



URGENT ACTION ALERT

**SEE ATTACHED
TALKING POINTS**

DATE: September 25, 2018
TO: Concerned Parties
FROM: Hilary O. Shelton, Director, NAACP Washington Bureau

List of full Senate
Judiciary Committee is
included

JUDGE KAVANAUGH SEXUAL MISCONDUCT HEARING BEFORE THE SENATE JUDICIARY COMMITTEE NOW SET FOR THURSDAY, SEPTEMBER 27, 2018 CONTACT YOUR SENATORS TO VOTE "NO" ON THE KAVANAUGH NOMINATION TO THE U.S. SUPREME COURT

THE ISSUE:

President Trump nominated Judge Brett Kavanaugh to the U.S. Supreme Court on July 10, 2018. After four days of hearings which began on Sept. 4, we are still left with serious questions, most importantly why are we rushing a decision as important as a lifetime appointment to the US Supreme Court, the highest court in the land. Furthermore, since that hearing at least two women have alleged that Judge Kavanaugh illegally tried to force himself on them. Until these allegations are investigated and resolved by a non-partisan authority such as the FBI, all additional hearings should be suspended. As the attorneys for one of the alleged victims wrote, "As the Judiciary Committee has recognized and done before, an FBI investigation of the incident should be the first step in addressing her allegations. A full investigation by law enforcement officials will ensure that the crucial facts and witnesses in this matter are thoroughly assessed in a non-partisan manner, and that the Committee is fully informed before conducting any hearing or making any decisions."

In addition to the new allegations, we do not yet have a full accounting of the nominee's complete policy beliefs, and there remain accusations of perjury before the US Senate Judiciary Committee thirteen years ago when he was being vetted for his current position on the US Court of Appeals. Thus, we are left with a candidate of questionable morals whose incomplete record demonstrates him to be an extremist with no empathy for the very real concerns and needs of most working middle-class Americans or for the unique challenges and concerns of racial and ethnic minority Americans or other historically marginalized people. The NAACP continues to strongly oppose Judge Kavanaugh's nomination.

By most estimates, Judge Kavanaugh's vetting by the Senate Judiciary Committee included less than 10% of the documents from his legal and administrative carrier in the White House and the federal government. This is a huge disservice to the American people. As a judge, Mr. Kavanaugh's actions are bound by precedents of the Supreme Court. However, Supreme Court Justices are able to overturn those precedents and apply their own interpretations of the Constitution. Crucial information continues to be withheld on a Supreme Court nominee from review by the Senate Judiciary Committee, the full Senate and the American people.

The NAACP has grave concerns about this nomination and about the unnecessary and reckless rush to confirmation. This nomination should only be considered by the Senate elected by the American people in November, 2018, after all the allegations have been resolved by trained, non-partisan individuals and after every Senator has had adequate time to fully review all of the relevant records; after the 116th Congress is seated in January 2019. The Supreme Court is too important. The American people are owed the complete and unvarnished truth.

THE ACTION WE NEED YOU TO TAKE:

Contact both your Senators **and URGE THEM TO REJECT THE NOMINATION BRETT KAVANAUGH TO THE US SUPREME COURT. THIS NOMINATION IS TOO IMPORTANT TO RUSH. WE SHOULD WAIT UNTIL A NEW CONGRESS IS SEATED IN JANUARY, 2019.** To contact your Senators you may:

✓ **Make a Phone Call:**

Call your Senators in Washington by dialing the Capitol Switchboard and asking to be transferred to your Senators' offices. The switchboard phone number is **(202) 224-3121** (see message section, below).

✓ **Write a Letter**

To write letters to your Senators, send them to:
The Honorable (name of Senator)
U.S. Senate
Washington, D.C. 20510

**A SAMPLE
LETTER IS
ATTACHED**

✓ **Send a Fax**

If you would like to send a fax, call your Senators' offices (through the Capitol switchboard) and ask for their fax numbers (you can use either the attached sample letter or the message box, below).

✓ **Send an E-Mail**

To send an e-mail to your Senators, go to www.senate.gov; click on "*Find Your Senators*". Look up your Senators by state; go to their web sites for e-mail addresses.

REMEMBER TO CONTACT BOTH YOUR SENATORS!!!!

THE MESSAGE

- Until the allegations of sexual misconduct against Judge Kavanaugh are investigated and resolved by a non-partisan authority such as the FBI, all additional hearings should be suspended;
- The Judiciary Committee hearings already made it clear that a number of questions regarding Judge Kavanaugh's beliefs and his judicial temperament are still unclear;
- The hearings did demonstrate, however, that Brett Kavanaugh does not empathize with the crucial needs of working middle-class Americans or the unique concerns of racial and ethnic minorities, the LGBT community, women, or others who comprise our diverse nation.
- His record shows a willingness to allow law enforcement to use the repugnant and counter-productive tactic of "racial profiling," an open hostility to the Affordable Care Act and access to health care for all Americans, as well as sensible measures to protect Americans from the growing crisis of gun violence.
- This nomination is too important to rush. The country desperately needs a fair-minded and independent jurist on the Supreme Court, not a divisive and biased ideologue who will further shake the American people's faith in our nation's justice system.
- This nomination should be fully vetted by the Senate elected by the American people in November, 2018, in the 116th Congress once and if any and all allegations of perjury and sexual misconduct have been resolved, when all of the facts are in and fully reviewed.

THANK YOU FOR YOUR ATTENTION TO THIS IMPORTANT MATTER!!!

If you have any questions, call Hilary Shelton at the Washington Bureau at (202) 463-2940.

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Sample Letter

(date)

The Honorable _____
United States Senate
Washington, D.C. 20510

RE: THE NEXT U.S. SUPREME COURT NOMINEE

Dear Senator _____;

As your constituent, I strongly urge you do all that you can to ensure that until all allegations of sexual misconduct and perjury are investigated and resolved by a non-partisan authority such as the FBI, and any additional hearings into the nomination should be suspended. The allegations directly bear on the Senate's determination of Judge Kavanaugh's character and fitness for a lifetime appointment to the highest court in the land.

The Senate Judiciary Committee hearings have already made it clear that a number of questions regarding Judge Kavanaugh's beliefs and his judicial temperament remain ambiguous, at best. The hearings did demonstrate, however, that Brett Kavanaugh does not empathize with the crucial needs of working middle-class Americans or the unique concerns of racial and ethnic minorities, the LGBT community, women, or others who comprise our diverse nation. Furthermore, the recent allegations of perjury and sexual misconduct only add to the list of unknowns. The questions that are being raised are serious. They should be reviewed and resolved by non-partisan professionals, such as the men and women of the FBI. I fully agree with the attorneys for one of the victims, who wrote, "As the Judiciary Committee has recognized and done before, an FBI investigation of the incident should be the first step in addressing her allegations. A full investigation by law enforcement officials will ensure that the crucial facts and witnesses in this matter are assessed in a non-partisan manner, and that the Committee is fully informed before conducting any hearing or making any decisions."

I have grave concerns about this nomination and about the unnecessary and reckless rush to confirmation. This nomination should only be considered by the Senate elected by the American people in November, 2018, after all the allegations have been resolved by trained, non-partisan individuals and after every Senator has had adequate time to fully review all of the relevant records; after the 116th Congress is seated in January 2019. The Supreme Court is too important. The American people, myself included, are owed the complete and unvarnished truth.

Please contact me in the very near future and let me know what you intend to do and if there is anything more I can do to make my voice heard.

Sincerely,

(sign and print your name and
remember to include your address)

***Remember to contact
BOTH your Senators.***

**U.S. SENATE JUDICIARY COMMITTEE,
SECOND SESSION, 115TH CONGRESS**

NAME	STATE	MAILING ADDRESS	PHONE NUMBER	FAX NUMBER	WEBSITE
Charles Grassley	IA	United States Senate Washington, DC 20510	202-224-3744	202-228-6020	grassley.senate.gov
Dianne Feinstein	CA	United States Senate Washington, DC 20510	202-224-3841	202-228-3954	feinstein.senate.gov
Orrin Hatch	UT	United States Senate Washington, DC 20510	202-224-5251	202-224-6311	hatch.senate.gov
Patrick Leahy	VT	United States Senate Washington, DC 20510	202-224-4242	202-224-3479	leahy.senate.gov
Lindsey Graham	SC	United States Senate Washington, DC 20510	202-224-5972	202-228-3808	lgraham.senate.gov
Richard Durbin	IL	United States Senate Washington, DC 20510	202-224-2152	202-228-0400	durbin.senate.gov
John Cornyn	TX	United States Senate Washington, DC 20510	202-224-2934	202-228-2856	cornyn.senate.gov
Sheldon Whitehouse	RI	United States Senate Washington, DC 20510	202-224-2921	202-228-6362	whitehouse.senate.gov
Mike Lee	UT	United States Senate Washington, DC 20510	202-224-5444	202-228-1168	lee.senate.gov
Amy Klobuchar	MN	United States Senate Washington, DC 20510	202-224-3244	202-228-2186	klobuchar.senate.gov
Ted Cruz	TX	United States Senate Washington, DC 20510	202-224-5922	202-228-0755	cruz.senate.gov
Chris Coons	DE	United States Senate Washington, DC 20510	202-224-5042	202-228-5042	coons.senate.gov
Ben Sasse	NE	United States Senate Washington, DC 20510	202-224-4224	202-228-9642	sasse.senate.gov
Richard Blumenthal	CT	United States Senate Washington, DC 20510	202-224-2823	202-228-9673	blumenthal.senate.gov
Jeff Flake	AZ	United States Senate Washington, DC 20510	202-224-4521	202-228-0515	flake.senate.gov
Mazie Hirono	HI	United States Senate Washington, DC 20510	202-224-6361	202-224-2126	hirono.senate.gov
Michael Crapo	ID	United States Senate Washington, DC 20510	202-224-6142	202-228-1375	crapo.senate.gov
Cory Booker	NJ	United States Senate Washington, DC 20510	202-224-4843	202-228-8378	booker.senate.gov
Thom Tillis	NC	United States Senate Washington, DC 20510	202-224-6342	202-228-2563	tillis.senate.gov
Kamala Harris	CA	United States Senate Washington, DC 20510	202-224-3553	202-228-0454	harris.senate.gov
John Kennedy	LA	United States Senate Washington, DC 20510	202-224-4623	202-228-5061	kennedy.senate.gov



NAACP

TALKING POINTS ON NAACP OPPOSITION TO SUPREME COURT NOMINEE JUDGE BRETT KAVANAUGH

I. WHY THE FBI SHOULD INVESTIGATE CLAIMS OF SEXUAL MISCONDUCT BY JUDGE KAVANAUGH

- Sexual assault is against the law, and Judge Kavanaugh may have committed a crime. The allegations directly bear on the Senate's determination of Judge Kavanaugh's character and fitness for a lifetime appointment to the highest court in the land.
- The Supreme Court is called upon to determine whether and when individuals and institutions can be held to account for sexual harassment or assault and whether and when to give greater credibility to those who testify about the harms of harassment and assault or those who dismiss them. The allegations ultimately affect the integrity and reputation of the Supreme Court itself.
- As the Judiciary Committee has recognized and done before, an FBI investigation of the incident should be the first step in addressing her allegations. A full investigation by law enforcement officials will ensure that the crucial facts and witnesses in this matter are assessed in a non-partisan manner, and that the Committee is fully informed before conducting any hearing or making any decisions.
- The investigation must be conducted by non-partisan professionals. Law enforcement officials have the education, experience, tools, and resources for conducting the type of careful and thorough investigation required here. This is particularly true in terms of interviewing certain witnesses such as victims of sexual assault and persons reluctant to become involved. Senators and their staff simply do not possess this skill and expertise. Additionally, it is imperative that the investigators are non-partisan and act independently of a political agenda. An investigation should not become an opportunity for selective questioning of witnesses or selective retrieval of documents. It certainly should not prompt political or partisan attacks against a private citizen forced into the spotlight against her will. An FBI investigation is the most effective way to ensure that conclusions drawn by the investigation are not politically motivated.

II. JUDGE KAVANAUGH'S RECORD OF HOSTILITY TO COMMUNITIES OF COLOR

- **HOSTILE TO AFFIRMATIVE ACTION:** Judge Kavanaugh shows every sign of deviating from Justice Anthony Kennedy's support under some circumstances for race-conscious measures in college admissions to promote racial diversity. He assisted the Bush Administration in asking the Supreme Court to strike down the University of Michigan's admissions policies which used race as one factor, writing: "The Michigan program is unconstitutional because race-neutral programs should be employed, where possible..." The Supreme Court rejected that position, ruling that the admissions process was narrowly tailored and therefore constitutional. As a private lawyer, Judge Kavanaugh co-authored a brief with failed Supreme Court nominee Robert Bork on behalf of the Center for Equal Opportunity, a group vehemently opposed to affirmative action. He argued that Hawaii violated the Constitution by permitting only Native Americans to vote in elections for the Office of Hawaiian Affairs. He wrote that "the intent, meaning, history, and policy of the Equal Protection Clause all suggest that the Constitution does not allow governmental racial classifications." In an op-ed, Judge Kavanaugh called the Hawaii restrictions a "racial spoils system" and urged the Court to "adhere to the fundamental constitutional principle most clearly articulated by Justice Antonin Scalia: In the eyes of government, we are just one race here. It is American." In an interview, Judge Kavanaugh stated, "This case is one more step along the way in what I see as an inevitable conclusion within the next 10 or 20 years when the Court says we are all one race in

the eyes of government.” NAACP President Derrick Johnson has written that, with Judge Kavanaugh’s nomination, “now is simply not the time to do away with affirmative action.”

- **SUPPORTED THE USE OF RACIAL PROFILING BY LAW ENFORCEMENT:** In one email which was originally labeled “Committee confidential” but released by Senator Cory Booker (NJ) with the subject line “racial profiling,” Judge Kavanaugh remarked that he “generally” favored race-neutral security measures, but thought there was an “interim question” of whether the government should use racial profiling before a supposedly race-neutral system could be developed sometime in the future. In other words, he thought it was okay to use racial profiling – the abhorrent and counter-productive process by which law enforcement stops people and otherwise treats them more harshly based on their appearance.
- **THREAT TO FAIR HOUSING:** One of retiring Justice Anthony Kennedy’s signature civil rights opinions upheld the “disparate impact” method for proving housing discrimination. This method—which allows facially neutral practices to constitute discrimination if they disproportionately impact communities of color—is a longstanding tool for proving discrimination of any kind. But Judge Kavanaugh needlessly and harshly questioned the disparate impact doctrine at a time when the Supreme Court had not yet settled that the Fair Housing Act allows this type of claim in *Greater New Orleans Fair Housing Ctr. v. HUD*. Civil rights organizations sued HUD under the Fair Housing Act for its policy of reimbursing homeowners after Katrina for the pre-storm value of the property or rebuilding costs, whichever was lower; they claimed that African Americans whose home values were lower than those in white areas, were disproportionately impacted. Judge Kavanaugh joined an opinion rejecting the disparate impact claim but also launching a broad-based attack on the doctrine itself. It speculated about whether plaintiffs could ever “identify a sound benchmark” for assessing disproportionate impact in these circumstances and whether white homeowners might have disparate impact claims under a different formula. The concurring opinion called this a “strange turn” and correctly noted that it seemed to lack any purpose “other than to posit hurdles for future disparate impact claims” and was “unnecessary” to resolve the case.
- **RESTRICTED POLITICAL PARTICIPATION TO WEALTHY & POWERFUL:** Brett Kavanaugh poses a severe threat to our democracy based on his record of voting rights and campaign finance issues, which signals willingness to further restrict communities of color from the political process and to limit exercise of the franchise to the wealthy and powerful.
- **WITH JUDGE KAVANAUGH, VOTING RIGHTS CAN BE FURTHER ERODED:** Five years ago, in *Shelby County v. Holder*, the Supreme Court gutted the heart of the Voting Rights Act by dismantling the requirement that jurisdictions with a history of discrimination preclear voting changes. State legislatures and municipalities quickly enacted measures to suppress the vote. But voting rights jurisprudence can get even worse. Just this past term, the Court upheld the most heinous voter purge law in the nation, transforming voting rights into a “use it or lose it” proposition, and then upheld racially gerrymandered districts in Texas. A future Court could decide that the Voting Rights Act does not cover challenges to redistricting or that its other provisions are unconstitutional or subject to death by a thousand cuts. Read NAACP President Derrick Johnson’s op-ed, “On Voting Rights We Have Much More to Lose with Brett Kavanaugh.”
- **UPHELD PHOTO ID LAW:** Judge Kavanaugh wrote the unanimous three-judge court opinion upholding South Carolina’s photo ID law in a challenge under the Voting Rights Act. *South Carolina v Holder*. The Justice Department had rejected the law under Section 5 of the Voting Rights Act on the basis that it would disenfranchise tens of thousands of voters of color. After South Carolina modified the law, Judge Kavanaugh upheld it. Significantly, Judge Kavanaugh refused to join a concurrence that stated “one cannot doubt the vital function that Section 5 of the Voting Rights Act has played here.” Section 5 is the heart of the Voting Rights Act that was completely disabled by the Supreme Court only one year later in *Shelby County v. Holder*. And, although South Carolina offered no evidence whatsoever of voter fraud, Judge Kavanaugh wrote: “We conclude that South Carolina’s goals of preventing voter fraud and increasing electoral confidence are legitimate: those interests cannot be deemed pretextual merely because of an absence of recorded

incidents of in-person voter fraud in South Carolina.” Judge Kavanaugh dissented in an earlier discovery ruling rejecting South Carolina’s effort to invoke attorney-client privilege to shield material prepared by state senate staff attorneys when the voter ID law was drafted. He wanted to allow South Carolina to keep information private from the Justice Department and civil rights organizations which intervened.

- **FAVORS MORE MONEY IN POLITICS:** Judge Kavanaugh’s record in election law cases indicates he would move more aggressively than Justice Kennedy in lifting restrictions on money in politics. He wrote the opinion striking down Federal Election Commission regulations to restrict spending by outside organizations, helping to fuel the creation of super PACs. Although the case could have been decided on administrative law grounds, Judge Kavanaugh issued a sweeping constitutional ruling, invoking a sharp rebuke by the extremely conservative Judge Janice Rogers Brown for disregarding precedent that instructs courts to avoid constitutional questions unless necessary and adding: “The court, however, is not content just answering a gratuitous constitutional question. Its holding is broader than even the plaintiff requests.” In another ruling, Judge Kavanaugh sought to revive a challenge to federal “electioneering communications” disclosure provisions in the McCain-Feingold Act although they had been twice upheld by the Supreme Court.

III. A LIFETIME APPOINTMENT TO THE US SUPREME COURT IS TOO IMPORTANT TO RUSH, ESPECIALLY WITH INCOMPLETE INFORMATION

- **STAKES ARE INCREDIBLY HIGH:** The stakes in filling the vacancy created by Justice Anthony Kennedy’s retirement from the Supreme Court could not be higher. During his thirty years on the Court, Justice Kennedy provided a crucial fifth vote in closely divided rulings by the Supreme Court. Although Kennedy was a reliably conservative justice, he occasionally cast votes to protect civil rights. For example, Kennedy voted to uphold consideration of race in higher education to promote diversity, to uphold using disparate impact to prove discrimination in housing, and to uphold marriage equality for same-sex couples.

- **QUESTIONS OF PERJURY:** There are questions as to whether or not Brett Kavanaugh fully, completely, and honestly answered all of the questions he was asked during his hearings for the position he now holds on the U.S. Court of Appeals for the D.C. Circuit. These questions need to be fully resolved before his nomination moves forward.

- **SUPREME COURT WILL LURCH TO FAR RIGHT:** Without Justice Kennedy’s influence, the Supreme Court would dramatically move to the far right. Civil rights hanging in the balance could be undermined or even eliminated by a majority of the Court specifically intent on protecting the wealthy and powerful rather than the rights of all Americans.

- **PRODUCT OF CORRUPT PROCESS:** Brett Kavanaugh was selected from Trump’s short-list of Supreme Court candidates developed by radical right groups with litmus tests on issues such as choice and civil rights. Kavanaugh’s record reveals a hard-core ideologue who will not protect civil rights and civil liberties and who has been auditioning for a Supreme Court seat during his entire tenure on the D.C. Circuit. He will provide a consistent vote against communities of color across civil rights issues. This will prove disastrous for civil rights jurisprudence for decades.

- **AN ILLEGITIMATE NOMINEE:** On August 21, Donald Trump was named as an unindicted co-conspirator in federal crimes involving his own election as president. Kavanaugh’s nomination is tainted and must be considered illegitimate. In calling for a halt to the confirmation process, NAACP President Derrick Johnson said: “The Senate owes it to the American people to see how these legal proceedings play out before even considering whether to confirm a SCOTUS nominee selected by a President linked to federal crimes. This is especially true with a nominee like Brett Kavanaugh who believes the President is immune from federal investigation.”

IV. JUDGE KAVANAUGH'S DIRECT AND SPECIFIC OPPOSITION TO NAACP POLICY PRIORITIES

- **ARGUED D.C.'S GUN REGULATIONS WERE UNCONSTITUTIONAL:** After the Supreme Court held that the Second Amendment protects an individual's right to bear arms, Washington, D.C. passed gun laws banning assault weapons and high-capacity magazines and requiring certain firearms to be registered. In a constitutional challenge to the new laws, a panel majority of two Republican-appointed judges held that the bans were constitutional. But Judge Kavanaugh dissented, arguing that the assault weapons ban was unconstitutional: "[T]he Supreme Court held that handguns—the vast majority of which today are semi-automatic—are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles."
- **FOE OF AFFORDABLE CARE ACT:** Judge Kavanaugh poses a threat to ensuring access to health care regardless of preexisting conditions and to a minimal level of health care for everyone. Both are tremendously important for communities of color, who face longstanding and systemic barriers to quality health care. Significantly, Judge Kavanaugh dissented in the D.C. Circuit's ruling upholding the constitutionality of the Affordable Care Act. He said the court lacked jurisdiction to rule on the individual mandate because the tax penalty first would have to be assessed. Alarming, he stated: "Under the Constitution, the president may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional, even if a court has held or would hold the statute constitutional." Several challenges to the Affordable Care Act are currently percolating in the lower courts; Judge Kavanaugh may soon have an opportunity to strike a devastating blow to health care protections for all.
- **NARROW VIEW OF FAIR EMPLOYMENT LAWS:** In several cases in which the D.C. Circuit upheld the rights of employees under anti-discrimination laws, Judge Kavanaugh dissented and argued that the federal laws had no application and were not even necessary to protect against discrimination in the workplace.
- **LIMITED APPLICATION OF TITLE VII:** Judge Kavanaugh wanted to ban Title VII's application to employees in all national security situations, despite precedent banning application only to denials or revocations of security clearances in *Rattigan v. Holder*. A black FBI employee accused officials of retaliation for reporting unfounded security concerns which prompted an investigation into his security clearance eligibility. The D.C. Circuit ruled that the claim could proceed if it challenged the reporting of the employee and not the decision to investigate, rejecting the federal government's request for "sweeping immunity from Title VII liability." The Court reasoned: "Were we to declare all reporting-based claims nonjusticiable, federal employees could no longer seek redress for the harm caused when a coworker fabricates security concerns in retaliation for statutorily protected activity, and Congress's purpose in enacting Title VII would be frustrated." Judge Kavanaugh dissented, saying that the majority opinion suffered from a "basic flaw" "by insisting that some agency security clearance decisions are judicially reviewable." Judge Kavanaugh believed that reliance on civil rights laws was unnecessary since sanctions such as agency discipline might deter such behavior.
- **FORECLOSED CLAIMS BY LEGISLATIVE EMPLOYEES:** Judge Kavanaugh argued that an African-American woman fired from her position working as Capitol Hill staff could not pursue claims of race discrimination and retaliation under the Congressional Accountability Act, which extends the protections of fair employment statutes to legislative branch employees. Judge Kavanaugh would have held these claims were barred by the Constitution's Speech or Debate Clause, a position which would have foreclosed federal lawsuits by workers throughout the federal legislative branch including those pursuing sexual harassment claims in the #MeToo era. In this situation, Judge Kavanaugh believed that administrative complaint procedures were an acceptable substitute for discrimination victims deprived of federal court claims. The majority, however, held that the employee's claims could in fact proceed under the Congressional Accountability Act because they were not precluded or limited by the evidentiary, testimonial or non-disclosures privileges that emanate from the Speech or Debate Clause.

- **ARGUED AGE DISCRIMINATION LAWS DO NOT APPLY:** Judge Kavanaugh tried to exclude federal employees from laws prohibiting age discrimination. The D.C. Circuit held that the State Department violated such laws by imposing a mandatory retirement age and firing an employee when he reached 65. It rejected the Department's attempt to exempt from coverage citizens employed abroad. But Judge Kavanaugh dissented, favoring the exemption. This prompted the majority to note—without disagreement by Judge Kavanaugh—that this position would free the Department from “any statutory bar against terminating [an employee] on account of his disability or race or religion or sex.” Judge Kavanaugh argued that the Constitution was sufficient to protect against discrimination on the basis of race, sex and religion but conceded that they would be entitled to limited remedies without the protection of federal anti-discrimination laws.
- **ELIMINATED FEDERAL AGENCY PROTECTIONS:** One of Donald Trump's top priorities is to reduce or eliminate the power of federal agencies to adopt protections for communities of color, workers, consumers, and the environment. Former Trump aide Steve Bannon vowed to fight daily for the “deconstruction of the administrative state.” White House Counsel Donald McGahn told the Federalist Society that “the ever-growing, unaccountable administrative state is a direct threat to individual liberty.” Judge Kavanaugh's appointment plays a large role in fulfilling Trump's promise to his base. Judge Kavanaugh has taken a harsh stance against the “Chevron doctrine,” a longstanding legal principle that courts should defer to federal agency interpretations of laws where the law is ambiguous and the agency's position is reasonable. He has stated: “The Chevron doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes.” Immediately after nominating Judge Kavanaugh, the White House boasted to business groups that Judge Kavanaugh “has overruled federal agency action 75 times.”
- **OPPOSED AGENCY TO PROTECT CONSUMERS:** In one of his most egregious rulings against agency protections, Judge Kavanaugh ruled that the entire Consumer Financial Protection Bureau was unconstitutional in *PHH Corp. v. Consumer Fin. Prot. Bureau*. This is the independent agency created by the *Dodd-Frank Wall Street Reform and Consumer Protection Act* in the wake of the 2008 financial crisis to protect consumers from abusive practices and lending discrimination by financial institutions. Judge Kavanaugh concluded it was unconstitutional for the agency to be headed by single director who could be removed by the President only for “inefficiency, neglect of duty or malfeasance in office.” He claimed that independent agencies constitute “a headless fourth branch of the U.S. government.” He stated: “Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.” The *en banc* D.C. Circuit upheld the agency's constitutionality and said that Judge Kavanaugh's argument “flies in the face” of Supreme Court precedent and “defies the historical practice.”
- **RULED AGAINST ENVIRONMENTAL JUSTICE:** In numerous instances, Judge Kavanaugh undermined the authority of the Environmental Protection Agency to fulfill its mission to protect the environment, with significant consequences on communities of color. First, he ruled that the EPA overstepped its authority by adopting the Cross-State Air Pollution Rule, called the “good neighbor rule.” This is a clean air safeguard which protects downwind states from harmful air pollution emitting from distant power plants, which are often located in communities of color, and then crossing state borders. The Supreme Court reversed his decision. In another case, Judge Kavanaugh strongly dissented from the D.C. Circuit's decision not to rehear a ruling upholding the EPA's finding that carbon dioxide was a pollutant and its emissions could be regulated. In *Coalition for Responsible Regulation, Inc. v. EPA* Judge Kavanaugh wrote: “[T]he ultimate clincher in this case is one simple point: EPA chose an admittedly absurd reading over a perfectly natural reading of the relevant statutory text. An agency cannot do that.” Judge Kavanaugh dissented when the D.C. Circuit upheld the EPA's first emission standards for mercury and other hazardous pollutants from coal and oil-fired plants. In another dissent, Judge Kavanaugh would have reversed an EPA penalty against a company that improperly shipped a corrosive chemical that caused “significant risks to public health.”

- **RULED AGAINST WORKERS' RIGHTS:** Donald Trump has already installed Justice Neil Gorsuch on the Supreme Court, who voted to overturn 40 years of precedent on collective bargaining law. The labor law record of Trump's second nominee to the Court, Brett Kavanaugh, reveals deep hostility to the rights of workers and threatens to undermine workplace protections even further. As the nation commemorates the 50th anniversary year of Dr. Martin Luther King's assassination, we must remember the clear message from Dr. King's last march in Memphis that workers' rights are civil rights: "The issue is injustice. The issue is the refusal of Memphis to be fair and honest in its dealings with its public servants who happen to be sanitation workers."
- **THREAT TO WORKERS' SAFETY:** In an extremely consequential opinion, Judge Kavanaugh challenged the ability of federal agencies to protect employees from harm in the workplace. When a SeaWorld trainer drowned after an attack by a killer whale, the D.C. Circuit upheld a Labor Department fine on SeaWorld for failing to keep the trainer from "recognized hazards" under workplace safety laws. But Judge Kavanaugh blasted the sanction and asked: "When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves." As commentators have noted, Judge Kavanaugh's view has "real world consequences for federal safeguards covering workers, consumers and the environment."
- **REJECTED UNDOCUMENTED IMMIGRANTS AS UNION MEMBERS:** Judge Kavanaugh dissented from a D.C. Circuit ruling that ordered a company to bargain with a union, on the grounds that certain employees were ineligible to vote as undocumented immigrants. In *Agri Processor Co. v. NLRB* the majority opinion harshly criticized Judge Kavanaugh's "misreading" of both the plain language of the National Labor Relations Act (NLRA) and clear Supreme Court precedent which held that undocumented immigrants are covered by the NLRA. The majority stated: "There is absolutely no evidence that ... Congress intended to repeal the NLRA to the extent its definition of 'employee' includes undocumented aliens."
- **SHARPLY CURTAILED UNION RIGHTS AT FEDERAL AGENCY:** Judge Kavanaugh wrote the majority opinion which allowed the Defense Department to proceed with what the Washington Post called "some of the most dramatic workplace changes planned for civil service employees in 30 years" and would "curb union rights at Defense and overhaul how the Department's civil employees are paid, promoted and disciplined." The district court had blocked the Pentagon from implementing a substantial portion of the regulations on the basis they would "entirely eviscerate collective bargaining." But Judge Kavanaugh reversed the decision. A partial dissent argued that Judge Kavanaugh's opinion would allow the Secretary of Defense to "abolish collective bargaining altogether—a position with which even the Secretary disagrees."
- **PRO-GOVERNMENT BIAS IN FOURTH AMENDMENT CASES:** A significant portion of the Supreme Court's docket each year is comprised of criminal justice cases, including those addressing racism in the criminal justice system. Judge Kavanaugh's record on and off the bench reveals a strong pro-government bias in criminal and other cases involving the Fourth Amendment. Indeed, Judge Kavanaugh authored 12 dissents in criminal justice cases, ruling for the government in 10.
- **PRAISED JUSTICE REHNQUIST FOR LIMITING RIGHTS OF DEFENDANTS:** In a recent speech, Judge Kavanaugh called former Chief Justice William Rehnquist his "first judicial hero." He praised Justice Rehnquist for "[leading] the charge in rebalancing Fourth Amendment law," noting that Rehnquist "fervently believed that the Supreme Court had taken a wrong turn in the 1960s and 1970s, and nowhere was he more forceful on this point than in the Fourth Amendment context, especially in cases involving violent crime and drugs." Specifically, Judge Kavanaugh lauded Justice Rehnquist for making "the probable cause standard more flexible and commonsensical," "expanding the category of special needs searches, those that could be done without a warrant or individualized suspicion," and opposing the "exclusionary rule by which courts would exclude probative evidence from criminal trials because the police had erred in how they obtained the evidence." According to Judge Kavanaugh, Rehnquist viewed this "judge-created rule" as "beyond the four corners of the Fourth Amendment's text and imposed tremendous costs on society."

- **ENDORSED RANDOMIZED DRUG TESTING:** Judge Kavanaugh dissented from an important drug testing ruling under the Fourth Amendment. A union challenged randomized drug testing of all employees of the Department of Agriculture’s Job Corps Civilian Centers which operated residential job programs for at-risk youth, aged 16 to 24. The D.C. Circuit held that the policy was “a solution in search of a problem,” and that the Department had failed to identify “special needs” for the testing, such as evidence of a drug problem among staff, which would have rendered the requirement for individualized suspicion impractical. But Judge Kavanaugh would have upheld the testing on grounds of “common sense.” He wrote: “In residential schools for at-risk youth, many of which have previously used drugs, it seems eminently sensible to implement a narrowly targeted drug testing program for the schools’ employees. ... [I]ndeed, it would seem negligent not to test.”
- **SUPPORTED EXPANSIVE ‘STOP AND FRISK’ BY POLICE:** Judge Kavanaugh strongly disagreed with a majority of the D.C. Circuit, including three Republican-appointed judges, which held that a defendant’s Fourth Amendment rights were violated. The police conducted a “stop and frisk” search which produced no results, and then moved the defendant to where he could be identified by a witness and unzipped his jacket, revealing a gun. Judge Kavanaugh wrote a 32-page dissent, arguing that the police action was justified because it was a reasonable continuation of the stop and frisk and helped show the defendant to a witness at an alleged robbery. “Prohibiting the police during [stop and frisk] stops from conducting identification procedures that constitute searches would lead to absurd and dangerous results.” He wrote that not allowing limiting moving of clothing to identify suspects would “hamstring the police and prevent them from performing reasonable identification procedures that could solve serious crimes and protect the community from violent criminals at large.”
- **A WOMAN’S RIGHT TO PROTECT HER REPRODUCTIVE LIFE IS IN JEOPARDY:** Judge Kavanaugh poses a severe threat to the rights of women to determine her reproductive life. His presence on Trump’s shortlist confirmed his willingness to overturn the protections women have to make their own choices. The vehemently anti-choice Susan B. Anthony List organization praised Judge Kavanaugh as an “outstanding choice” and “principled jurist with a strong record of protecting life and constitutional rights.” Indeed, Judge Kavanaugh reversed a lower court ruling allowing a 17-year-old undocumented immigrant in government custody to secure an immediate abortion consistent with Texas law which bans abortions after 20 weeks. When the full court swiftly overturned Judge Kavanaugh’s decision, he accused his colleagues of inventing “a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.” With Judge Kavanaugh providing a fifth vote, the Court could overturn Roe outright or uphold abortion restrictions on the ground they pose no “undue burden.” These decisions would have a tremendous impact on low-income women of color, who lack unfettered reproductive choices.
- **WOULD LIMIT ACCESS TO CONTRACEPTION:** Judge Kavanaugh also sought to limit access to contraceptive care for employees of religious non-profit organizations. The D.C. Circuit upheld an Affordable Care Act regulatory accommodation for religiously affiliated non-profit employers to opt out of paying employees’ contraception coverage. Judge Kavanaugh dissented when the entire court refused to rehear the case, arguing that the objecting employers should have prevailed under the *Religious Freedom Restoration Act*. He wrote: “[T]he regulations substantially burden the religious organizations’ exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs or else pay significant monetary penalties.” His view raises serious questions about his willingness to use religion as a defense to discrimination.

V. THE AVAILABLE RECORDS PAINT AN INCOMPLETE RECORD OF HOW JUDGE KAVANAUGH WILL RULE ON THE SUPREME COURT

- **UNDERSTANDING HIS THOUGHTS ARE CRUCIAL:** As a Judge, Mr. Kavanaugh’s actions have been bound by precedents of the Supreme Court. However, Supreme Court Justices are free to overturn those precedents and apply

their own views of the Constitution. Positions Mr. Kavanaugh took as a lawyer and staff member in the Bush administration will also shed additional light on how he might rule when unconstrained by a higher authority.

- **INCOMPLETE VETTING:** By most estimates, Judge Kavanaugh's vetting by the Senate Judiciary Committee is "less than 10% complete."
- **RECORDS WHEN HE WORKED FOR PRESIDENT GEORGE W. BUSH:** Prior to becoming a Judge, Mr. Kavanaugh spent 3 years as Staff Secretary to President George W. Bush, a time he has described as "the most formative" for him as a judge. Specifically, his job was to provide advice "on any issue that may cross [the President's] desk." While we don't even have the records to know what those issues were, let alone his thoughts, we know they included a woman's right to control her reproductive life, same-sex marriage, and even torture. This amounts to a 35-month hole in Judge Kavanaugh's career about which we know nothing.
- **"COMMITTEE CONFIDENTIAL" RECORDS:** more than 40 percent of the documents which have been received by Senate Judiciary Committee members — almost 190,000 pages — have been labeled "committee confidential." Some of these documents — including emails which show Judge Kavanaugh's thought on racial profiling and the *Roe v. Wade* case — have been released to the public by sources willing to bear the consequences.
- **RELEASE OF DOCUMENTS TO COMMITTEE MEMBERS:** at 6:45 am, on Tuesday, September 4, 42,000 pages of documents were made available to Senate Judiciary Committee members and their staff for a hearing which began at 9:30 am. This means that Committee Members and their staffs would have had to have read over 254 pages per minute for the entire time in order to review them all.
- **DOCUMENTS WITHHELD:** For the first time in history, the President has invoked executive privilege to withhold more than 101,000 documents on a Supreme Court nominee from the Judiciary Committee, as well as the full Senate which is charged with providing its "advice and consent" on any nominee to a lifetime appointment to the highest court in the land as well as keeping them the American people.

VI. POSITIONS ON PRESIDENTIAL POWER

- **BELIEVES PRESIDENT IS ABOVE LAW:** Finally, and perhaps most importantly given shocking developments about Donald Trump's personal legal jeopardy, Brett Kavanaugh has asserted extreme views on presidential power. On August 21, Donald Trump was identified as an unindicted co-conspirator in the guilty plea of his personal lawyer, Michael Cohen, to felony violations of campaign finance laws relating to the presidential election. Judge Kavanaugh's views on the scope of executive power, immunity and the ability of the courts to act as a check on executive power are deeply alarming, especially at this moment in history. Along with consideration of Judge Kavanaugh's extremely disturbing record on civil rights, these views must be at the forefront of the Senate's examination of the Kavanaugh nomination.
- **NO CRIMINAL INVESTIGATION OR PROSECUTION OF PRESIDENT:** Despite his leading role during Kenneth Starr's independent counsel investigation of President Bill Clinton, Judge Kavanaugh now believes presidents are immune from criminal investigations or prosecutions while in office, no matter what evidence of wrongdoing has been uncovered. In 2009, he wrote: "[W]e should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions." He continued: "And the country loses when the President's focus is distracted by the burdens of civil litigation or criminal investigation and possible prosecution." In another article, he proposed that Congress adopt a statute "to establish that a sitting president cannot be indicted." He argued that "[t]he 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 only occur after the President has left office." When asked on a panel at Georgetown Law School, "How many of you believe, that a sitting president cannot be indicted during the term of office," Judge Kavanaugh responded in the affirmative.

- **PRESIDENT HAS ABSOLUTE DISCRETION OVER SPECIAL COUNSEL:** Judge Kavanaugh has said the president should have “absolute discretion” to determine whether and when to appoint a special counsel like Robert Mueller. He also said that special counsels should be “removable in the same manner as other high-level executive branch officials” - in other words, at the president’s prerogative. He would not serve as a desperately needed independent check on the executive branch.
- **QUESTIONED RULING IN UNITED STATES V. NIXON:** In *United States v. Nixon*, a unanimous Supreme Court ordered President Nixon to turn over his secret tape recordings involving Watergate, rejecting his claim of absolute privilege against a subpoena related to internal communications. Astonishingly, Judge Kavanaugh has questioned this ruling. In a 1999 lawyer roundtable, he stated: “Maybe Nixon was wrongly decided – heresy though it is to say so. Maybe the tension of the time led to an erroneous decision.” He stated that the case “took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official.”

VII. BACKGROUND

- **A LIFETIME OF PRIVILEGE:** Brett Kavanaugh is a 53-year-old white male who was born in Washington D.C. and raised in its wealthy suburbs. He has led an exceedingly privileged life. His father was a lobbyist for the cosmetics industry. He attended only private schools, including Georgetown Preparatory School where Trump Supreme Court appointee Neil Gorsuch was a classmate. He received his B.A. from Yale University in 1987 and his J.D. from Yale Law School in 1990. Kavanaugh has none of the hard-scrabble or working class experience that could produce an appreciation for others struggling to make better lives for themselves and their families in the face of strong social and economic headwinds. He simply does not understand the experiences of average people, and his opinions consistently reflect that.
- **CLERKED FOR THREE JUDGES:** Kavanaugh served as law clerk to Third Circuit Judge Walter Stapleton (Reagan appointee) and to Ninth Circuit Judge Alex Kozinski (Reagan appointee), who retired in disgrace last year after multiple claims of sexual harassment by law clerks, law students, lawyers and even a fellow judge. Kavanaugh clerked, along with Neil Gorsuch, for Justice Anthony Kennedy on the Supreme Court in the 1993-94 term.
- **HISTORY OF EXTREME PARTISANSHIP:** Judge Kavanaugh has a deeply partisan background. He worked for Independent Counsel Kenneth Starr during his wide-ranging investigation into President Clinton and Hilary Clinton. He co-authored the infamous Starr Report which made the case for impeaching President Clinton, wrote the articles of impeachment against Clinton, and investigated the tragic suicide of Vince Foster. During the George W. Bush Administration, he served in the White House Counsel’s office for two years and then as a top advisor to President Bush for three years, where he wielded extraordinary influence on controversial positions involving civil rights and civil liberties.
- **SELECTED JUDGES HOSTILE TO CIVIL RIGHTS:** Judge Kavanaugh helped to select George W. Bush’s controversial judicial nominees such as Charles Pickering, Terrence Boyle, and Dennis Shedd, who were opposed by the NAACP. Evidence suggests that Judge Kavanaugh lied to the Judiciary Committee during his own judicial confirmation about his role in aiding these controversial nominees. He denied assisting Charles Pickering, who was defeated by the Senate because he reduced the sentence of a cross-burner, but the New York Times revealed Judge Kavanaugh played a lead role. Judge Kavanaugh also assisted with Bush’s selection of Supreme Court nominee John Roberts, whose record against voting rights was legendary. Once confirmed, Roberts authored the opinion in *Shelby County v. Holder*, which gutted the heart of the 1965 *Voting Rights Act*.

- **NAACP OPPOSED KAVANAUGH'S CIRCUIT COURT APPOINTMENT:** When George W. Bush nominated Brett Kavanaugh to the D.C. Circuit in 2003, the NAACP opposed his nomination because he “was responsible for overseeing efforts to pack our nation’s courts with extreme right-wing judicial nominees.” Senator Chuck Schumer said: “Brett Kavanaugh’s nomination is not just a drop of salt in the partisan wounds, it is the whole shaker.” His controversial nomination stalled for three years. The ABA conducted three separate evaluations of Judge Kavanaugh and downgraded its rating, with a majority concluding he did not meet its highest standard. Judge Kavanaugh was eventually confirmed in 2006, in a 57-36 vote.