

The Honorable Chuck Grassley  
Chairman, U.S. Senate Judiciary Committee  
CC: Members of the United States Senate

The Honorable Dianne Feinstein  
Ranking Member, U.S. Senate Judiciary Committee

Dear Senators Grassley and Feinstein,

We write as law professors who care deeply about the Constitution, the judiciary, and the future of the Supreme Court. After careful review of the available record, which is only partial and incomplete due to the Chairman's decision not to requisition all relevant material from the National Archives, we urge you to oppose the confirmation of Judge Brett Kavanaugh to the United States Supreme Court.

Appointing a Supreme Court Justice is of paramount national importance. The nine justices on our Court have the awesome power to shape our government, our laws, and future for generations to come. Nearly every aspect of our daily lives, the rights and opportunities we enjoy as Americans, are influenced by the Court.

Our Constitution sets out the process for appointing a justice: the President has the task of appointing a nominee while the Senate plays the equally important role of ensuring that the nominee has the right qualifications and temperament for a lifetime seat on the Court. The Senate is not intended to be a rubber-stamp for the President's nominee. Rather, it has an obligation to take an active role in exercising its power to provide "advice and consent" on the President's nominations. Each Senator must ensure that the nominee will interpret our laws fairly, with an open mind, and with a vision that enables the country to continue the progress made over the decades, not take us backward.

The appointment of Brett Kavanaugh to fill Justice Kennedy's seat on the Supreme Court may well be the most important appointment in recent history. The Court is closely divided on a number of issues such as voting rights, health care, the role of agencies in protecting health and safety, civil rights, and reproductive justice. Given the current composition and ages of the eight sitting justices, confirming Judge Kavanaugh could cement a bloc of five justices who will be able to consistently tilt the Court toward the ultraconservative side of the constitutional spectrum for at least the next quarter century and probably more.

The key question facing the Senate and American people with this nomination is whether to allow the Court to continue on its present course of eroding key constitutional rights and legal protections for decades, or insist on a nominee sensitive to equal rights, social justice, and to the needs of contemporary society. The stakes in this nomination debate could not be higher.

Brett Kavanaugh is not that nominee. His record on the D.C. Circuit reveals a predisposition to decide cases in order to achieve results that threaten fundamental rights and in some cases the very lives of Americans. The President made it clear early on that he had two litmus tests for Supreme court nominees: that they will undermine access to healthcare under the Affordable Care Act ("ACA"), and will overturn or eviscerate *Roe v. Wade*. Kavanaugh made it to the President's Supreme Court short list because he met these criteria. Notably, as one of his former law clerks wrote, Kavanaugh's dissent in *Seven-Sky v. Holder* provided a 'roadmap' for those who sought to rule the ACA unconstitutional.

Several key observations about Judge Kavanaugh's record are set out below.

**Judge Kavanaugh's judicial philosophy** reflects a backward-looking view of the Constitution. In 2014, Kavanaugh stated that, "from the beginning, the most important aspect of constitutional interpretation was...what were the precise words of the constitutional text."<sup>1</sup> This philosophy is often portrayed as a benign

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<sup>1</sup> Judge Brett Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution 1916* (2014) (transcript available at <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4554&context=ndlr>).

and even laudable loyalty to the Founders' intent; it is not. Rather, it is a pretext for an agenda-driven approach to the law that seeks to advance ultraconservative political goals, and has been used to deny constitutional rights and protections for many vulnerable communities and to challenge the civil rights progress of the past decades.

**Kavanaugh's writings suggest that he would shelter the President from the rule of law.** In a 2008 law review article,<sup>2</sup> Kavanaugh wrote that "criminal investigations and prosecutions of the President," should be deferred while he is in office, and that "the indictment and trial of a sitting President... would ill serve the public interest." Earlier, he made comments suggesting that the unanimous Supreme Court ruling in *U.S. v. Nixon*, which forced President Nixon to turn over the Watergate documents, was wrongly decided.<sup>3</sup> He also wrote that Congress should allow the President to act when he believes "that a particular independent counsel is 'out to get him.'"<sup>4</sup> The risk of these views to the Mueller investigation, which must be allowed to continue for the sake of our national security and the future of our democracy, cannot be overstated.

**Kavanaugh would undermine affordable health care.** Kavanaugh's record on the D.C. Circuit, where he twice dissented<sup>5</sup> from decisions upholding the Affordable Care Act, is clear: he is hostile to the ACA and as a Supreme Court justice would vote to strip health care from millions of people, including the tens of millions with preexisting conditions. This is no hypothetical scenario: a multi-state lawsuit challenging the ACA is working its way through the federal court system today,<sup>6</sup> and the next appointee to the Court will likely participate in deciding it.

**Kavanaugh would overturn and gut *Roe v. Wade*.** Judge Kavanaugh is hostile to individuals' reproductive rights. He tried to block a young woman from accessing abortion care in *Garza v. Hargan*,<sup>7</sup> the widely-known "Jane Doe" case. He would have put numerous obstacles in the woman's path as she sought to exercise her right to obtain an abortion. The ruling by Kavanaugh's panel was, as we all know, overturned by the full D.C. Circuit.

**Kavanaugh would undermine protections for clean air and water.** Kavanaugh's record shows he has repeatedly ruled in favor of polluters and against the Environmental Protection Agency, in cases that affect the health and safety of the environment.<sup>8</sup> In *EME Homer City Generation, LP v. EPA*, Kavanaugh voted to overturn clean air protections and allow businesses to increase air pollution.<sup>9</sup> According to a [Washington Post article, the regulations would have saved](#) 13,000 premature deaths, 19,000 hospital visits, and 1.8 million days of missed work or school per year.

**Kavanaugh would restrict regulatory agencies' ability to enforce laws to protect the public.** Kavanaugh's hostility to health and safety regulations extends beyond environmental protections. Writing for the panel majority in *PHH Corp. v. Consumer Financial Protection Bureau*, where he ruled that the CFPB was unconstitutional, Kavanaugh stated that "independent agencies pose a significant threat to individual liberty."<sup>10</sup>

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<sup>2</sup> Brett M. Kavanaugh, *Separation of Powers during the Forty-Forth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1461 (2008).

<sup>3</sup> Mark Sherman, *Kavanaugh: Watergate Tapes Decision May Have Been Wrong*, Associated Press (Jul. 22, 2018), <https://apnews.com/3ea406469d344dd8b2527aed92da6365>.

<sup>4</sup> Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Geo. L.J. 2134, 2151 (1998).

<sup>5</sup> *Seven Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *Sissel v. US Dept. of Health and Human Services*, 799 F.3d 1035 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).

<sup>6</sup> Complaint for Declaratory and Injunctive Relief, *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex. Feb. 26, 2018).

<sup>7</sup> *Garza v. Hargan*, 874 F.3d 735, 752, 755 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing the court was creating "a new right" for immigrants in custody "to obtain immediate abortion on demand.").

<sup>8</sup> *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (Kavanaugh, J., dissenting); *Tex v. EPA*, 726 F.3d 180 (D.C. Cir. 2013) (Kavanaugh, J., dissenting); *Coal. For Responsible Regulation Inc. v. EPA*, 2012 U.S. App. LEXIS 25997 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting) (stressing that a broad interpretation of 'air pollutant' will impose significantly higher costs on businesses).

<sup>9</sup> *EME Homer City Generation, L.P., v. EPA*, 696 F.3d 7 (2012).

<sup>10</sup> *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 6 (D.C. Cir. 2016).

Here too, the full court overruled him. Agencies such as the CFPB, the SEC, the NLRB, and the OSHRC play critical roles in upholding the rights of consumers, workers, and investors; Kavanaugh would be hostile to the protection of these rights.

**Kavanaugh would side with powerful corporate interests over workers, consumers, and the rights of all.** Kavanaugh's opposition to health, safety, environmental and consumer protections speaks volumes about his attitude toward the rights of everyday people. His rulings in cases involving the rights of employees facing mistreatment by corporate employers, including allegations of racial discrimination, are equally troubling. Notably, Kavanaugh also has repeatedly denied claims of racial discrimination in the workplace.<sup>11</sup> As a Supreme Court justice, he could contribute to a legacy of rulings that would turn back the clock on a century of progress toward better working conditions and better employment opportunities for all people.

**We urge you to conduct a thorough review of Kavanaugh's record. We strongly believe that once you have done so you will conclude, as we have, that Judge Kavanaugh's vision of the Constitution and the law is wrong for our country. He should not be confirmed by the Senate.**

Sincerely,  
The Undersigned

*Please note: Name, state, and school will be listed for identification purposes. Organizational affiliation for all signatories is included for identification purposes only; individuals represent only themselves, not the institutions where they are teaching or other organizations in which they are active.*

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<sup>11</sup> *Jackson v. Gonzales*, 496 F.3d (D.C. Cir. 2007) (denying Title VII claim by an African-American employee who alleged race discrimination after being refused a promotion by the Federal Bureau of Prisons); *Howard v. Office of the Chief Admin. Officer*, 720 F.3d 939 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) (arguing a black woman who was fired from her position as House of Representatives deputy budget director should not have been able to pursue her claims of race discrimination and retaliation).

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Deirdre M. Smith	University of Maine School of Law
Jim Burke	University of Maine School of Law
U. Charles Remmel II	University of Maine School of Law
Douglas L Colbert	University of Maryland Francis King Carey School of Law
Gordon Young	University of Maryland Francis King Carey School of Law
David Abraham	University of Miami School of Law
Dennis O. Lynch	University of Miami School Of Law
Elizabeth M. Iglesias	University of Miami School of Law
Samuel Gross	University of Michigan Law School
Beverly Balos	University of Minnesota Law School
Mary Louise Fellows	University of Minnesota Law School
Chris Blakesley	University of Nevada Las Vegas, William S. Boyd School of Law
Jennifer Moore	University of New Mexico School of Law
Margaret Montoya	University of New Mexico School of Law
Scott England	University of New Mexico School of Law
Deborah M. Weissman	University of North Carolina School of Law
Dominick Vetri	University of Oregon Law School
Dorothy Roberts	University of Pennsylvania Law School
Eric A. Feldman	University of Pennsylvania Law School
Louis S. Rulli	University of Pennsylvania Law School
Jasmine Gonzales Rose	University of Pittsburgh School of Law
John Burkoff	University of Pittsburgh School of Law
Lu-in Wang	University of Pittsburgh School of Law
Mary Crossley	University of Pittsburgh School of Law
Rhonda Wasserman	University of Pittsburgh School of Law
David Wexler	University of Puerto Rico
Corinna Barrett Lain	University of Richmond School of Law

Mary L. Heen	University of Richmond School of Law
Bill Hing	University of San Francisco School of Law
Maya Manian	University of San Francisco School of Law
Michael T Iglesias	University of San Francisco School of Law
W. Lewis Burke	University of South Carolina School of Law
Dean Rivkin	University of Tennessee College of Law
Fran Ansley	University of Tennessee College of Law
Barbara Hines	University of Texas at Austin School of Law
Jeffrey Abramson	University of Texas at Austin School of Law
John Cary Sims	University of the Pacific, McGeorge School of Law
Daniel Steinbock	University of Toledo College of Law
Howard Friedman	University of Toledo College of Law
Joseph Slater	University of Toledo College of Law
Nicole Porter	University of Toledo College of Law
Rebecca E. Zietlow	University of Toledo College of Law
Elizabeth McCormick	University of Tulsa College of Law
Miriam Marton	University of Tulsa College of Law
J H Verkerke	University of Virginia School of Law
Anna Mastroianni	University of Washington School of Law
Robert Aronson	University of Washington School of Law
R. Alta Charo	University of Wisconsin Law School
Alan Jay Weisbard	University of Wisconsin Law School (Emeritus)
Ariela Gross	USC Gould School of Law
Daria Roithmayr	USC Gould School of Law
Gregory C. Keating	USC Gould School of Law
Robert M. Saltzman	USC Gould School of Law
Sam Erman	USC Gould School of Law
Rosalie Berger Levinson	Valparaiso University School of Law
Joan E. Vogel	Vermont Law School
Liz Ryan Cole	Vermont Law School
Stephanie Fariior	Vermont Law School
Patrick Parenteau	Vermont Law School
Mary Ramirez	Washburn University School of Law
David Baluarte	Washington and Lee University School of Law
Timothy Stoltzfus Jost	Washington and Lee University School of Law
Diane Orentlicher	Washington College of Law
Jonathan Weinberg	Wayne State University
Patrick McGinley	West Virginia University College of Law
Suzanne Weise	West Virginia University College of Law
Harris Freeman	Western New England University School of Law
Matthew Charity	Western New England University School of Law
Jennifer Lee Koh	Western State College of Law
Stacey Sobel	Western State College of Law
Susan Etta Keller	Western State College of Law

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Michael Wise	Willamette University College of Law
Miriam Werner	Willamette University College of Law
Steven Green	Willamette University College of Law
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Valerie J. Vollmar	Willamette University College of Law
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John Fabian Witt	Yale Law School
Michael J. Wishnie	Yale Law School
Stephen Wizner	Yale Law School
Susan Rose-Ackerman	Yale Law School
Vicki Schultz	Yale Law School
Bruce Ackerman	Yale Law School
David Singh Grewal	Yale Law School
Issa Kohler-Hausmann	Yale Law School