who sought to form a union. Kavanaugh disagreed with the majority decisions specifically because many of the workers were undocumented immigrants. Misreading the plain language of the NLRA and disregarding direct Supreme Court precedent,<sup>97</sup> Kavanaugh claimed that undocumented workers were not “employees” protected by the NLRA solely because of their immigration status.

Kavanaugh's reasoning shows callous disregard for the everyday lives of vulnerable workers, like undocumented workers. His dissent frames the actions of these workers as if they had duped their unwitting employer into letting them vote for union representation rather than acknowledging that, at tremendous personal risk, this group of workers from a Brooklyn meat

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<sup>95</sup>*Union Membership Is Critical for Equal Pay*, NAT'L WOMEN'S LAW CENTER (Mar. 9, 2018), <https://nwlc.org/resources/union-membership-critical-women%E2%80%99s-wage-equality/>; *Public Sector Unions Promote Economic Security and Equality for Women*, NAT'L WOMEN'S LAW CENTER (Jan. 19, 2018), <https://nwlc.org/resources/public-sector-unions-promote-economic-security-and-equality-for-women/>.

<sup>96</sup> 514 F. 3d 1 (D.C. Cir. 2008).

<sup>97</sup> *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984) (held, in part, that undocumented workers come within the NLRA's broad statutory definition of “employee”).

wholesaler succeeded in exercising their legal and democratic right to vote in a union election in order to better their chances for safe and dignified work.<sup>98</sup>

Equally troubling, Kavanaugh's reasoning demonstrates a willingness to set aside binding Supreme Court precedent even as a judge on a lower court. Finally, Kavanaugh's approach would increase the risk of abuse for undocumented workers. The same theory that led him to conclude that undocumented workers are not "employees" under the NLRA would also suggest that they are not "employees" protected from harassment and other forms of discrimination under federal law. This conclusion would give employers a blank check to sexually exploit and engage in many of the most despicable forms of discrimination against undocumented workers.

In yet another example, Kavanaugh dissented in *SeaWorld of Fla., LLC v. Perez*,<sup>99</sup> asserting that workers in the entertainment industry should not fall under the ambit of the Occupational Safety and Health Administration (OSHA), which administers the Occupational Safety and Health Act. In the *SeaWorld* case, Dawn Brancheau, a whale trainer, was killed by an orca during a live show. OSHA subsequently issued citations to SeaWorld. SeaWorld fought the citations and appealed in court. The majority of the D.C. Circuit panel denied SeaWorld's petition for review, holding that SeaWorld could reasonably be required to take measures to abate the hazards created by work with orcas. The majority rejected SeaWorld's argument that its trainers accepted and controlled their exposure to risk and that the job therefore fell outside the reach of OSHA, stating that such an argument fundamentally "contravenes Congress's decision to place the duty to ensure a safe and healthy workplace on the employer, not the employee."<sup>100</sup>

Rather than confront the realities of dangerous workplaces and employers' obligations to address workplace hazards, Kavanaugh's dissent waxes nostalgically about the thrills of American sports spectatorship. He asserts that if OSHA were allowed to regulate orca performances, OSHA could regulate sports, such as NFL tackling and fast driving in NASCAR races. Rather than grapple with the death of Dawn Brancheau and whether SeaWorld could have reasonably taken steps that might have prevented it, Kavanaugh poses the central question of the case as a theoretical one, asking, "When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves—that the risk of significant physical injury is simply too great even for eager and willing participants? And most importantly for this case, *who decides* that the risk to participants is too high?"<sup>101</sup>

As the majority so aptly points out by quoting the D.C. Circuit's *Miller v. Clinton* decision, discussed above, nothing in the Occupational Safety and Health Act exempted all performances in the entertainment industry from regulation, and had Congress intended such an exemption, it would have made that intention clear.<sup>102</sup> Instead, Kavanaugh created a new exemption himself based on his theory that workers in the sports and entertainment industries take on danger based

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<sup>98</sup> In addition, while the majority opinion consistently refers to the workers in question as "undocumented," Kavanaugh uses the term, "illegal immigrants," language which is widely acknowledged to be derogatory.

<sup>99</sup> 748 F.3d 1202 (D.C. Cir. 2014).

<sup>100</sup> *Id.* at 1211.

<sup>101</sup> *Id.* at 1217.

<sup>102</sup> *Id.* at 1213.

on their own willingness to accept risk rather than, as is so often the case, at the whims and desires of their employers.

*b. Kavanaugh's analysis evidences a kneejerk deference to employers*

Kavanaugh's legal reasoning in cases brought by individuals to enforce their workplace rights frequently betrays a kneejerk deference to employers.<sup>103</sup> In *America v. Mills*,<sup>104</sup> when Richard America's accused his former employer of race discrimination, the employers agreed to pay him tens of thousands of dollars to settle the claims. The settlement agreement also said that if prospective employers contacted the former employer about Mr. America, the only response would be a neutral reference from a human resources representative. Instead of abiding by this agreement, the former employer allowed a non-human resources employee to give a reference for Mr. America that included statements such as, "He may not be the guy to take it to the next level..." and "I don't think he got along with everybody...".<sup>105</sup> Mr. America, who found it difficult to find another position, sued the employer for breach of the settlement agreement. Kavanaugh held that the former employer was not liable for violating the settlement agreement because the comments made by the non-human resources employer amounted to a neutral reference.

Many individuals who experience discrimination are afraid to come forward because they believe doing so will make it difficult or impossible to find another job. And in the real world, of course, a reference like the one at issue in *America v. Mills* can seriously undercut a job opportunity. As noted by dissenting Judge Janice Rogers Brown, herself a conservative George W. Bush appointee, Kavanaugh's analysis rendered meaningless the part of the settlement agreement that was meant to ensure Mr. America's future job prospects were not harmed as a result of challenging discrimination.<sup>106</sup> Kavanaugh's unwillingness to take these realities seriously amounts to a thumb on the scale for employers.

In *Jackson v. Gonzales*,<sup>107</sup> Kavanaugh dismissed Kevin Jackson's discrimination claims and, in doing so, demonstrated a disturbing eagerness to defer to employer's justifications. Mr. Jackson was a Black employee working in the Bureau of Prisons. He claimed that he was denied a

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<sup>103</sup> See also *Adeyemi v. D.C.*, 525 F.3d 1222, 1227 (D.C. Cir. 2008) (Kavanaugh, writing for the majority and affirming summary judgment for the employer and against a job applicant in a disability discrimination claim, "In cases where the comparative qualifications are close, a reasonable jury would not usually find discrimination because the jury would 'assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call.' We must 'respect the employer's unfettered discretion to choose among qualified candidates.' To conclude otherwise, we have said, 'would be to render the judiciary a super-personnel department that reexamines an entity's business decisions—a role we have repeatedly disclaimed.'")(internal citations omitted); *Baloch v. Kempthorne*, 550 F.3d 1191, 1197 (D.C. Cir. 2008)(Kavanaugh, writing for the majority and affirming summary judgment for the employer and against the employee bringing race, religion, age and disability discrimination claims as well as retaliation and hostile work environment claims, "we have previously underscored our hesitancy to engage in 'judicial micromanagement of business practices' by second-guessing employers' decisions about 'which of several qualified employees will work on a particular assignment.'")(internal citations omitted).

<sup>104</sup> 643 F.3d 330 (D.C. Cir. 2011).

<sup>105</sup> *Am. v. Mills*, 714 F. Supp. 2d 88, 97 (D.D.C. 2010), *aff'd*, 643 F.3d 330 (D.C. Cir. 2011).

<sup>106</sup> *Id.* at 333.

<sup>107</sup> 496 F.3d 703 (D.C. Cir. 2007).

promotion because of his race. The employer argued that the white employee who was promoted instead of Mr. Jackson was more qualified, even though the particular qualifications the employer pointed to weren't identified as necessary or desirable in the job description. Instead of letting a jury decide whether the employer's justification was persuasive, Kavanaugh held that the employer had demonstrated that the white employee selected was more qualified for the position than Mr. Jackson.

In a strong dissent, Judge Rodgers again took issue with the manner in which the majority evaluated the case, noting that Kavanaugh's opinion "ignores the material issue of disputed fact raised by Jackson's evidence that goes directly to the question of what type of applicant the [employer] actually sought."<sup>108</sup> In other words, Kavanaugh ignored the evidence put forth by Mr. Jackson and instead simply accepted the rationales offered by the employer, resulting in an improper resolution of matters of fact and credibility that were more properly left to the jury.

*c. Kavanaugh must answer questions about his own personal tolerance for sexual harassment.*

Kavanaugh clerked for Judge Alex Kozinski of the Ninth Circuit and has reportedly remained close to his former boss, including since becoming a judge. Indeed, in a 2010 speech, Kavanaugh described the relationship between judge and clerk as "the most intense and mutually dependent one outside of marriage, parenthood, or a love affair."<sup>109</sup>

Kozinski abruptly retired in late 2017 after more than a dozen allegations of sexual harassment by former clerks and other professional contacts. At least two women reported that Kozinski called them into his chambers to show them pornography.<sup>110</sup> Several others alleged Kozinski groped or fondled their breasts and other body parts.<sup>111</sup> And more said that Kozinski would often ogle female attorneys<sup>112</sup> and make sexually suggestive comments.<sup>113</sup> Many have described Kozinski's abusive behavior as an open secret that was widely known for years, and indeed in 2009, Kozinski was formally admonished by a panel of federal judges for distributing sexually

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<sup>108</sup> *Id.* at 714.

<sup>109</sup> Brett Kavanaugh, *Remarks on Judge Walter Stapleton's 40<sup>th</sup> Anniversary on the Bench*, QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT, SENATE JUDICIARY COMMITTEE, Appendix 12(d), Page 653 (July 10, 2018), [https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%2012\(d\)%20Attachments.pdf](https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%2012(d)%20Attachments.pdf).

<sup>110</sup> Matt Zapotosky, *Prominent appeals court Judge Alex Kozinski accused of sexual misconduct*, WASH. POST (Dec. 8, 2017), [https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef\\_story.html?utm\\_term=.bd0aad99c576](https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.bd0aad99c576).

<sup>111</sup> Matt Zapotosky, *Nine more women say judge subjected them to inappropriate behavior, including four who say he touched or kissed them*, WASH. POST (Dec. 15, 2017), [https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c\\_story.html?utm\\_term=.a765460670ab](https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html?utm_term=.a765460670ab).

<sup>112</sup> Dalia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/12/judge\\_alex\\_kozinski\\_made\\_us\\_all\\_victims\\_and\\_accomplices.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/12/judge_alex_kozinski_made_us_all_victims_and_accomplices.html).

<sup>113</sup> Dara E. Purvis, *When Judges Prey on Clerks*, NEW YORK TIMES (December 12, 2017), [https://www.nytimes.com/2017/12/12/opinion/law-schools-alex-kozinski.html?\\_r=1](https://www.nytimes.com/2017/12/12/opinion/law-schools-alex-kozinski.html?_r=1).

explicit and otherwise offensive photos, videos, and jokes through an email list and publicly accessible internet server.<sup>114</sup> Kavanaugh also reportedly worked with Kozinski as a “screener” recommending clerkship candidates for Justice Kennedy over the years, and Justice Kennedy hired many of Kozinski’s former clerks. In other words, working for Kozinski was a gateway to clerking on the Supreme Court and Kavanaugh was one of the gatekeepers.

In the last year, other attorneys have come forward to express regret at their inaction in the face of Kozinski’s sexually harassing and abusive behavior.<sup>115</sup> Many have acknowledged that individuals and the judiciary as a whole permitted Kozinski’s abusive behavior to flourish in plain sight.<sup>116</sup> In light of Kavanaugh’s longstanding and close relationship with Kozinski, the Senate should examine and consider what he knew or suspected regarding Kozinski’s harassing behavior. Questions such as: When did he first become aware of the allegations against Kozinski? Was he aware of Kozinski’s 2009 reprimand for distributing explicit material? Was he aware of Kozinski’s distribution of sexually explicit photos and videos and offensive jokes prior to media reports in 2009? Either in 2008 when the e-mail list first became public or at any time afterward, did he take any actions in response to this conduct? There is far too much at stake to let these critical questions go unanswered.

## **VI. Kavanaugh’s Record Shows a Willingness to Give Unchecked Power to the President**

Kavanaugh’s record shows he would shift more power to President Trump and rubber-stamp his anti-civil rights, anti-woman agenda, all while shielding President Trump and the administration from investigation.

In two different cases, Kavanaugh has asserted the troubling stance that a president can pick and choose the laws he or she would enforce based on his or her belief about the constitutionality of the law. In Kavanaugh’s dissent in *Seven-Sky v. Holder*,<sup>117</sup> Kavanaugh argues, in part, that courts should not yet weigh in on the constitutionality of the ACA’s minimum coverage requirement because “the President may decline to enforce a statute that regulates private individuals when the President deems that statute unconstitutional, even if a court has held or would hold the statute unconstitutional.” The assertion that a sitting president may simply choose not to enforce the law and act as both the executive and judicial branch carries troubling implications for the system of checks and balances in our democracy.<sup>118</sup>

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<sup>114</sup> Bill Mears, *Judge Kozinski admonished for explicit items on Website* CNN (July 2, 2009), <http://www.cnn.com/2009/CRIME/07/02/judge.explicit.files/>.

<sup>115</sup> See, Dalia Lithwick, *supra* note 117.

<sup>116</sup> See, Dalia Lithwick, *supra* note 117; Dara E. Purvis, *supra* note 118; Charlotte Garden, *On Judge Kozinski and Open Secrets*, TAKE CARE BLOG (Dec. 13, 2017), <https://takecareblog.com/blog/on-judge-kozinski-and-open-secrets>; Catherine Crump, *Clerkships are invaluable for young lawyers. They can also be a setup for abuse*, WASH. POST (Dec. 15, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/12/15/when-women-law-clerks-are-harassed-they-often-have-nowhere-to-turn/?utm\\_term=.78409eb9d89f](https://www.washingtonpost.com/news/posteverything/wp/2017/12/15/when-women-law-clerks-are-harassed-they-often-have-nowhere-to-turn/?utm_term=.78409eb9d89f).

<sup>117</sup> *Seven-Sky v. Holder*, 661 F.3d 1, 3 (D.C. Cir. 2011), *abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, (2012).

<sup>118</sup> *Id.*

Similarly, Kavanaugh's concurring opinion in *In re Aiken County*, would expand the President's power to ignore existing statutory mandates.<sup>119</sup> In that case, the majority found that the petitioners did not have standing to sue when an agency was not performing a statutorily mandated duty. But Kavanaugh wrote a separate concurrence making clear he would go even further to allow the President and executive branch to override legislative actions in some circumstances. He argued, "the President (and subordinate executive agencies supervised and directed by the President) may decline to follow that statutory mandate or prohibition if the President concludes that it is unconstitutional."<sup>120</sup> Again, the notion that the President, or his Administration, can decide whether to enforce a law passed by the legislature based on his conclusions about the constitutionality of it would have serious implications on our democracy and our rights.

Kavanaugh's decisions in *Seven-Sky v. Holder* and *In re Aiken* indicate that, if confirmed, he would vote to give broad discretion to the President to pick and choose which laws to enforce. Taken together, Kavanaugh's judicial philosophy would undermine our democratic institutions by disrupting the balance of power and giving tremendous power to the president. This is not only unacceptable for our democratic system, but it would carry grave implications for the rights of people. Given that Trump has spent much of his presidency wielding his executive power to trample on individual's civil rights and upend existing consumer and worker protections, giving him further power to decide which laws he deems constitutional and enforceable puts at risk our most crucial constitutional rights and legal protections. The Supreme Court serves as a critical check on executive power, but Kavanaugh's record shows we cannot trust that he will stand up to Trump and protect our core constitutional rights.

In addition to dramatically expanding presidential powers, Kavanaugh's record indicates he would also shield the presidency from investigation. Kavanaugh has argued that the president has "absolute, unfettered, unchecked power to pardon."<sup>121</sup> On numerous occasions, Kavanaugh has stated that a sitting president should be exempt from civil suits and criminal prosecutions and investigations.<sup>122</sup> At a 1998 Georgetown Law School conference, Kavanaugh stated that "if the President were the sole subject of a criminal investigation... no one should be investigating

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<sup>119</sup> *In re Aiken Cty*, 725 F.3d 255 (D.C. Cir. 2013) (finding that the Department of Energy's attempt to withdraw a license construction application was not ripe and thus the petitioners' challenge was premature).

<sup>120</sup> *Id.* at 261. ("Presidents routinely exercise this power through Presidential directives, executive orders, signing statements, and other forms of Presidential decisions.").

<sup>121</sup> Brett Kavanaugh, *Our Anchor/or 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE. DAME. L. REV. 1907 (2014) ("Everyone agrees that the pardon power gives the president absolute, unfettered, unchecked power to pardon every violator of every federal law. Obviously, there are political checks against doing that, or against using the pardon power in an arbitrary manner. But in terms of raw constitutional power, that is the power the president has."). See also Brett Kavanaugh, *One Government, Three Branches, Five Controversies: Separation of Powers Under Presidents Bush and Obama*, MARQ. LAWYER MAGAZINE (Fall 2016), at 8 ("In this regard, consider the interaction of the power of prosecutorial discretion and the pardon power. The president has the absolute discretion to pardon individuals at any time after commission of the illegal act.").

<sup>122</sup> Brett Kavanaugh, *Separation of Powers During the 44th Presidency and Beyond*, 93 MINN. L. REV. 1454 (2009), [http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh\\_MLR.pdf](http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf).

that.”<sup>123</sup> In his 1998 Georgetown Law Journal article, Kavanaugh opined that “the President can be indicted only after he leaves office voluntarily or is impeached by the House of Representatives.”<sup>124</sup> In another 1998 Georgetown Law Journal conference, Kavanaugh raised his hand, agreeing with the notion that “as a matter of law that a sitting president cannot be indicted during the term of office.”<sup>125</sup> Kavanaugh has even gone so far as to suggest that “Congress might consider a law exempting a President—while in office—from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel.”<sup>126</sup> Last but not least, Kavanaugh believes that “the [special] prosecutor should be removable at will by the President” and explicitly stated that he thought the independent counsel law, which was intended to prevent abuse of by government officials, should be overturned.<sup>127</sup> These troubling opinions suggest Kavanaugh would fail to defend our fundamental rights and democracy as we know it and instead allow the president to both be above the law and usurp the legislative and judicial branches of our government.

## VII. Conclusion

The Supreme Court must have Justices who uphold core constitutional values of liberty, equality, and justice and who respect laws designed to protect individuals against unfair and harmful actions by employers, educational institutions, and other powerful forces. Yet, Kavanaugh’s record makes clear he is a threat to our most cherished rights and legal protections. Indeed, Kavanaugh’s record demonstrates that he would fulfill the President’s promises to gut *Roe v. Wade* and dismantle the Affordable Care Act and he would fail to act as an independent check on executive power. If Kavanaugh is confirmed to a lifetime position on the Supreme Court, women could suffer the devastating impact of his decisions for generations to come.

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<sup>123</sup> Brett Kavanaugh, Speaker at American Bar Association panel: Independent Counsel Structure and Function (Feb. 19, 1998), <https://www.c-span.org/video/?lO1055-1/independent-counselstructure-function>. (“[A] special prosecutor should be nominated by the President and confirmed by the Senate...The prosecutor should be removable at will by the President.”).

<sup>124</sup> Brett Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L. J. 2133 (1998) (“the President can be indicted only after he leaves office voluntarily or is impeached by the House of Representatives and convicted and removed by the Senate.”).

<sup>125</sup> See Brett Kavanaugh, Speaker at American Bar Association Panel: Independent Counsel Act (Feb. 22, 1998), <https://www.c-span.org/video/?101056-1/independent-counsel-statute-future>.

<sup>126</sup> Brett Kavanaugh, *Separation of Powers During the 44th Presidency and Beyond*, 93 MINN. L. REV. 1454 (2009) [http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh\\_MLR.pdf](http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf). He later says that “the indictment and trial of a sitting President, moreover, would cripple the federal government, rendering it unable to function with credibility in either the international or domestic arenas. Such an outcome would ill serve the public interest, especially in times of financial or national security crisis. Even the lesser burdens of a criminal investigation—including preparing for questioning by criminal investigators—are time-consuming and distracting.” *Id.*

<sup>127</sup> Brett Kavanaugh, Speaker at American Enterprise Institute: Federal Courts & Public Policy (Mar. 31, 2016) (“*Morrison v. Olson*... it’s been effectively overturned but I would put the final nail in.”).