

# Report on the Record of Supreme Court Nominee Brett M. Kavanaugh

Demos Opposes Confirmation Because It Would Threaten Equal Justice for People of Color and the Future of Racial Equity

**T**he Supreme Court plays a vital role in ensuring equal justice and dignity for all Americans. Its decisions touch the lives of millions and are especially important to those who have been and continue to be excluded from full membership in our democracy and economy. In many areas of the law—from workers’ rights to democracy law to mass incarceration—the consequences of the Court’s rulings are particularly profound for communities of color. In those communities, women, immigrants, LGBTQ people, and people with disabilities have still more at stake in the Court’s rulings. Because of the Court’s crucial role in shaping both our lives and the systems in which we operate, each vacancy creates an opportunity to move toward, or away from, racial equity.

On July 9, 2018, President Donald Trump nominated Judge Brett M. Kavanaugh of the D.C. Circuit Court of Appeals to the U.S. Supreme Court. After an extensive examination of his record on a series of issues bearing on racial justice, Demos concludes that Judge Kavanaugh’s confirmation would be a major setback for people of color and for racial equity in the United States. We therefore oppose his confirmation to the Supreme Court.

In case after case, Kavanaugh has sided with the more powerful party, often at the expense of people of color. He has written and joined radical opinions addressing issues that were unnecessary to decide the case—and sometimes, that were not even raised by the parties—to promote legal theories that exacerbate rather than ameliorate inequality. For this, he has repeatedly drawn criticism from his colleagues on the D.C. Circuit,

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including his conservative colleagues. He has also ruled in ways that suggest he would swing the Court to the hard right on key issues like reproductive rights and fair housing.

Kavanaugh has also made it clear that he buys into the problematic trope that the Constitution should be “colorblind”—a shorthand for the view that race-conscious efforts to remedy our long history of slavery, Jim Crow segregation, and state-sanctioned violence against people of color are themselves discriminatory. Kavanaugh has remarked that “we are just one race here. . . . American,” and has railed against benefits to Native peoples as a “naked racial-spoils system.” Comments like these not only erase our history and present-day reality of racism and white supremacy, but also reflect an ideology hostile to vital tools for addressing systemic racism, such as disparate impact claims and affirmative action.

As detailed herein, the confirmation of Judge Kavanaugh to the Supreme Court would likely:

- **Make it harder to address both intentional racial discrimination and systemic racism.** In an economy in which discriminatory hiring, firing, pay, and harassment block opportunities for people of color—and particularly for those who hold other marginalized identities—we need a Supreme Court Justice who will faithfully apply our civil rights laws. We also need a Justice who understands that bad actors typically hide rather than announce their discriminatory motives and that systems can produce racist outcomes, regardless of the intent of individuals. Kavanaugh’s record on racial discrimination cases raises red flags on both counts. For example, in one case he would have exempted a class of U.S. citizens working for the State Department from all federal anti-discrimination statutes. In another case, he went out of his way to disparage the legal theory of discrimination by disparate impact under the Fair Housing Act.
- **Undermine Native American rights and self-government.** No vision of racial justice is complete without equity and restorative justice for Native Americans. Kavanaugh’s record in this area has been downright dismissive. He characterized state programs on behalf of indigenous Hawaiians as a “system of racial separatism” driven by “political correctness.” He further denied that the island’s indigenous people could ever be covered by the legal protections that apply to mainland tribes, because that would allow “any racial group with creative reasoning [to] qualify as an Indian tribe.”

- **Make it harder to dismantle the New Jim Crow system of mass incarceration.** All Americans should feel safe and protected in their communities. But in many ways our criminal legal system has torn families apart and undermined the safety and security of people of color. With the New Jim Crow system seeping into our economy and our democracy and disproportionately depriving people of color of life's opportunities, we need a Supreme Court Justice who will take structural inequities into account when ruling on criminal cases and who will not reflexively defer to law enforcement. Kavanaugh, however, has labored to absolve officers who committed an unconstitutional search and refused to suppress evidence obtained based on a warrant that contained knowingly false statements.
- **Undermine inclusive democracy and perpetuate a system that works only for the wealthy few.** Our democracy is not yet working equally for all of us. Policies skew toward wealthy donors who are disproportionately white, while voters of color are deprived of an equal say through restrictions on the fundamental freedom to vote. With major voting rights and money-in-politics cases sure to come before the Supreme Court in the near future, we need a Justice committed to broad and multiracial democratic participation. Kavanaugh's record on these issues reveals cause for concern—from his downplaying of blatant racism in a voting rights case, to a radical view of the First Amendment that could make it impossible to close the floodgates on big money in our elections.
- **Hinder access to justice for low-income people and people of color.** The courthouse doors should be open to everyone. But procedural barriers such as restrictions on class actions and arbitration clauses in contracts can leave injured parties without legal recourse. Kavanaugh has advocated for stricter rules about who can bring and sustain a lawsuit, repeatedly siding against everyday Americans and in favor of the party with more power. In one case, he stretched to try to prevent taxpayers from joining together as a class to sue the IRS after the agency wrongfully took money from millions of Americans. Another case reveals that he fails to apprehend the power imbalance that leads many employees to “agree” to unfair terms of employment, which often include restrictions on the ability to sue. Such restrictions fall most heavily on low-income people and people of color.

- **Prioritize private profits over the communities of color hurt most by environmental injustice and climate change.** Policies skewed in favor of big polluters and corporate interests have long put communities of color at heightened risk—from increased rates of illness, to displacement from climate disasters, to pipelines laid through Native lands. We need a Supreme Court Justice who will uphold environmental protections and who will consider the impact of pollution and climate change on communities of color. Kavanaugh, however, has sided with polluters challenging environmental rules, while giving little to no regard for the communities that suffer the brunt of environmental injustice and climate change.
- **Limit health care access and threaten hard-won rights for people of color in the areas of reproductive rights, disability justice, and LGBTQ equality.** Racial equity requires that all people have agency to make their own choices about their bodies, and access to non-discriminatory, affordable health care. It is vital that an incoming Supreme Court Justice appreciate the centrality of these interests to basic human liberty and dignity. Kavanaugh, however, has praised Justice Rehnquist’s dissent in *Roe v. Wade*. He has written that the ACA’s individual mandate is “unprecedented” and that upholding it would be “a jarring prospect.” Kavanaugh appears likely to vote to limit reproductive rights and take away health care—developments that would destabilize the lives of women of color, people of color with disabilities, and trans and queer people of color in particular.
- **Undermine justice for immigrants and foreign nationals while deferring to a xenophobic administration.** With so much at stake for immigrants and refugees, we need a Supreme Court Justice who values the rights of all people, regardless of immigration status, national origin, or religion. Kavanaugh’s record of siding against immigrant workers and his excessive deference to the executive branch on immigration and foreign policy issues raise red flags that he would not provide a meaningful check on abuses of presidential power. The significance of this orientation cannot be overstated at a time when the Trump administration has barred people from Muslim-majority countries from our shores, separated children from their parents at the border, and sent ICE agents into courthouses and hospital rooms.

## **Kavanaugh would likely make it harder to address intentional racial discrimination and systemic racism.**

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### **Kavanaugh repeatedly rules against racial discrimination claims brought against employers.**

One of Judge Kavanaugh’s earliest rulings for the D.C. Circuit was in *Jackson v. Gonzales* (2007),<sup>1</sup> an employment case in which he affirmed the rejection of the plaintiff’s racial discrimination claim. The plaintiff, a black man, was denied a promotion at the Bureau of Prisons that later went to a white woman. Kavanaugh accepted the employer’s contention that the hiring decision was purely a matter of who was better qualified, despite the fact that the particular skill for which the Bureau said it hired the white applicant was not listed in the job description.

The dissenting opinion, by Judge Judith Rogers, wrote that summary judgment was improper because the plaintiff had presented “evidence suggesting that the employer’s asserted nondiscriminatory reason for selecting another candidate was fabricated to mask unlawful discrimination”: namely, that if the skill for which the Bureau hired the white woman was so important, the agency would have included it in the job description.<sup>2</sup> Because there was a genuine issue of material fact as to the employer’s real reason for hiring the white applicant, Rogers explained, summary judgment was inappropriate.<sup>3</sup>

Since that early ruling in *Jackson*, Kavanaugh has occasionally recognized the availability of racial discrimination claims, including in a concurrence

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1. 496 F.3d 703 (D.C. Cir. 2007).

2. *Id.* at 710, 12 (Rogers, J., dissenting).

3. *Id.* at 715-16.

opining that a single incident of a supervisor calling an employee the N-word in the workplace can create a hostile environment under Title VII of the Civil Rights Act of 1964.<sup>4</sup>

In cases involving less direct evidence—but high-stakes legal questions—Kavanaugh has ruled against employees seeking to pursue discrimination claims. His dissent in *Miller v. Clinton* (2012)<sup>5</sup> argued that a law about overseas employment with the State Department established a blanket exemption to federal antidiscrimination laws and allowed the State Department to deny employment to U.S. citizens solely based on their age—and by implication, based on race, gender, religion, or any factor otherwise protected under federal antidiscrimination laws.

*Miller* involved a statute permitting the State Department to contract with American workers abroad “without regard” to laws relating to the “performance of contracts and performance of work in the United States.”<sup>6</sup> The government argued that this allowed the State Department to force an employee to retire solely because he had reached the age of 65, without regard to the Age Discrimination in Employment Act. The D.C. Circuit disagreed because such an interpretation was inconsistent with congressional intent, and, if accepted, would apply equally to, and render ineffective, numerous other antidiscrimination statutes: “We simply do not believe [Congress] would have authorized the State Department to ignore statutory proscriptions against discrimination on the basis of age, disability, race, religion, or sex through the use of ambiguous language.”<sup>7</sup>

Kavanaugh, however, agreed with the government’s extreme position. He attempted to downplay the consequences of creating a new exception to federal statutes barring discrimination, stating that plaintiffs could still sue under the Constitution.<sup>8</sup> Constitutional challenges, however, are much more difficult to sustain, and frequently there is no cause of action under the Constitution where there would be under Title VII.<sup>9</sup> As the majority opinion pointed out, by applying Title VII to the federal government, “Congress made clear that it did not regard constitutional protections as sufficient.”<sup>10</sup> Judge Kavanaugh’s comfort level with

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4. *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *see also Ortiz-Diaz v. U.S. Dep’t of Housing & Urban Dev., Office of the Inspector Gen.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J. concurring) (arguing that “all discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII”).

5. 687 F.3d 1332 (D.C. Cir. 2012)

6. *Id.* at 1343 (citing 22 U.S.C. § 2669(c)).

7. *Id.* at 1338.

8. *Id.* at 1359 (Kavanaugh, J., dissenting).

9. The majority further pointed out that the State Department declined to say at oral argument that a plaintiff could file a constitutional claim and obtain a remedy under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Id.* at 1338 & n. 5.

10. *Id.* at 1338.

a blanket exemption from our statutory anti-discrimination laws should be a matter of deep concern.

Kavanaugh again sided with the government over an employee of color in a case involving security clearances. In *Rattigan v. Holder* (2012),<sup>11</sup> a Muslim FBI employee of Jamaican descent alleged he was subjected to a baseless investigation of his clearance eligibility in retaliation for his complaints of discrimination. The majority ruled that the employee could pursue a Title VII retaliation claim if he proffered evidence that his employer reported knowingly false information about him. Kavanaugh dissented based on his expansive view of *Department of the Navy v. Egan* (1988),<sup>12</sup> a Supreme Court case “often cited by those who argue that the President has broad and exclusive powers . . . to control access to national security information.”<sup>13</sup> Kavanaugh argued that no part of the decision to subject the employee to additional investigation was judicially reviewable, even if it involved reports of misconduct that were knowingly false and based on discriminatory motives.<sup>14</sup>

Kavanaugh’s record of attempting to close the courthouse door to victims of discrimination extends to still other areas. In *Howard v. Office of the Chief Administrative Officer of the U.S. House of Representatives* (2013),<sup>15</sup> he authored a dissent arguing that the Constitution’s Speech or Debate Clause barred an African-American woman’s federal court claim that she was demoted and then terminated from her position as budget director for the House of Representatives’ administrative support office based on race. The majority concluded that the employee could prevail by offering evidence that did not implicate actions integral to the legislative process. Kavanaugh disagreed. In dissent, he argued that the Clause should prevent the lawsuit even if the employer’s stated reason for terminating the employee was pretextual.<sup>16</sup> This would mean a congressional employer need only *assert* a justification based on the employee’s legislative activity to trigger the Clause’s protection—a legal rule ripe for abuse. Kavanaugh would have forced the plaintiff employee to go through the secretive processes of the government’s Office of Compliance, which has been accused of undercutting victims and has fewer protections than are afforded to other federal employees.<sup>17</sup>

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11. 689 F.3d 764 (D.C. Cir. 2012).

12. 484 U.S. 518 (1988).

13. Louis Fisher, *Judicial Interpretations of Egan*, L. Libr. Cong., 1 (Nov. 13, 2009), *available at* <https://fas.org/sgp/eprint/egan.pdf>.

14. *Rattigan*, 689 F.3d at 773-76 (Kavanaugh, J., dissenting).

15. 720 F.3d 939 (D.C. Cir. 2013).

16. *Id.* at 954-57 (Kavanaugh, J., dissenting).

17. Michelle Ye Hee Lee and Elise Viebeck, *How Congress Plays by Different Rules on Sexual Harassment and Misconduct*, WASHINGTON POST (Oct. 27, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/10/27/how-congress-plays-by-different-rules-on-sexual-harassment-and-misconduct/>.

## Kavanaugh has been skeptical of disparate impact theory, a crucial tool for remedying racial discrimination.

Racism is difficult to stamp out. Typically, people who intentionally discriminate are savvy enough to hide their motives. Sometimes, practices have a racially discriminatory outcome—a disparate impact—that may not be deliberate, but is unnecessary and avoidable. Given the stark racial inequities that persist in our economy and democracy, disparate impact claims are an essential tool for addressing unjustified disparities that are unintentional or where discriminatory intent cannot be proven.<sup>18</sup> The retirement of Justice Kennedy—who just 3 years ago cast the deciding vote to recognize disparate impact claims under the Fair Housing Act—leaves the future of this critical remedial tool up in the air.

Judge Kavanaugh’s record raises serious concerns regarding his views about the validity of such claims. In *Greater New Orleans Fair Housing Action Center v. U.S. Dept. of Housing and Development (HUD)* (2011),<sup>19</sup> Kavanaugh joined the majority opinion denying injunctive relief to groups challenging HUD’s formula for disbursing grants to homeowners to rebuild their homes in the aftermath of Hurricane Katrina as having a discriminatory impact on African Americans. The challengers argued the formula’s implementation required black homeowners to shoulder higher cost deficits by tying grants to the lesser of the pre-Katrina home values and actual rebuilding costs.<sup>20</sup> However, between the filing of the lawsuit and the consideration of the motion for injunctive relief, a key component of the formula was modified: a \$50,000 cap on a supplemental grant for low-to-moderate income homeowners was lifted, making all homeowners eligible for a total of \$150,000 or the total rebuilding costs (whichever was lower).<sup>21</sup> As Judge Rogers’s concurring opinion pointed out, this modification “effectively eliminated” resource gaps previously resulting from the formula’s consideration of pre-storm home values.<sup>22</sup>

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[washingtonpost.com/politics/how-congress-plays-by-different-rules-on-sexual-harassment-and-misconduct/2017/10/26/2b9a8412-b80c-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.3819c7d5621a](http://www.washingtonpost.com/politics/how-congress-plays-by-different-rules-on-sexual-harassment-and-misconduct/2017/10/26/2b9a8412-b80c-11e7-9e58-e6288544af98_story.html?utm_term=.3819c7d5621a).

18. See, e.g., Sean McElwee, *Why Disparate Impact Claims Are Essential To Racial Justice*, Demos (June 25, 2015), <https://www.demos.org/blog/6/25/15/why-disparate-impact-claims-are-essential-racial-justice>.

19. 639 F.3d 1078 (D.C. Cir. 2011).

20. *Id.* at 1081. They pointed to a study by PolicyLink showing that on average, African-American homeowners ended up having to pay over \$8,000 more out-of-pocket for repairs than their white counterparts, and concluding that this resource gap was driven largely by the grant ceiling’s being tied to pre-storm home values. *Id.* at 1081-82.

21. *Id.* at 1082.

22. *Id.* at 1092. (Rogers, J., concurring).

This intervening event made resolving the case fairly straightforward. Nonetheless, the majority opinion, which Kavanaugh joined in full, went out of its way to cast doubt on the validity of disparate impact claims beyond the one before the court. Indeed, the opinion cast wide-ranging doubts about the ability of plaintiffs to *ever* prove unlawful disparate racial impact. As Judge Rogers’s explained, this analysis was not necessary to decide the questions at hand:

[T]he majority meanders into disparate impact theory—without citation to authority—and into benchmark suppositions not briefed by the parties much less argued in the district court and set up only to be rejected without record evidence on either side of the new constructs while ignoring support for plaintiffs’ evidentiary proffer. The majority’s statewide analysis requirement suffers from similar flaws and, as noted, that argument by Keegan is not properly before the court. Along the way, the majority even speculates that white recipients might have disparate impact claims under a different, size-of-grant benchmark. One might well wonder what purpose these meanderings have other than to posit hurdles for future disparate impact claims. Whatever their purpose, the comments by the majority are unnecessary to the resolution of these appeals.<sup>23</sup>

The majority opinion also relied on troubling “colorblindness” reasoning. For instance, the court noted that in locations where “African-American and white homeowners have significantly different economic profiles, it will presumably be the case that particular elements of a complex formula . . . will have a disproportionate negative impact on African-Americans, an impact potentially offset by other elements of the formula.”<sup>24</sup> As an example, the court noted that “the \$150,000 cap on total grants would seem to disfavor wealthier (and therefore, according to the PolicyLink study, disproportionately white) grant recipients.”<sup>25</sup> This reasoning fails to recognize that the “significantly different economic profiles” of white and black homeowners reflect systemic racism and a legacy of our country’s devastating history of racial discrimination,<sup>26</sup> instead treating these disparities as a neutral baseline that reflects some kind of natural order.

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23. *Id.* at 1093 (Rogers, J., concurring) (citations omitted).

24. 639 F.3d at 1086.

25. *Id.*

26. *See, e.g.*, Results: The Power to End Poverty, *The Racial Wealth Gap*, [https://www.results.org/issues/the\\_racial\\_wealth\\_gap](https://www.results.org/issues/the_racial_wealth_gap) (last accessed Aug. 23, 2018).

Kavanaugh's apparent skepticism of disparate impact theory would be a dramatic departure from the jurisprudence of Justice Kennedy. Kennedy was the pivotal vote and author of *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.* (2015),<sup>27</sup> which held that disparate impact challenges could be brought under the Fair Housing Act. There, Justice Kennedy explained that disparate impact liability empowers plaintiffs to "counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."<sup>28</sup>

Judge Kavanaugh's views of racial disparate impact claims may align more closely with those of the late Justice Scalia. In a 2009 concurring opinion, Scalia theorized that laws prohibiting disparate impact are themselves unconstitutional.<sup>29</sup> He wrote that such provisions "place a racial thumb on the scale, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is . . . discriminatory."<sup>30</sup> Notably, Judge Kavanaugh has quoted Justice Scalia on race approvingly in the past (discussed in the next section). Like Scalia, Kavanaugh appears to subscribe to the theories of "reverse discrimination" and "colorblindness" that have figured prominently in conservative opposition to race-conscious measures to remedy past discrimination, including affirmative action.<sup>31</sup> Asserting that remedies to racial discrimination are themselves discriminatory (often, against white people) avoids any interrogation of historic and present-day manifestations of systemic racism.<sup>32</sup>

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27. 135 S. Ct. 2507 (2015). See also Kriston Capps, *What the Supreme Court's 'Disparate Impact' Decision Means for the Future of Fair Housing*, CityLab (June 25, 2015), <https://www.citylab.com/equity/2015/06/what-the-supreme-courts-disparate-impact-decision-means-for-the-future-of-fair-housing/396704/>.

28. *Id.* at 2522.

29. *Ricci v. DiStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

30. *Id.*

31. Among the famous proponents of "colorblindness" is Chief Justice Roberts. See e.g., *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 747-48 (2007) (invalidating public school policies seeking to include students of color in popular schools, likening policy to segregation "for very different reasons," and writing, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). See also Gene Demby, *Two Justices Debate the Doctrine of Colorblindness*, NPR.ORG (April 23, 2014), <https://www.npr.org/sections/codeswitch/2014/04/23/306173835/two-justices-debate-the-doctrine-of-colorblindness>.

32. As Justice Breyer explained in his dissent in *Parents Involved in Community Schools*, equating race-consciousness with racial discrimination "distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public

Kavanaugh’s sympathy for the “colorblindness” philosophy signals that he would oppose race-conscious efforts to remedy past racial exclusion and to serve other compelling state interests. As with disparate impact, this view again would put him at odds with Justice Kennedy, who wrote the 5-4 decision in *Fisher v. Univ. of Texas at Austin* (2016)<sup>33</sup> upholding affirmative action in higher education.<sup>34</sup> Notwithstanding the principle of stare decisis, a Court that exchanges Kennedy for Kavanaugh could revisit and outlaw affirmative action in the near term.

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schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*’s promise of integrated primary and secondary education that local communities have sought to make a reality.” 551 U.S. at 803-04 (Breyer, J., dissenting).

33. 136 S. Ct. 2198 (2016).

34. See Kimberly West-Faulcon, *Symposium: Surprisingly, Facts Rule the Day in Fisher II*, SCOTUSblog (June 24, 2016), [www.scotusblog.com/2016/06/symposium-surprisingly-facts-rule-the-day-in-fisher-ii/](http://www.scotusblog.com/2016/06/symposium-surprisingly-facts-rule-the-day-in-fisher-ii/)

## Kavanaugh would likely undermine Native American rights and self-government.

*There can be no vision of racial justice without equity and restorative justice for Native Americans. Kavanaugh's record in this area has been downright dismissive. He characterized state programs on behalf of indigenous Hawaiians as a "system of racial separatism" driven by "political correctness."*

The next Supreme Court Justice could shape American Indian law for decades to come, particularly in light of Justice Kennedy's record of consistently voting against the interests of Native American tribes.<sup>35</sup> His departure creates an opening for a Supreme Court Justice who will respect the sovereignty and unique experiences of Native Americans. Unfortunately, Kavanaugh's record and commentary regarding Native Americans suggests he will be hostile to efforts to protect the rights and self-determination of indigenous people.

In a 1999 opinion piece for the *Wall Street Journal*, Kavanaugh relied upon Justice Scalia's "colorblindness" trope to slam the pro-indigenous policies of the Office of Hawaiian Affairs (OHA) and the Clinton administration as discriminatory.<sup>36</sup> OHA is a state agency that is headed by and addresses the specific needs of Hawaiians of Polynesian descent ("Native Hawaiians"), who have disproportionately experienced "economic deprivation, low educational attainment, poor health status, substandard housing, and social dislocation" compared to non-Native Hawaiians.<sup>37</sup> The agency, which has a high degree of autonomy, was created so that income from land seized from the takeover of the Hawaiian Kingdom would be used by and for Native Hawaiians under the direction of a board of trustees.<sup>38</sup> At the time Kavanaugh wrote his op-ed, only Native Hawaiians could vote for OHA officers.

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35. Anna V. Smith, *The Next Supreme Court Pick Could Shape Indian Law for Decades*, HIGH COUNTRY NEWS (Aug. 8, 2018), <https://www.hcn.org/articles/tribal-affairs-the-next-supreme-court-pick-could-shape-indian-law-for-decades>; Matthew Fletcher, *Why Justice Anthony Kennedy Wasn't Good for Indian Country*, HIGH COUNTRY NEWS (July 6, 2018), <https://www.hcn.org/articles/tribal-affairs-why-justice-anthony-kennedy-wasnt-good-for-indian-country>.

36. Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL STREET JOURNAL (Sep. 27, 1999), reproduced at [https://turtletalk.files.wordpress.com/2018/07/are\\_hawaiians\\_indians\\_the\\_jus.pdf](https://turtletalk.files.wordpress.com/2018/07/are_hawaiians_indians_the_jus.pdf).

37. U.S. Dep. of the Interior and U.S. Dep. of Justice, *From Mauka to Makai: The River of Justice Must Flow Freely 2* (2000), <https://www.doi.gov/sites/doi.gov/files/migrated/ohr/library/upload/Mauka-to-Makai-Report-2.pdf>.

38. See Office of Hawaiian Affairs, "About", <https://www.oha.org/about/> (last accessed Aug. 28, 2018).

With complete disregard for the context that gave rise to state and federal protections<sup>39</sup> for Native Hawaiians, Kavanaugh characterized OHA as an unconstitutional “naked racial-spoils system” and scorned the federal government’s defense of OHA as “political correctness.”<sup>40</sup> He also denied that the island’s indigenous people could ever be covered by the legal protections that apply to mainland tribes, because that would allow “any racial group with creative reasoning [to] qualify as an Indian tribe.”<sup>41</sup> He closed his article with a line from a Scalia opinion: “Under our Constitution . . . we are just one race here. It is American.”<sup>42</sup>

Kavanaugh’s assertion that “we are just one race here” suggests a disregard for a long and brutal history of oppression of Native Americans, which calls into serious question his respect for the self-determination of indigenous people. It also demonstrates remarkable ignorance to the lived experience of people of color in the United States. The mere *existence* of people of color in spaces such as college campuses, public parks, stores, and even a person’s own neighborhood or home is regularly met with calls for a police response that often turns deadly.<sup>43</sup> According to the Centers for Disease Control and Prevention, “Native Americans are killed in police encounters at a higher rate than any other racial or ethnic group,” followed by African Americans.<sup>44</sup> Judge Kavanaugh’s apparent ignorance to this difference in the lived experience of people of color compared to that of white people calls deeply into question his fitness to rule upon ultimate questions of racial equality on the Supreme Court.

In addition to publishing the *Wall Street Journal* op-ed, Kavanaugh represented an advocacy group in an *amicus curiae* brief in support of a white, non-Native Hawaiian person’s challenge to OHA’s voting rules as

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39. *Id.*; see also Frances Kai-Hwa Wang, *Dept. of Interior Finalizes Rule to Recognize Native Hawaiian Government*, NBC NEWS (Sep. 26, 2016), <https://www.nbcnews.com/news/asian-america/departments-interior-finalizes-rule-recognize-native-hawaiian-government-n653631> (providing a contemporary example of federal protections of Native Hawaiians).

40. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, *supra* n. 36

41. *Id.*

42. *Id.* (citing *Adarand Constructors v. Peña*, 515 U.S. 200, 239 (1995)).

43. Ernie Suggs, *This is America: Recent Episodes of ‘Existing While Black’ Show Darker Side of Racial Profiling*, AMERICAN CONSTITUTION-JOURNAL (May 17, 2018), <https://www.accessatlanta.com/news/national/this-america-recent-episodes-existing-while-black-show-darker-side-racial-profiling/J5FX7k84v3V6WJOMNi6RIK/>; Connie Razza, *Social Exclusion: the Decisions and Dynamics that Drive Racism*, DEMOS (May 29, 2018), <https://www.demos.org/publication/social-exclusion-decisions-and-dynamics-drive-racism>.

44. Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN (Nov. 17, 2017), <https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html>.

unconstitutional.<sup>45</sup> As noted in a letter to the editor of Hawaii Public Radio entitled “Native Women Oppose Judge Kavanaugh for U.S. Supreme Court,” Kavanaugh said in a 1999 interview 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.”<sup>46</sup>

This “one race” trope is a way of pretending that discrimination does not exist, or that it would disappear if we would just not focus on it. The notion that the government should be “colorblind”—after generations of colonization, slavery, Jim Crow segregation, and state-sanctioned violence against Native Americans, people of color and immigrants—is a means of taking race-conscious remedies for discrimination off the table. Eliminating those remedies, such as affirmative action and state programs that empower Native peoples, does not bring about racial equity. It sustains racial injustice.

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45. See *Rice v. Cayetano*, 528 U.S. 495 (2000); Brief of Amici Curiae Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, And Abigail Thernstrom In Support Of Petitioner, 1999 WL 345639, (May 27, 1999).

46. Letter to the Editor: Native Women Oppose Judge Kavanaugh for U.S. Supreme Court, Hawaii Public Radio (Aug. 15, 2018), <http://hpr1.com/index.php/opinion/letters-to-the-editor/letter-to-the-editor-native-women-oppose-judge-kavanaugh-for-u.s.-supreme-c/?platform=hootsuite> (citing *The Christian Science Monitor*, 1999).

## **Kavanaugh would likely make it harder to dismantle the New Jim Crow system of mass incarceration.**

*All Americans should feel safe and protected in their communities. But in many ways our criminal legal system has torn families apart and undermined the safety and security of people of color. With the New Jim Crow system seeping into our economy and our democracy and disproportionately depriving people of color of life's opportunities, we need a Supreme Court Justice who will take structural inequities into account when ruling on criminal cases, and who will not reflexively defer to law enforcement. Kavanaugh's record suggests he would fail on both counts.*

## **Kavanaugh has disregarded inequities in the criminal law system working against people of color.**

The American criminal justice system is plagued by “racially disparate policies, beliefs, and practices,”<sup>47</sup> which means that seemingly neutral laws and legal requirements play out in discriminatory ways. This includes over-policing of communities of color and inadequate protections for those who are arrested and prosecuted.

Although Judge Kavanaugh has occasionally endorsed arguments made by criminal defendants,<sup>48</sup> he has been unsympathetic to the reality of the structural racism baked into our criminal justice system. In *United States v. Martinez-Cruz* (2013),<sup>49</sup> the defendant argued that his sentencing for a conviction was improperly lengthened by a prior DUI conviction that had been secured in violation of his right to counsel. Martinez-Cruz was an immigrant from Mexico who did not speak English, could not read or write in Spanish, and had received no formal education at the time of the prior charge. After spending 2 days in jail, he printed his name on waiver-of-counsel form and pleaded guilty without a lawyer. There was no transcript and so no record of whether the translator or anyone explained the form to him. The issue in the case was whether the government or the

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47. Ashley Nellis, *Racial and Ethnic Disparity in State Prisons*, Sentencing Project (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

48. See *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) (advising district judges not to consider acquitted conduct to enhance sentences).

49. 736 F.3d 999 (D.C. Cir. 2013).

defendant bears the burden of proving whether Martinez-Fuente’s prior conviction involved a knowing and intelligent waiver of his right to counsel or was instead unconstitutional.

A majority of the panel held that the government must bear the burden. “Not only is the right to counsel itself fundamental,” Reagan appointee Judge Stephen Williams wrote, “but its assertion is critical to vindicating the other fundamental rights deemed essential for the fair prosecution of a criminal proceeding.”<sup>50</sup> Here, when Martinez-Cruz offered evidence calling the voluntariness of his waiver into question—namely, “that he was incapable of understanding the only explanation of his rights of which either party is aware”—the burden shifted to the government to prove he was adequately apprised of his rights.<sup>51</sup> Judge Kavanaugh dissented. He argued that this heavy and often outcome-determinative burden should fall on Martinez-Cruz, despite what the majority characterized as “ample reason to suspect that he did not validly waive his right to counsel” for his earlier conviction.<sup>52</sup>

### **Kavanaugh defers to police officers even when they behave badly.**

Judge Kavanaugh’s record reflects undue deference to police officers—even when they engage in aggressive stop-and-frisk tactics or provide recklessly false information when seeking a search warrant. In *United States v. Askew* (2008),<sup>53</sup> Paul Askew was stopped by officers searching for a robbery suspect. After patting down Askew and finding nothing, police nonetheless presented him to the victim for a “show-up” identification. As part of the identification, one of the officers partially unzipped Askew’s jacket to see if he was wearing a sweatshirt that matched the suspect’s description. The victim told officers Askew was not the robber.<sup>54</sup> An officer then fully unzipped Askew’s jacket, finding a gun. Askew was later convicted of a gun possession charge.

The en banc court held that the initial unzipping was an unconstitutional evidentiary search. The court declined to create a “wholly new investigative identification search exception to the warrant and probable cause requirements,”<sup>55</sup> and reasoned that at any rate there was nothing distinctive about a sweatshirt Askew was wearing under his jacket that would have aided the identification. The court also held that the factual record could not justify the search as a “reasonable continuation of [a] protective frisk,” which officers had completed before they partially unzipped Askew’s jacket.<sup>56</sup>

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50. *Id.* at 1003 (internal quotation marks omitted).

51. *Id.* at 1004.

52. *Id.* at 1005; *id.* at 1006-07 (Kavanaugh, J., dissenting).

53. 529 F.3d 1119 (D.C. Cir. 2008).

54. *Id.* at 1124-25.

55. *Id.* at 1134.

56. *Id.* at 1141-44.

Kavanaugh—who had authored the contrary panel opinion before rehearing en banc was granted<sup>57</sup>—dissented. He opined that the unzipping “was an objectively reasonable protective step to ensure officer safety,” crediting officer testimony that was not relied upon by the majority that Askew was “uncooperative” during the initial frisk.<sup>58</sup> Kavanaugh wrote that he would also hold that the unzipping was a reasonable “identification procedure,” not an unconstitutional search under the Fourth Amendment.<sup>59</sup>

In *United States v. Cardoza* (2013),<sup>60</sup> Kavanaugh held that a police officer’s affidavit in support of a search warrant sufficiently established probable cause for the search, despite including 4 false statements made with reckless disregard of the truth. Among other things, the officer had knowingly or recklessly made false statements in his affidavit that defendant Mr. Cardoza “had told the officer that he had a large sum of cash because he ‘took bets on baseball games’; and that, in the officer’s opinion, Cardoza was likely carrying a ‘ledger and currency reserve’ in order to ‘take, track, payout and collect on wagers.’”<sup>61</sup> The District Court had concluded that after excising the 4 false statements, the material that remained in the warrant affidavit did not establish probable cause.<sup>62</sup> The D.C. Circuit reversed, with Judge Kavanaugh reasoning that even if the statements were made in reckless disregard for the truth, the remaining material on the search warrant application was sufficient.<sup>63</sup> The ruling does nothing to deter law enforcement officers from inserting false statements when seeking a search warrant.

### **Kavanaugh has used language relied upon to perpetrate racial profiling.**

In the criminal justice system, racial code words<sup>64</sup> have been used to support racial profiling and skew case outcomes. Unfortunately, like many jurists, Kavanaugh has at times used racially coded language in criminal cases. In *United States v. Washington* (2009), Kavanaugh upheld a police search of a vehicle during a traffic stop based on “a number of factors [that] would have led reasonable officers to fear for their safety.”<sup>65</sup> Among those

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57. *United States v. Askew*, 482 F.3d 532 (D.C. Cir.), *rev’d en banc*, *Askew*, 736 F.3d 999.

58. *See Askew*, 736 F.3d. at 1153, 1151 (Kavanaugh, J., dissenting).

59. *See id.* at 1157.

60. 713 F.3d 656 (D.C. Cir. 2013).

61. *Id.* at 658-69.

62. *Id.* at 659.

63. *Id.* at 659-61.

64. *See generally*, IAN HANEY-LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (Oct. 19, 2013), reproduced at <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fileID=7213>.

65. *United States v. Washington*, 559 F.3d 573, 576-77 (D.C. Cir. 2009).

factors, Kavanaugh cited that the driver was stopped “in a neighborhood in Southeast Washington” D.C. that Kavanaugh described as “crime-plagued,” “high-crime,” and “known for narcotics, trafficking, shootings, and homicides.”<sup>66</sup>

As the Ninth Circuit has cautioned, judges should be wary of descriptions like “high-crime” as “such a description, unless properly limited and factually based, can easily serve as a proxy for race and ethnicity.”<sup>67</sup> Judge Kavanaugh’s opinion in *Washington* did not cite crime statistics or even identify the specific area. He twice referred to it as “a neighborhood in Southeast Washington,” a description that is well known to locals as racially coded language. It is a large geographic area, and there are in fact predominantly white parts, but the term is generally used to refer to the predominantly black and working-class sections of the city. Kavanaugh used similar coded language in another case, when it was not at all relevant to his analysis. In *Wesby v. District of Columbia* (2016), involving a civil lawsuit brought by individuals alleging they were falsely arrested at a house party, he gratuitously noted that the party took place “east of the Anacostia River” even though he cited the specific cross streets for the residence.<sup>68</sup> “East of the River” is another shorthand for the historically and predominantly black area of D.C.; as the former mayor has observed, many speakers use the term in the sense of “other side of the tracks.”<sup>69</sup>

While these are just 2 examples, and Judge Kavanaugh is hardly alone in such word choice, it is imperative that the public scrutinize the language and rationales that are used by our courts to justify police activity. Case law allowing officers to consider a person’s presence in a so-called “high-crime area” as a factor in deciding whether to stop or search someone has created a system in which a person’s zip code can be the difference between a stop that is reasonable and one that is not. Such decisions also help facilitate a system in which people of color are over-policed and disproportionately brutalized by law enforcement.

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66. *See id.* at 574-77.

67. *See* Reshaad Shirazi, *It’s High Time to Dump the High Crime Area Factor*, 21 Berkeley J. Crim. L. 76, 102 (2016), available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1108&context=bjcl> (citing *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (en banc)).

68. 816 F.3d 96, 103 (D.C. Cir. 2016) (Mem) (Kavanaugh, J., dissenting from denial of rehearing en banc), *panel opinion rev’d and remanded sub nom* *Dist. of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

69. *See* Chris Myers Asch & Derek Musgrove, *Opinion: The Origins Of ‘East Of The River’*, WAMU (April 3, 2018), <https://wamu.org/story/18/04/03/opinion-origins-east-river/>.

## **Kavanaugh would likely rule in ways that undermine inclusivity in our democracy and perpetuate a system that works only for the wealthy few.**

*Our democracy is not working equally for all of us. Policies skew toward wealthy donors who are disproportionately white, while voters of color are deprived of an equal say through restrictions on the fundamental freedom to vote. With major voting rights and money-in-politics cases sure to come before the Supreme Court in the near future, we need a Justice committed to broad and multiracial democratic participation. Kavanaugh’s record on these issues reveals cause for concern—from his downplaying of blatant racism in a voting rights case, to a radical view of the First Amendment that could make it impossible to close the floodgates on big money in our elections.*

## **In a case approving a state voter identification law, Kavanaugh declined to join his colleagues’ commitment to the Voting Rights Act and downplayed evidence of discriminatory intent.**

The next Justice must protect the rights of all Americans to vote. A commitment to voting rights is all the more important after recent Supreme Court decisions ending federal “preclearance” of election changes for jurisdictions with a history of discrimination under the Voting Rights Act,<sup>70</sup> approving of voter purges in Ohio,<sup>71</sup> and permitting racial gerrymandering in Texas<sup>72</sup>—decisions that unfairly exclude voters of color from our democracy. Kavanaugh’s limited voting rights record raises questions about his commitment to laws protecting the freedom to vote and his willingness to seriously grapple with the discriminatory effects of voting restrictions on communities of color and Native Americans.<sup>73</sup>

In *South Carolina v. United States* (2012),<sup>74</sup> Kavanaugh authored an opinion approving South Carolina’s voter identification (ID) law over a

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70. *Shelby County v. Holder*, 570 U.S. 529 (2013).

71. *Husted v. A. Philip Randolph Inst., et al.*, 138 S. Ct. 1833 (2018).

72. *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

73. See, e.g., Letter to the Editor: Native Women Oppose Judge Kavanaugh for U.S. Supreme Court, *supra* note 46.

74. 898 F. Supp. 2d 30 (D.D.C. 2012) (three-judge panel).

challenge under Section 5 of the Voting Rights Act (VRA). Section 5, before it was gutted by the Supreme Court in 2013, required certain state and local jurisdictions with a history of discriminatory voting practices to obtain federal approval before enacting changes to voting laws. Approximately 130,000 South Carolina voters—who were disproportionately African-American—did not have the required ID.<sup>75</sup> Writing for a three-judge court, Kavanaugh rejected the Department of Justice’s (DOJ) argument that the law would have the effect of discriminating on account of race in violation of the VRA. His decision placed significant weight on a provision allowing individuals who faced a “reasonable impediment” to obtaining an ID to vote by provisional ballot if they signed an affidavit stating their reason for not obtaining identification. He also relied heavily on assurances from state officials that election authorities would interpret this provision broadly.<sup>76</sup> Kavanaugh did not address DOJ’s concern that due to the reasonable impediment provision’s lack of formal guidance, it could function “differently from county to county, and possibly from polling place to polling place[,] and thus risks exacerbating rather than mitigating the retrogressive effect of the new requirements on minority voters.”<sup>77</sup>

The other 2 judges on the *South Carolina* panel both wrote concurrences. In the first, District Judge Colleen Kollar-Kotelly opined that any future effort by the state to narrow its interpretation of “reasonable impediment” must itself be pre-cleared under Section 5 of the VRA because “such narrowing may have the real effect of disenfranchising a group that is likely to be disproportionately comprised of minority voters.”<sup>78</sup> District Judge John Bates’s concurrence—which Kollar-Kotelly joined—emphasized that Section 5 had played a “vital function” in shaping the law, which evidenced Section 5’s “continuing utility . . . in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws.”<sup>79</sup> Judge Kavanaugh’s omission of these crucial points from the majority opinion suggests he did not share his colleagues’ commitment to the Voting Rights Act.

Kavanaugh’s opinion also downplayed evidence of discriminatory purpose—specifically, an openly racist email exchange between a constituent

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75. *See id.* at 53 (Kollar-Kotelly, J., concurring) & *id.* (Bates, J., concurring).

76. *See id.* at 35-41. The law directed counties to count such provisional ballots unless they had “grounds to believe the affidavit is false.” *Id.* at 34 (citation omitted).

77. *See* Case No. 12-CV-00203, Dkt. No. 50-6 (filed 4/12/12) (Attorney General’s Objection Letter from Thomas E. Perez, Ass’t Attorney General, Civil Rights Division, Dep’t of Justice, to C. Havird Jones, Jr., Ass’t Deputy Attorney General, South Carolina Office of the Attorney General (Dec. 23, 2011)), reproduced at [justice.gov/crt/voting-determination-letter-65](http://justice.gov/crt/voting-determination-letter-65).

78. *Id.* at 53 (Kollar-Kotelly, J., concurring).

79. *Id.* at 53-54 (Bates, J., concurring).

and a state legislator. The constituent wrote that if black voters were paid for getting IDs, “it would be like a swarm of bees going after a watermelon,” to which the legislator responded, “Amen” and “thank you for your support.”<sup>80</sup> Although Kavanaugh wrote that the constituent’s email demonstrates that racism persists in America, his opinion omitted the legislator’s racist response and characterized his behavior as mere “failure to immediately denounce” the constituent’s views.<sup>81</sup>

**Kavanaugh is hostile to attempts to rein in the influence of big money in politics. His jurisprudence makes him a reliable ally of the disproportionately wealthy, white donor class.**

Kavanaugh embraces doctrines that have pushed open the floodgates to money in politics—that money is speech, that corporations are people, and that Congress cannot restrict spending to prevent the wealthy few from drowning out the voices of the many. His record strongly suggests he will be a prime mover in the Supreme Court’s effort to invalidate reasonable limits on the influence of money in our elections.<sup>82</sup>

This jurisprudence has significant racial equity consequences. The Court’s decisions have resulted in a political system in which elite donors have a greater say than the rest of us. Because of our country’s long history of excluding people of color from our democracy and our economy, this donor class is not only much wealthier than Americans as a whole, but also much whiter, and less likely to care about matters of pressing concern to communities of color.<sup>83</sup> Under the current system, candidates of color—who

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80. 898 F. Supp. 2d at 45; *see also* Ryan J. Reilly, *South Carolina Lawmaker Said ‘Amen’ To Email Comparing Blacks to ‘Bees Going After A Watermelon’*, TALKING POINTS MEMO, (Aug. 29, 2012), <https://talkingpointsmemo.com/muckraker/south-carolina-lawmaker-said-amen-to-email-comparing-blacks-to-bees-going-after-a-watermelon>.

81. 898 F. Supp. 2d at 45.

82. For a comprehensive overview of Kavanaugh’s money-in-politics record, *see* Demos & Campaign Legal Center, *Kavanaugh Has Unsettling Record on Democracy*, Demos.org (July 13, 2018), <https://www.demos.org/sites/default/files/publications/CLC%20Demos%20Kavanaugh%20Brief%207-12-18%209pm.pdf>. For an overview of the Roberts Court’s troubling approach to money in politics, *see* Adam R. Lioz, *Breaking the Vicious Cycle: Rescuing Our Democracy and Our Economy by Transforming the Supreme Court’s Flawed Approach to Money in Politics*, Demos (Dec. 15, 2015), [https://www.demos.org/sites/default/files/publications/breaking\\_the\\_cycle%20\(2\).pdf](https://www.demos.org/sites/default/files/publications/breaking_the_cycle%20(2).pdf).

83. *See, e.g.*, Testimony of Heather C. McGhee, President of Demos Before the Committee on the Judiciary of the United States Senate Regarding the Nomination of Judge Neil Gorsuch to Become Associate Justice of the United States Supreme Court, March 23, 2017, *available at* <https://www.demos.org/sites/default/files/publications/HCM%20Written%20SJC%20Testimony%203%2021%2017.pdf>; Rahna Epting, *Race, Presidential Politics, and the Challenge of Creating a Democracy for All of Us*, HuffPost (Aug. 7, 2015), [https://www.huffingtonpost.com/rahna-epting/race-presidential-politic\\_b\\_7956634.html](https://www.huffingtonpost.com/rahna-epting/race-presidential-politic_b_7956634.html).

are less likely to have access to networks of wealthy donors—are less likely to run for office in the first place, and raise less money when they do.<sup>84</sup> Kavanaugh’s record signals he would do nothing to break this vicious cycle; to the contrary, he may vote to weaken the few campaign finance protections the Roberts Court has left intact.<sup>85</sup> For instance, he has implied a willingness to revisit the constitutionality of limits on contributions to political parties;<sup>86</sup> the fall of such limits threatens to make political parties even less responsive than they already are to communities of color and more responsive to ultra-rich donors. His record also raises concerns that he would be sympathetic to challenges to disclosure requirements that help us hold political candidates and donors accountable.<sup>87</sup>

Kavanaugh’s money-in-politics record demonstrates judicial overreach and a willingness to accept a fiction about how our elections work. The fiction is that spending by entities that are officially “independent” of campaigns (such as “Super PACs”) can *never* give rise to political corruption, and thus, cannot be limited—even though such spending is often independent in name only.<sup>88</sup> This analysis was at the heart of the Supreme Court’s historically unpopular *Citizens United v. Federal Election Commission (FEC)* decision in 2010, which struck down a rule banning corporations from making so-called “independent” expenditures directly from their corporate treasuries.<sup>89</sup>

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84. See *id.*; Adam R. Lioz, *Stacked Deck: How the Racial Bias in our Political System Undermines our Democracy and our Economy*, Demos (July 23, 2015), <https://www.demos.org/publication/stacked-deck-how-racial-bias-our-big-money-political-system-undermines-our-democracy-a-0>.

85. See generally Demos & Campaign Legal Center, *Kavanaugh Has Unsettling Record on Democracy*, *supra* note 82. In addition to concerns of his being sympathetic to challenges to party soft money limits and disclosure requirements, Kavanaugh’s narrow interpretation of the statute upheld in *Bluman v. FEC*—a provision banning campaign contributions and expenditures from foreign nationals—raises concerns that Kavanaugh would embrace legal interpretations that open the floodgates to even more spending on elections by Russian operatives and other hostile governments or regimes. See *Bluman v. Federal Election Comm’n*, 800 F. Supp. 2d 281, 287 (D.C. Cir. 2011), *summarily aff’d*, 132 S.Ct. 1087 (2012); Ian Vandewalker, *Kavanaugh Could Narrow Ban on Foreign Money in Elections*, Brennan Center for Justice (July 10, 2018), <https://www.brennancenter.org/blog/kavanaugh-could-narrow-ban-foreign-money-elections>; Rick Hasen, *On Kavanaugh and Campaign Finance (and Allowing Foreign Interference in Our Elections): Methinks the Bopp Doth Protest Too Much*, Election Law Blog (July 3, 2018, 5:09pm), [electionlawblog.org/?p=99897](http://electionlawblog.org/?p=99897).

86. Judge Brett Kavanaugh—The Court: Power, policy, and self-government, YOUTUBE 45:29 to 47:17 (Mar. 31, 2016), <https://www.youtube.com/watch?v=GcR0OyHiK8>.

87. *Independence Institute v. Federal Election Comm’n*, 816 F.3d 113 (D.C. Cir. 2016) (going to great lengths to keep a disclosure challenge alive though the Court had rejected similar claims twice).

88. See, e.g., Brent Ferguson, *Candidates & Super PACs: The New Model in 2016*, Brennan Center for Justice (June 12, 2015), <https://www.brennancenter.org/publication/candidates-super-pacs-new-model-2016>.

89. See *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 357 (2010) (“we now

A year before the Court’s pivotal decision in *Citizens United*, Kavanaugh authored *EMILY’s List v. FEC*,<sup>90</sup> which struck down rules to address an influx of outside spending by not-for-profit corporations in the 2004 elections. The opinion could and should have been decided on administrative law grounds (as Judge Brown noted in her concurrence),<sup>91</sup> but Kavanaugh went out of his way to make new constitutional law. The challengers themselves had not asked for such a sweeping ruling. Kavanaugh reasoned that it was “implausible” that contributions to outside organizations—as opposed to groups making contributions directly to candidates—could ever be corrupting.<sup>92</sup> His overreach in *EMILY’s List* helped lay the groundwork for the reasoning adopted by the Supreme Court in *Citizens United*. It also made Kavanaugh’s subsequent vote a *fait accompli* in the circuit court’s en banc decision in *SpeechNow.org v. FEC* (2010),<sup>93</sup> which opened the floodgates to unlimited contributions to Super PACs and other groups that engage only in independent spending.

Between Kavanaugh’s *EMILY’s List* opinion blessing so-called “independent” spending in the 2009-2010 election cycle and the 2015-2016 cycle, independent spending increased by nearly 18 times.<sup>94</sup> The vast majority of Super PAC spending can be traced to donors giving more than \$10,000<sup>95</sup>—well beyond the means of the vast majority of American households, including householders of color.<sup>96</sup>

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conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”); Cristian Farias, *Americans Agree on One Thing: Citizens United Is Terrible*, HuffPost (Sept. 29, 2015), [https://www.huffingtonpost.com/entry/citizens-united-john-roberts\\_us\\_560acd0ce4b0af3706de129d](https://www.huffingtonpost.com/entry/citizens-united-john-roberts_us_560acd0ce4b0af3706de129d).

90. 581 F.3d 1 (D.C. Cir. 2009).

91. *Id.* at 30-31 (Brown, J., concurring in part) (“Because this case can be decided on statutory grounds, we need not reach the constitutional question, and so should not reach the constitutional question. Our precedent is not wishy-washy[.]”).

92. *See id.* at 11 (citing *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 292–93 (4th Cir.2008)).

93. 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, *Keating v. Federal Election Comm’n*, 131 S. Ct. 553 (2010).

94. *See Total Outside Spending by Election Cycle, Excluding Party Committees*, OpenSecrets.org, [https://www.opensecrets.org/outsidespending/cycle\\_tots.php](https://www.opensecrets.org/outsidespending/cycle_tots.php) (last accessed Aug. 23, 2018). In the 2010 election cycle, there were \$32,731,286 in reported independent expenditures; by 2016, that number leapt to \$586,028,514. *Id.* Thus far in the 2018 election cycle, there have been \$257,744,577 in reported independent expenditures. *Id.*

95. *See* Blair Bowie & Adam R. Lioz, *Billion Dollar Democracy: the Unprecedented Role of Money in the 2012 Elections*, Demos & U.S. PIRG, 1 & 8, fig. 9 (Jan. 17, 2013), <https://www.demos.org/sites/default/files/publications/billion.pdf> (In 2012, “[m]ore than 93% of the money Super PACs raised came in contributions of at least \$10,000—from just 3,318 donors, or the equivalent of 0.0011% of the U.S. population.”)

96. *See, e.g.*, Amy Traub, et al., *The Racial Wealth Gap: Why Policy Matters*, Demos (June 21, 2016), <https://www.demos.org/publication/racial-wealth-gap-why-policy-matters>.

## Kavanaugh would likely hinder access to justice for low-income people and people of color.

*The courthouse doors should be open to everyone. But procedural barriers such as restrictions on class actions and arbitration clauses in contracts can leave injured parties without legal recourse.*

*Kavanaugh has advocated for stricter rules about who can bring and sustain a lawsuit, repeatedly siding against everyday Americans and in favor of the party with more power. These kinds of restrictions on access to justice disproportionately hurt low-income people and people of color.*

Judges frequently have to rule on procedural questions that play a critical role in determining whether aggrieved persons have meaningful access to the courts. The availability of class action suits, whether a plaintiff has standing and a claim that is “ripe” or must be postponed, when judges can dismiss cases rather than allow them to go to trial, whether an arbitration clause will prevent a plaintiff from suing at all—these are critical questions that determine whether injured parties can use our justice system to seek redress. Unduly restrictive standards disproportionately hurt low-income people and people of color, who depend on the courts to protect them from exploitation where the market and democratic process do not.

Judge Kavanaugh’s record includes a notable example of hostility to class actions and an aggressive application of the ripeness doctrine to attempt to deny access to the courts. In the 2011 case *Cohen v. United States* (2011),<sup>97</sup> the IRS had created a mechanism to refund excise taxes on telephone calls that it collected illegally from millions of Americans. A group of taxpayers brought a class-action lawsuit alleging the refund mechanism was inadequate and unlawful. The en banc court allowed the lawsuit to proceed. In dissent, Judge Kavanaugh went on what one scholar has described as “a minor diatribe against class actions,”<sup>98</sup> disparaging the plaintiffs for allegedly seeking a “class-wide jackpot” and seeming to dismiss the very legitimacy of class actions.<sup>99</sup> Kavanaugh would have required each individual taxpayer to bring

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97. 650 F.3d 717 (D.C. Cir. 2011).

98. Amanda Bronstad, *Kavanaugh’s Record on Class Actions Thin, but Leaves Clues He’d Restrain Them*, National Law Journal (July 16, 2018), available at <https://www.law.com/nationallawjournal/2018/07/16/kavanaughs-record-on-class-actions-thin-but-leaves-clues-hed-restrain-them/?slreturn=20180713140832>.

99. *Cohen*, 650 F.3d at 757 (Kavanaugh, J., dissenting).

their own action against the IRS for a refund—highly impractical, since any one individual might not have enough at stake to hire a tax attorney to bring such an action, let alone the resources to do so. He also claimed the suit was not ripe because the plaintiffs should have first filed for refunds with the IRS. The majority opinion, authored by fellow George W. Bush appointee Judge Janice Rogers Brown, faulted Kavanaugh for portraying the plaintiffs “as taxpayers looking for a handout” and called his defense of the IRS under the circumstances “ironic.”<sup>100</sup> As Judge Brown explained, “it would be cold comfort to direct [taxpayers] to proceed in a series of individual suits, submitting themselves one by one to the very refund procedures that they claim to be unlawful.”<sup>101</sup> Judge Brown also wrote that accepting Kavanaugh’s ripeness argument would be judicial overreach.<sup>102</sup>

Another area that is important for access to the courts involves the standards permitting federal courts to dismiss lawsuits without allowing any factual investigation, based on the court’s conclusion that there is no possible set of facts that would allow the plaintiff to prevail on the claim asserted in the plaintiff’s complaint—known as a Rule 12(b)(6) dismissal. Such dismissals are a harsh step, and one way to ameliorate their effect is to allow plaintiffs to amend their complaints if the court finds them inadequate as originally written. Judge Kavanaugh’s dissent in *Rollins v. Wackenhut Services, Inc.* (2012)<sup>103</sup> indicates that he would be unusually strict in denying this opportunity.

In *Rollins*, the D.C. Circuit dismissed under Federal Rule of Civil Procedure 12(b)(6) the plaintiff’s wrongful death claim against her son’s employer and a pharmaceutical company. Kavanaugh did not merely agree with the majority, but wrote a separate concurrence suggesting that the default rule for dismissals under Rule 12(b)(6) should be dismissal with prejudice: in other words, dismissal that would prevent the plaintiff from re-filing the lawsuit to add additional facts or claims.<sup>104</sup>

Pro se plaintiffs who file lawsuits without the help of a lawyer and are unfamiliar with the nuances of the law, and plaintiffs bringing claims under newer legal theories, are more vulnerable to having their claims dismissed under 12(b)(6).<sup>105</sup> Kavanaugh’s restrictive interpretation of the rule would make it even harder for these plaintiffs to assert their rights. A

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100. *Id.* at 734-35.

101. *Id.* at 733.

102. *Id.* at 736.

103. 703 F.3d 122 (D.C. Cir. 2012).

104. *See id.* at 132 (Kavanaugh, J., concurring).

105. CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, (3d ed. 2018 update).

disproportionate share of these obstacles would be shouldered by low-income people and people of color.<sup>106</sup>

Kavanaugh has also favored reducing government oversight of employers, and his record suggests he would read employment contracts to make it harder for employees to challenge unsafe work environments. *SeaWorld of Florida, LLC v. Perez* (2014)<sup>107</sup> involved the death of SeaWorld trainer Dawn Brancheau, who was attacked by a killer whale during a performance and drowned as a result of her injuries. The D.C. Circuit held, over Kavanaugh's dissent, that SeaWorld was liable for Brancheau's death because the company violated its duty under the Occupational Safety and Health Act to keep its employees safe from "recognized hazards."<sup>108</sup> SeaWorld was aware of the dangers its trainers faced, but did not take adequate steps to address them. Kavanaugh's dissent framed the case differently: Brancheau and the other trainers knew of the various dangers they faced, but did their jobs anyway.<sup>109</sup> Kavanaugh's description of safety regulations as "paternalistic[]" attempts to protect individuals engaged in dangerous activities from themselves (as opposed to from hazardous conditions) is troubling.<sup>110</sup> Many people have jobs that involve health or safety risks; that does not mean that they are not entitled to reasonable safety precautions at the workplace.

Kavanaugh's logic also ignores the power imbalance between employees and employers, and calls to mind the Supreme Court's recent decision in *Epic Systems Corp. v. Lewis* (2018).<sup>111</sup> There, the Court approved the use of arbitration clauses in employment contracts, which can prohibit workers from suing in federal court over wage theft, sexual harassment, and other legal violations. The Court's 5-4 decision rested on the fiction that employees and employers have equal bargaining power and that the employee agrees to all the specific terms of an employment contract. The reality is that job

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106. As Demos has noted, "struggling Americans, who are disproportionately people of color, often do not have legal representation when their homes, livelihoods, and health are at risk. Demos, *Everyone's America: State Policies for an Equal Say in Our Democracy and an Equal Say in Our Economy*, 76-77 (July 24, 2018), available at [https://www.demos.org/sites/default/files/publications/EveryonesAmerica\\_July23.pdf](https://www.demos.org/sites/default/files/publications/EveryonesAmerica_July23.pdf). Research also shows that people of color are more likely to lack legal representation in employment discrimination cases—an area of law where even plaintiffs alleging discrimination who have legal representation "face serious hurdles to success." Amy Myrick, et al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 *Legis. & Pub. Pol'y*, 705, 711 & 714 (2012), available at <http://www.nyu.edu/lpp.org/wp-content/uploads/2013/01/myricknelsonnielsen-race-and-representation.pdf>.

107. 748 F.3d 1202 (D.C. Cir. 2014).

108. *Id.* at 1205.

109. *Id.* at 1216.

110. *Id.* at 1217.

111. 138 S. Ct. 1612 (2018).

applicants do not balk at oppressive terms in standard corporate contracts because they know that if they did, they would not be hired; and those who are sent new terms as a condition of continued employment do not reject them.<sup>112</sup> Kavanaugh's inability to recognize the coercive power that companies hold over their employees foretells that he would be a vote against fair access to the courts for working-class people, who are disproportionately people of color.

Were Kavanaugh's opinions on these issues to become the law of the land, existing inequities in our legal system could get much worse.

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112. Terri Gerstein, *Brett Kavanaugh Has His Own "Frozen Trucker" Case*, SLATE (Aug. 7, 2018), <https://slate.com/news-and-politics/2018/08/brett-kavanaugh-has-his-own-frozen-trucker-case-it-involves-a-killer-whale.html>.

## **Kavanaugh would likely prioritize private profits over the communities of color hurt most by environmental injustice and climate change.**

*Policies skewed in favor of big polluters and corporate interests have long put communities of color at heightened risk—from increased rates of illness, to displacement from climate disasters, to pipelines laid through Native lands. We need a Supreme Court Justice who will uphold environmental protections, and who will consider the impact of pollution and climate change on communities of color. Kavanaugh, however, has sided with polluters challenging environmental rules, while giving little to no regard for the communities that suffer the brunt of environmental injustice and climate change.*

In the United States, the costs of pollution and climate change is not borne equally by all of us. Black, Latinx, and Native American people bear “a disproportionate share of environmental and health risks,”<sup>113</sup> risks that regulatory agencies like the Environmental Protection Agency (EPA) exist to mitigate. Kavanaugh’s approach in cases involving environmental justice indicates that he is more concerned with the burdens and costs on industry players than on the human beings and communities most impacted by climate change.<sup>114</sup>

When tasked with reviewing the decisionmaking of federal administrative agencies, Judge Kavanaugh has often centered his analyses around how the decision at issue burdens the industry being regulated, rather than the communities affected. Kavanaugh has admonished the EPA for not considering the impact of its regulations on companies. In *White Stallion Energy Center, LLC v. EPA* (2014),<sup>115</sup> the D.C. Circuit upheld EPA air pollutant emission standards. Kavanaugh dissented, opining that the at-issue air quality standards were inappropriate because they did not consider how much the regulations

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113. Robert D. Bullard, *Race and Environmental Justice in the United States*, 18 YALE J. INT’L L. 319 (1993), available at <https://digitalcommons.law.yale.edu/yjil/vol18/iss1/12>.

114. For a fuller synopsis of Kavanaugh’s record on environmental justice issues, see Stop Brett Kavanaugh Fact Sheet: Environmental Justice, People for the American Way, [www.pfaw.org/campaign/protecting-the-supreme-court/tool-kit-for-activists-stop-brett-kavanaugh/stop-brett-kavanaugh-fact-sheet-environmental-justice/](http://www.pfaw.org/campaign/protecting-the-supreme-court/tool-kit-for-activists-stop-brett-kavanaugh/stop-brett-kavanaugh-fact-sheet-environmental-justice/) (last accessed Aug. 17, 2018).

115. 748 F.3d 1222 (D.C. Cir. 2014) (Kavanaugh, J., dissenting), *rev’d and remanded sub nom.* Michigan v. Environmental Protection Agency, 136 S. Ct. 2463 (2015).

would cost to implement—including costs to big polluters.<sup>116</sup> He bemoaned that “the financial burden of complying with [the standards] will likely knock a bunch of coal-fired electric utilities out of business and require enormous expenditure by other coal and oil-fired electric utilities.”<sup>117</sup> In a 5-4 decision written by Justice Scalia, the Supreme Court eventually adopted this pro-polluter analysis, over a dissent by Justice Kagan joined by Justices Ginsburg, Breyer, and Sotomayor.<sup>118</sup>

In *Mingo Logan Coal Co. v. EPA*,<sup>119</sup> Kavanaugh dissented from a decision upholding the EPA’s decision to withdraw a coal mine operator’s permit because of the coal extraction’s “unacceptable adverse effect[s]” to the environment.<sup>120</sup> The coal company argued that EPA unlawfully failed to consider the costs it had incurred in reliance on the permit. The majority held that the company had “doubly” waived its right to make this argument at the appellate level, because it had not presented the argument to the EPA or the district court.<sup>121</sup> In his dissent, Kavanaugh sided with the coal company, admonishing the EPA for failing to consider the company’s costs.<sup>122</sup> Remarkably, to Kavanaugh, considering the coal company’s costs equated to a consideration of the “human costs” of EPA’s decision:

EPA ignored the costs to *humans* caused by the revocation of [the] permit, such as the harm to [the company’s] owners and shareholders and to the coal miners who had been or would be employed at the mine. By ignoring costs, EPA in essence discounted the costs to humans all the way to zero. That’s how EPA was able to conclude that the harm to some salamanders, fish, and birds from the mining operation outweighed the loss of jobs for hundreds of coal miners, the financial harm to [the company’s] owners and shareholders, and many other costs from revoking the permit.<sup>123</sup>

Kavanaugh’s priorities in valuing the impact of regulation in environmental justice cases were on display again in *Multicultural Media, Telecom & Internet Council v. Federal Communications Commission (FCC)*.<sup>124</sup>

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116. *Id.* at 1258 (Kavanaugh, J., dissenting).

117. *Id.* at 1263-64.

118. *Michigan v. EPA*, 136 S. Ct. 2463 (2015).

119. 829 F.3d 710 (D.C. Cir. 2016).

120. *Id.* at 729.

121. *Id.* at 719.

122. *Id.* at 732-738 (Kavanaugh, J., dissenting).

123. *Id.* at 733-34.

124. 873 F.3d 932 (D.C. Cir. 2017).

The case was brought by advocacy groups challenging the FCC’s long-time failure to promulgate rules requiring emergency alerts to be broadcast in languages other than English—alerts that “provide[] immediate life-saving information to the public when emergencies like hurricanes, earthquakes, tornadoes, or terrorist attacks occur.”<sup>125</sup> Writing for the majority, Kavanaugh ruled in favor of the FCC, which had asserted for a decade already that it needed to gather more information before promulgating such a rule.<sup>126</sup>

Kavanaugh was persuaded by the FCC’s arguments that it needed still more time to gather information, citing burdens that multilingual alert requirements would place on broadcasters. He noted that:

[P]etitioners do not want alerts just in English and Spanish. They want alerts in whatever languages might be commonly spoken in particular local communities, such as (to name just a few) Portuguese, Chinese, Vietnamese, Japanese, or Arabic. Given the variety of languages in addition to English that are spoken throughout the United States, that would be a difficult, complicated, and costly task for many broadcasters.<sup>127</sup>

Totally absent from Kavanaugh’s opinion were the human costs of the FCC’s failure to act. As Circuit Judge Patricia Millett noted in her opinion dissenting from the majority ruling that FCC’s “foot-dragging” was not arbitrary and capricious, “Hurricane Katrina laid bare the tragic consequences of that gap when peoples’ lives were lost because they could not understand the warnings.”<sup>128</sup> She continued:

When Hurricane Katrina and its flooding hit, KGLA(AM)—the sole Spanish language station in the New Orleans area—went off the air, leaving the city’s tens of thousands of primarily Spanish-speaking residents without ready access to vital information on the hurricane and its aftermath, or to official guidance concerning safety measures and places to get help. The consequences of that communications shortfall proved deadly. For example, KGLA reported that an entire Latino family, unaware of gas leaks in the area, was killed after lighting a match in their home. In addition, the National Council of La Raza reported that, when the storm destroyed an apartment building in Gulfport, Mississippi, 70 to 80 Jamaican, Peruvian, and Brazilian residents went missing and were presumed dead because they had not received the evacuation warnings in Spanish or Portuguese.<sup>129</sup>

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125. *Id.* at 935; *id.* at 940 (Millett, J., concurring in part and dissenting in part).

126. *Id.* at 936.

127. *Id.* at 938.

128. *Id.* at 940 (Millett, J., concurring in part and dissenting in part).

129. *Id.* at 945.

Judge Millett found that “[w]ith lives on the line, a decade of study would seem to have been ample time to decide *something*.”<sup>130</sup> Kavanaugh—so willing to consider the “human costs” of lost profits in his dissents in *White Stallion* and *Mingo Logan*—did not even mention, let alone consider, the tragic human costs of the agency’s inaction, paid not out of the wallets of company owners or shareholders, but with the lives of non-English speakers.

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130. *Id.*

## **Kavanaugh would likely limit health care access and threaten hard-won rights for people of color in the areas of reproductive rights, disability justice, and LGBTQ equality.**

*Racial equity requires that all people have agency to make their own choices about their bodies, and access to non-discriminatory, affordable health care. It is vital that an incoming Supreme Court Justice appreciate the centrality of these interests to basic human liberty and dignity. Kavanaugh appears likely to vote to limit reproductive rights and take away health care—developments that would destabilize the lives of women of color, people of color with disabilities, and trans and queer people of color in particular.*

### **Judge Kavanaugh has voted to burden reproductive rights.**

Both in Congress and at the state level, legislatures have turned their attention to limiting abortion access and defunding reproductive health clinics, a primary or sole source of health care for many women of color.<sup>131</sup> Meanwhile, President Trump campaigned on a promise to “consign *Roe v. Wade* to the ash heap of history where it belongs,” and has made no secret of his intention to put pro-life Justices on the Court.<sup>132</sup> It’s clear who would be hurt the most. As Felicia Brown-Williams, Mississippi state director for Planned Parenthood Southeast, has stated, “Women with financial means will always have access to abortion. . . . They’ll be able to travel to another place to receive services.”<sup>133</sup> This is simply not so for many low-income people of color.

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131. Ayana Byrd, *Why Overturning Roe v. Wade Is an Assault on More Than Abortion Rights*, Colorlines, July 9, 2018, <https://www.colorlines.com/articles/read-why-overturning-roe-v-wade-assault-more-abortion-rights>; Miriam Berg, *Guess Which 4 Groups Would be Disproportionately Hurt by “Defunding” Planned Parenthood*, Planned Parenthood Action (Feb. 10, 2017), <https://www.plannedparenthoodaction.org/blog/guess-which-3-groups-defunding-planned-parenthood-would-hurt-most>.

132. Seema Mehta, *Roe vs. Wade Will be Overturned if Donald Trump Wins*, *Mike Pence Says*, LOS ANGELES TIMES, July 28, 2016, <http://www.latimes.com/nation/politics/trailguide/la-na-democratic-convention-2016-live-pence-says-roe-v-wade-will-be-1469737388-htmstory.html>; Aaron Blake, *Trump Makes Clear Roe v. Wade is on the Chopping Block*, WASHINGTON POST, July 1 2018, [https://www.washingtonpost.com/news/the-fix/wp/2018/07/02/trump-makes-clear-roe-v-wade-is-on-the-chopping-block/?utm\\_term=.bc0707e4aa54](https://www.washingtonpost.com/news/the-fix/wp/2018/07/02/trump-makes-clear-roe-v-wade-is-on-the-chopping-block/?utm_term=.bc0707e4aa54).

133. Bryce Covert, *Mississippi Abortion Ban Endangers Low-Income Women*, *Women of Color*, Rewire.News (Mar.21, 2018), <https://rewire.news/article/2018/03/21/mississippi->

Judge Kavanaugh recently attempted to obstruct a young woman of color from obtaining an abortion. In *Garza v. Hargan* (2017),<sup>134</sup> the full D.C. Circuit vacated an order that blocked “J.D.,” a 17-year-old immigrant in government detention, from exercising her constitutionally-protected right to have a pre-viability abortion. Kavanaugh dissented. He would have afforded the government 11 additional days to secure and release J.D. to a “sponsor” so that she would be “in a better place when deciding whether to have an abortion.”<sup>135</sup> If no sponsor for J.D. were found in 11 days, J.D. could recommence the legal proceedings over her right to choose.

Kavanaugh charged in dissent that the en banc court was creating “a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.”<sup>136</sup> Circuit Judge Patricia Millett’s concurrence put the lie to this assertion, explaining that “the mere act of entry into the United States without documentation does not mean an immigrant’s body is no longer her or his own.”<sup>137</sup> She noted that J.D. was already 15 weeks pregnant, and the government had already been trying to locate a sponsor for her for nearly 7 weeks. What the case really held, then, is that J.D., who had “satisfied every requirement of state law to obtain an abortion, need not wait additional weeks” to exercise her constitutional right.<sup>138</sup>

Kavanaugh’s suggestion that it would be preferable to put J.D. “in a better place when deciding whether to have an abortion” was an argument never advanced by the government. He provided that interest himself. By the time J.D. initiated proceedings to secure an abortion, however, she had already made her own decision, as only she was qualified to do. Kavanaugh’s suggestion implies that J.D. was making a mistake and that in a different environment, in the presence of a sponsor, she might have realized that and changed her mind. This logic privileges the government’s policy preferences about abortion above a woman’s constitutional right to control her own body.

Kavanaugh’s approach in *Garza* raises concerns about how he would vote if the Supreme Court reconsiders *Roe v. Wade*, or short of that, what position he would take on onerous parental consent laws and other tactics to restrict abortion access that hurt women of color most.<sup>139</sup> Kavanaugh has expressed

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[abortion-ban-will-absolutely-affect-low-income-women-women-color/](#).

134. 874 F.3d 735 (D.C. Cir. 2017), *vacated on mootness grounds by* *Azar v. Garza*, 138 S. Ct. 1790 (2018).

135. *Id.* at 755 (Kavanaugh, J., dissenting).

136. *Id.* at 752.

137. *Id.* at 737 (Millett, J., concurring).

138. *Id.* at 738.

139. See ACLU, *Laws Restricting Teenagers’ Access to Abortion*, ACLU.ORG, <https://www.acLU.org>.

support for former Chief Justice Rehnquist's dissent in *Roe*, which he noted argued that states have the authority to regulate abortion access because the right to an abortion, unlike various unenumerated rights the Court had deemed fundamental, is not "rooted in the nation's history and tradition."<sup>140</sup> More recently, Kavanaugh has indicated that he is aligned with Chief Justice Roberts on the law involving reproductive freedom.<sup>141</sup> For Americans concerned about losing their right to choose, this is deeply disturbing. Roberts voted with the dissent in the Supreme Court's 5-4 decision in *Whole Woman's Health v. Hellerstedt* (2016).<sup>142</sup> Justice Kennedy joined the majority to strike down a Texas law that used onerous and pretextual facility requirements to drive abortion providers out of operation. The dissent, authored by Justice Alito, downplayed the enormous consequences of the Texas statute on the right to choose. One Supreme Court commentator explained:

In suggesting that the burden on women isn't great in his own dissent, Justice Samuel Alito argues that "virtually no woman of reproductive age lives more than 150 miles from an open clinic." For this proposition he cites evidence that "82.5 [percent] of Texas women of reproductive age live within 150 miles of open clinics in Austin, Dallas, Fort Worth, Houston, and San Antonio." What that means is that 17.5 percent of those women do live more than 150 miles from an open clinic. That is almost 1 in 5 women. One in 5 women of reproductive age, in the dissent's view, is the same as "virtually no woman of reproductive age."<sup>143</sup>

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[aclu.org/other/laws-restricting-teenagers-access-abortion](https://www.aclu.org/other/laws-restricting-teenagers-access-abortion) (last accessed Aug. 24, 2018) Statement from National Asian Pacific American Women's Forum Executive Director Sung Yeon Choimorrow re: Announcement of Supreme Court Nominee Brett Kavanaugh, NAPAWF (July 9, 2018), <https://www.napawf.org/2018-07-09pr.html>.

140. BRETT M. KAVANAUGH, *FROM THE BENCH: THE CONSTITUTIONAL STATESMANSHIP OF CHIEF JUSTICE WILLIAM REHNQUIST* 15 (2017), <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.

141. See Elise Viebeck & Gabriel Pogrud, *Sen. Susan Collins says Kavanaugh sees Roe v. Wade as 'Settled Law'*, THE WASHINGTON POST, (Aug. 21, 2018), [https://www.washingtonpost.com/powerpost/sen-susan-collins-said-kavanaugh-sees-roe-v-wade-as-settled-law/2018/08/21/214ae5dc-a54c-11e8-8fac-12e98c13528d\\_story.html?utm\\_term=.9e382838ac26](https://www.washingtonpost.com/powerpost/sen-susan-collins-said-kavanaugh-sees-roe-v-wade-as-settled-law/2018/08/21/214ae5dc-a54c-11e8-8fac-12e98c13528d_story.html?utm_term=.9e382838ac26).

142. 136 S. Ct. 2292 (2016).

143. Walter Dellinger, *Supreme Court Breakfast Table, Entry 22: Feeble Opposition*, Slate.com (June 27, 2016), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2016/supreme\\_court\\_breakfast\\_table\\_for\\_june\\_2016/the\\_conservative\\_abortion\\_dissents\\_were\\_a\\_sad\\_sight.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2016/supreme_court_breakfast_table_for_june_2016/the_conservative_abortion_dissents_were_a_sad_sight.html).

Had Kavanaugh been on the Court and voted with Justice Roberts, the *Whole Woman's Health* decision would have swung the other way—depriving thousands of Texans of their right to choose.<sup>144</sup> Kavanaugh has also expressed distaste for what he has called “free-wheeling” privacy rights,<sup>145</sup> not only raising the prospect of overturning *Roe* but also potentially imperiling precedent in areas of the law with roots in the constitutional freedoms set forth in *Roe*. One example of a case building upon that foundation is *Lawrence v. Texas*, a pro-LGBTQ decision written by Justice Kennedy.<sup>146</sup>

**Judge Kavanaugh has been hostile to the Affordable Care Act, threatening access to health care for people of color with disabilities and trans and queer people of color.**

Kavanaugh has dissented in 3 cases involving the Affordable Care Act (ACA).<sup>147</sup> In *Seven-Sky v. Holder* (2011),<sup>148</sup> he characterized a central feature of the ACA, the individual mandate, as “unprecedented on the federal level in American history.”<sup>149</sup> He also remarked that in the future, “the President might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional,” citing to a concurring opinion by Justice Scalia.<sup>150</sup> Kavanaugh’s former law clerk described his “takedown” of the individual mandate in his *Seven-Sky* dissent as a “roadmap” for the dissenting conservative Justices in the Supreme Court opinion upholding the ACA.<sup>151</sup> The same clerk has remarked that Kavanaugh “is much more conservative in his approach to law than Justice Kennedy. . . There is no

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144. Amicus Curiae brief of Twelve Organizations Dedicated To The Fight For Reproductive Justice As Amici Curiae Supporting Petitioners, No. 15-274, *Whole Women's Health v. Cole*, available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/In%20Our%20Own%20Voice%20Willkie.pdf>.

145. Kavanaugh, FROM THE BENCH: THE CONSTITUTIONAL STATESMANSHIP OF CHIEF JUSTICE WILLIAM REHNQUIST, *supra* note 141 at 16.

146. See Ayana Byrd, *supra* n. 132.

147. See JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, *Review of Disability-Related Cases Involving Judge Brett Kavanaugh*, 1-3, 2018, available at <http://www.bazon.org/wp-content/uploads/2018/07/Kavanaugh-Disability-Report-2018.pdf> (discussing *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); *Sissel v. U.S. Dep't of Health and Human Servs.*, 799 F.3d 1035 (D.C. Cir. 2015); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1 (D.C. Cir. 2015)).

148. 661 F.3d 1.

149. *Id.* at 51 (Kavanaugh, J., dissenting).

150. *Id.* at 50 & n. 43 (citing *Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring)).

151. 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/>.

guesswork with Judge Kavanaugh. He is extremely predictable.”<sup>152</sup>

If the ACA were struck down, an estimated 52 million Americans who have preexisting conditions<sup>153</sup>—many of whom are people of color with disabilities—could lose their health care. Several lawsuits seeking to undermine the ACA are working their way through the courts, and one may well end up before the Supreme Court again soon.

Threats to the ACA and other programs and protections for people with disabilities would hurt people of color with disabilities in particular. As research from the National Disability Institute shows, the extra costs that having a disability creates—costs which would be even greater should the ACA be undermined or undone—can be especially burdensome for people of color, “who already have poorer outcomes in education, income and employment and who are also less likely to be fully banked and more likely to use predatory financial services.”<sup>154</sup> African American adults with disabilities are also already the most likely to be deprived of necessary care due to the burdensome cost of care, with 17% of African Americans with disabilities reporting having experienced cost as a barrier preventing them from getting care.<sup>155</sup>

Beyond his ACA opinions, Kavanaugh’s record affecting disability rights includes his long-time advocacy for school voucher programs, as well as rulings against federal regulatory agencies and against a public school student with a disability. These positions are troubling, given how indispensable federal agencies and public schools are in affording anti-discrimination protections, resources, and opportunities to people with disabilities.<sup>156</sup> He has

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152. David G. Savage, *Judges Brett Kavanaugh and Amy Coney Barrett Are Leading Candidates for Supreme Court Seat*, L.A. TIMES (June 28, 2018), available at <http://www.latimes.com/politics/la-na-pol-court-kavanaugh-barrett-20180628-story.html#>.

153. Carolyn Y. Johnson, *ACA Lawsuit Could Jeopardize 52 Million Americans’ Access to Health Care*, THE WASHINGTON POST (June 8, 2018), available at [https://www.washingtonpost.com/news/wonk/wp/2018/06/08/aca-lawsuit-could-jeopardize-52-million-americans-access-to-health-care/?utm\\_term=.f234cd3efb8a](https://www.washingtonpost.com/news/wonk/wp/2018/06/08/aca-lawsuit-could-jeopardize-52-million-americans-access-to-health-care/?utm_term=.f234cd3efb8a).

154. Nanette Goodman, et al., *Financial Inequality: Disability, Race, and Poverty in America*, National Disability Institute (Sept. 2017), available at [https://www.realeconomicimpact.org/assets/site\\_18/files/other\\_documents/empowered%20cities/disability-race-poverty-in-america.pdf](https://www.realeconomicimpact.org/assets/site_18/files/other_documents/empowered%20cities/disability-race-poverty-in-america.pdf)

155. *Id.* at 16-17.

156. *See, e.g.*, DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW *supra* n. 148 at 6-7 (examining *Hester v. District of Columbia*, 433 F. Supp. 2d 71 (D.D.C. 2006), *rev’d and remanded*, 505 F.3d 1283 (D.C. Cir. 2007), and noting that Kavanaugh was previously the co-chairman of the Federalist Society’s “School Choice Practice Group”); *id.* at 9 (discussing *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7 (D.C. Cir. 2012), *rev’d and remanded*, 134 S. Ct. 1584 (2014), and *PHH Corporation v. Consumer Finance Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *reh’g en banc granted, order vacated* (Feb. 16, 2017), *on reh’g en banc*, 881 F.3d 75 (D.C. Cir. 2018)). *See also, e.g.*, AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, *The American Association*

also ruled against the freedom of individuals with intellectual disabilities to have a say regarding their own medical treatment.<sup>157</sup>

Rollbacks on the availability of health care would be severe for trans and queer people, who are already twice as likely to be uninsured as non-LGBTQ people.<sup>158</sup> “The elimination of coverage would be dire for LGBT people and people living with HIV,” whose un-insurance rates have significantly decreased since the ACA’s passage.<sup>159</sup> Trans, queer, and gender-nonconforming people of color and Native Americans face still greater barriers to health care and some of the highest rates of poverty and discrimination in the nation.<sup>160</sup> A court ruling that guts the ACA or otherwise makes health care unavailable will be felt even more harshly by LGBTQ people of color.

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*of People with Disabilities Opposes the Nomination of Judge Brett Kavanaugh to the US Supreme Court* (Aug. 15, 2018), available at <https://www.aapd.com/press-releases/the-american-association-of-people-with-disabilities-opposes-the-nomination-of-judge-brett-kavanaugh-to-the-us-supreme-court/>; PEOPLE FOR THE AMERICAN WAY, *Stop Kavanaugh: Disability Justice*, 2018, available at <http://www.pfaw.org/campaign/protecting-the-supreme-court/tool-kit-for-activists-stop-brett-kavanaugh/stop-brett-kavanaugh-fact-sheet-disability-justice/>.

157. See, e.g., DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW *supra* n. 148 (citing, *Doe ex rel. Tarlow v. District of Columbia*, 489 F.3d 376, 382 (D.C. Cir. 2007)).

158. See, e.g., Letter to Chairman Grassley and Ranking Member Feinstein from 63 National, State and Local LGBT Groups Opposing Confirmation of Judge Brett Kavanaugh to the Supreme Court 6 (July 31, 2018), available at [https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/dc\\_20180731\\_letter-of-opposition-lgbt-kavanaugh.pdf](https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/dc_20180731_letter-of-opposition-lgbt-kavanaugh.pdf).

159. See *id.*

160. See *id.* at 6-7 & Lourdes Ashley Hunter, Ashe McGovern, and Carla Sutherland, eds., *Intersecting Injustice: Addressing LGBTQ Poverty and Economic Justice for All: A National Call to Action* 4-5 (New York: Social Justice Sexuality Project, Graduate Center, City University of New York, 2018); Center for American Progress & Movement Advancement Project, *PAYING AN UNFAIR PRICE: The Financial Penalty for LGBT People of Color in America*, Updated June 2015, available at <https://www.lgbtmap.org/file/paying-an-unfair-price-lgbt-people-of-color.pdf>.

## **Kavanaugh would likely undermine justice for immigrants and foreign nationals while deferring to a xenophobic administration.**

*With so much at stake for immigrants and refugees, we need a Supreme Court Justice who values the rights of all people, regardless of immigration status, national origin, or religion. Kavanaugh's record of siding against immigrant workers and his excessive deference to the executive branch on immigration and foreign policy issues raise red flags that he would not provide a meaningful check on abuses of presidential power. The significance of this orientation cannot be overstated at a time when the Trump administration has barred people from Muslim-majority countries from our shores, separated children from their parents at the border, and sent ICE agents into courthouses and hospital rooms.*

### **Kavanaugh has a history of voting against immigrant workers.**

Judge Kavanaugh's dissents in 2 cases involving immigrant workers leave little doubt that he would rule against immigrant and migrant workers, who are indispensable to the U.S. economy. In *Agri Processor Co., Inc. v. NLRB* (2008),<sup>161</sup> the D.C. Circuit rejected a meat processing company's claim that it could refuse to bargain with a worker union on the grounds that many of the workers were undocumented immigrants. Although federal labor law broadly defines "employees," whose right to organize and collectively bargain are protected, to include "any employee," the employer argued that these labor protections were displaced by the subsequently enacted Immigration Reform and Control Act of 1986 (IRCA), which made it illegal for companies to knowingly employ workers without documentation.<sup>162</sup> The majority reasoned that nothing in IRCA expressly overrode the earlier law, and pointed to its legislative history indicating that Congress did not intend for the employer sanctions part of the statute to be used to undermine labor law.<sup>163</sup> Judge Kavanaugh dissented. He would have ruled that undocumented workers are

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161. 514 F.3d 1 (D.C. Cir. 2008).

162. *Id.* at 3 (citing 8 U.S.C. § 1324a(a)(i)).

163. *Id.* at 4-5.

actually not “employees” entitled to labor protections.<sup>164</sup> The majority opinion criticized his dissent as illogical and not applying the proper standard for determining whether the labor law had been repealed by implication.<sup>165</sup>

Kavanaugh also dissented in *Fogo de Chao Inc. v. U.S. Department of Homeland Security* (2014).<sup>166</sup> That case overturned a U.S. Citizenship and Immigration Services (USCIS) decision to deny a “specialized knowledge” employment visa to a Brazilian gaucho chef on the grounds that cultural knowledge is categorically irrelevant to specialized knowledge. The majority held the USCIS decision was not entitled to deference, and that the categorical rule that USCIS expressed was not grounded in federal statutes. It also rejected USCIS’s conclusion that the visa applicant had not adequately demonstrated his completion of relevant job training, noting that while USCIS is entitled to some deference, it is not allowed to “close its eyes to on-point and uncontradicted record evidence without any explanation at all.”<sup>167</sup> Kavanaugh dissented and agreed with USCIS, stating that “such a ‘foreign citizenship and cultural background constitute specialized knowledge for purposes of working in an ethnic restaurant or bar’ argument would gut the specialized knowledge requirement and open a substantial loophole in the immigration laws.”<sup>168</sup> The majority criticized Kavanaugh for claiming that the case boiled down to whether “American chefs either can’t learn to cook or won’t cook Brazilian steaks”<sup>169</sup>—a characterization that ignored record evidence that the position required “seventeen distinct cooking and non-cooking skills,” that Fogo de Chao regularly hires American chefs, and that the company needed to bring on a Brazilian chef to train those American employees.<sup>170</sup>

### **Kavanaugh likely would not provide a badly-needed check on xenophobic federal immigration enforcement.**

With a presidential administration that is ratcheting up discrimination against immigrants and refugees while looking the other way on white supremacist terrorism at home,<sup>171</sup> it is critical that a Supreme Court Justice

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164. *Id.* at 14-15 (Kavanaugh, J., dissenting).

165. *Id.* at 6.

166. 769 F.3d 1127 (D.C. Cir. 2014).

167. *Id.* at 1147.

168. *Id.* at 1152 (Kavanaugh, J., dissenting).

169. *Id.* at 1153.

170. *Id.* at 1151 (majority opinion).

171. Tina Vasquez, Trump Administration Is Conflating Immigration With Terrorism at the Expense of Domestic Threats, Rewire.News (Feb. 15, 2018), <https://rewire.news/article/2018/02/15/trump-administration-conflating-immigration-terrorism-expense->

not indiscriminately stand behind the executive on matters involving immigration and national security. Here again, Kavanaugh’s record reveals cause for concern.

In *Doe v. Exxon Mobil Corp.* (2007),<sup>172</sup> Exxon had moved to dismiss a lawsuit brought by Indonesian nationals for alleged abuses committed by the company’s security force in Indonesia, including murder, torture, and sexual assault. While the motion to dismiss was pending, the district court sought input from the U.S. State Department as to whether ruling on the case would interfere with foreign policy. The State Department responded that it might, but how much would depend largely on the intrusiveness of discovery and the claims at issue. The district court allowed the common law tort claims to go forward, but noted that “the parties must ‘tread cautiously’ and conduct discovery ‘in such a manner so as to avoid intrusion into Indonesian sovereignty.’”<sup>173</sup> Exxon then sought a writ of mandamus from the D.C. Circuit compelling the lower court to dismiss the claims. The D.C. Circuit denied the petition because Exxon had not established a “clear and indisputable right” to have the claims dismissed, noting that the State Department itself had not asked for a dismissal and had not weighed in on the matter since the district court order limiting discovery.<sup>174</sup>

Kavanaugh’s lengthy dissent riffs on the importance of judicial deference to the executive branches on matters of foreign policy—notwithstanding the fact that the executive branch had not even asked for the case to be dismissed and the petitioner was Exxon Mobil, not the executive branch.<sup>175</sup> Kavanaugh would have ruled Exxon did indeed have a “clear and indisputable” right to have the case dismissed. He would have spared Exxon from having to stand trial in the United States in connection with serious allegations of human rights abuses.

Kavanaugh’s dissent in *Exxon Mobil* echoes notes from law review articles he has authored arguing against interfering with or questioning the actions of the executive branch.<sup>176</sup> In 2009, Kavanaugh argued in the *Minnesota Law Review* that criminal investigations of a sitting president ill-serve the public

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[domestic-threats/](https://www.demos.org/publication/social-exclusion-black-people-have-everything-lose-under-trump/); Algernon Austin, *Social Exclusion: Black People Have Everything to Lose Under Trump*, Demos 6-7 (June 15, 2018) available at [https://www.demos.org/publication/social-exclusion-black-people-have-everything-lose-under-trump](https://www.demos.org/publication/social-exclusion-black-people-have-everything-lose-under-trump/).

172. 473 F.3d 345 (D.C. Cir. 2007).

173. *Id.* at 347-48.

174. *Id.* at 356.

175. *Id.* at 359-61 (Kavanaugh, J., dissenting).

176. Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454 (2009); Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133 (1998).

interest. Citing to his five-and-a-half years working in the George W. Bush White House, he wrote: “I believe it vital that the President be able to focus on his never-ending tasks with as few distractions as possible. . . . I believe that the President should be excused from some of the burdens of ordinary citizenship while serving in office.”<sup>177</sup> Kavanaugh suggested 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>178</sup> In a different article, he indicated that he believed a rule that the president not be prosecuted while in office was *constitutionally* required.<sup>179</sup>

His writings suggest he would be at least as deferential to the president, and perhaps more so, as Justice Kennedy was when he joined a five-Justice majority to uphold the restriction on individuals from Muslim-majority countries in *Trump v. Hawaii*.<sup>180</sup> Kavanaugh’s expansive theory of executive power strongly indicates that he would uphold discriminatory policies like the Travel Ban, which may be before the Supreme Court again, given the anti-immigrant commitments of the current administration.

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177. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, *supra* note 177 at 1460.

178. *Id.* at 1461.

179. Kavanaugh, *The President and the Independent Counsel*, *supra* note 177, at 2158 (“The Constitution itself seems to dictate, in addition, 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.”).

180. *Trump v. Hawaii*, 138 S.Ct. 2392, 2424 (2018) (Kennedy, J., concurring) (discussing the “substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs”).

## Conclusion

*Senators who value racial justice must oppose the confirmation of Judge Kavanaugh to the Supreme Court.*

Our courts shape the ways in which we experience life in the United States. The next Supreme Court Justice will wield enormous influence for a generation or more. In this moment of surging inequalities and stark injustice, Senators must interrogate any nominee's record on race and racial equity.

Our extensive review of Judge Kavanaugh's record leaves us with little doubt that his interpretations of the law would benefit the powerful few at the expense of the many—especially people of color. Judge Kavanaugh has endorsed the myth of “colorblindness,” so often used to look away from our history and present-day reality of white supremacy and to undermine race-forward solutions to race-based inequities. His opinions reflect priorities that would perpetuate mass incarceration, permit grave environmental injustice, and imperil our autonomy over our own bodies. And he has undermined the capacity of working-class people of color to participate in our democracy and seek justice from our courts.

Senators who value the lives and opportunities of people of color must vote to oppose his confirmation to the U.S. Supreme Court.





Demos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy.

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