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BRETT M. KAVANAUGH:
WRONG FOR LGBTQ
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The dissent in *Roe v. Wade* was “my judicial hero” and helped “stem[] the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.”

— JUDGE BRETT KAVANAUGH, 2017 SPEECH

President Trump’s recent nomination of Judge Brett M. Kavanaugh to the U.S. Supreme Court is a direct threat to the constitutional rights of everyday Americans and for the LGBTQ community in particular. Kavanaugh has a troublingly lengthy, far-right pedigree, and he was hand-picked by anti-LGBTQ, anti-choice groups in an explicit effort to undermine equality. This nomination threatens to erode our nation’s civil rights laws, block transgender troops from bravely serving this nation, and issue a license to discriminate against LGBTQ people in every aspect of American life. If confirmed, Kavanaugh will undoubtedly bring a dangerous brand of ideological partisanship that has no place on the Court. Kavanaugh will take the seat of Justice Anthony Kennedy, who authored foundational cases for LGBTQ equality including, *Lawrence v. Texas*, *U.S. v. Windsor*, and *Obergefell v. Hodges*, and he will undoubtedly provide the solid fifth vote that opponents to equality need to move the Court in a deeply conservative direction across a range of legal issues. Kavanaugh will have the opportunity to shape civil and constitutional rights jurisprudence in the country for decades to come. In the coming years, the Supreme Court will be asked to decide critical issues for the LGBTQ community including:

- Whether our nation’s nondiscrimination laws include protections for LGBTQ people—as many lower courts have already concluded. This would impact employment, housing, healthcare, and education civil rights statutes.
- Whether individuals and organizations have a license to discriminate against LGBTQ people when receiving taxpayer dollars to provide critical services.
- Whether LGBTQ people and families can be turned away from businesses open to the general public, simply because of who they are or whom they love.



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- Whether qualified transgender people can be excluded from serving in the military simply because of who they are.

Coming just 15 months after the confirmation of Trump nominee Neil Gorsuch in 2017, Kavanaugh's nomination will potentially engrain the Trump-Pence Administration's dangerous views of the judiciary and the rule of law into the fabric of our nation's highest court for generations to come.

Justices of the Supreme Court need not be well-liked. We may not always agree with their rulings. But we must have faith in their impartiality, openness to legal advocacy, and adherence to reaching decisions based upon legal arguments and established facts—rather than political ideologies or personal biases. The LGBTQ community depends on the Court to enforce constitutional protections and civil rights statutes and to fairly interpret them in ways that protect our community. We must insist that any Supreme Court justice maintain due respect for the dignity and equality of LGBTQ people, which was a proud hallmark of Justice Kennedy's tenure on the bench. This is not a high bar, but Kavanaugh does not meet it.

All told, Judge Kavanaugh's public record on the bench, as a White House official, and as a practicing attorney and commentator, reveals his rigid approach to the law that too often has proven to fuel partisan and ideological fights and excludes real people from justice. His most vocal supporters recognize this and have not been shy to applaud Trump's choice. These supporters including the National Rifle Association, Breitbart News, Focus on the Family, National Organization for Marriage, and National Right to Life Committee.¹

Kavanaugh's broad body of work speaks volumes about the type of justice he is likely to be, if confirmed. In particular, Judge Kavanaugh's record on reproductive rights, the right to privacy, and religious liberty indicates a potent combination of ideological views that could significantly and unnecessarily reshape constitutional doctrine and nondiscrimination protections as they apply to LGBTQ persons. Moreover, as President Trump openly emphasized in his announcement of the nomination, Judge Kavanaugh's adherence to a view of the Constitution that is rooted in tradition and originalism could result in an implementation of the Constitution that is essentially frozen in the 1700s. Finally, Judge Kavanaugh has strident and sometimes curious views on the separation of powers, which he readily and regularly employs to disempower federal agencies and regulations. Together, with the direction the Supreme Court has already taken on religious exemptions in its 2014 *Hobby Lobby* decision,² Judge Kavanaugh could cement a rightward push in the law and the wholesale creation of new constitutional exceptions—much to the detriment of the LGBTQ community.

In the end, LGBTQ Americans deserve a justice who will be open-minded on constitutional rights and who will safeguard the promise of equality for all. Judge Kavanaugh is unfortunately not such a nominee.

1 See, e.g., HRC, *Kavanaugh Passes the Test of These Anti-Equality Organizations—And Most Certainly Fails Ours*, July 19, 2018, <https://www.hrc.org/blog/kavanaugh-passes-the-test-of-these-anti-equality-organizations-but-most-cer>; John Binder, 'America First' SCOTUS Choice: Judge Brett Kavanaugh Applies Trump's Economic Patriotism to the Law, *Breitbart*, July 4, 2018, <https://www.breitbart.com/big-government/2018/07/04/america-first-scotus-choice-judge-brett-kavanaugh-applies-trumps-economic-patriotism-to-the-law/>.

2 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).



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BACKGROUND

Judge Brett Kavanaugh was nominated to serve on the U.S. Court of Appeals for the D.C. Circuit by President George W. Bush in 2003 and ultimately confirmed in 2006. He obtained his bachelor's degree from Yale College and law degree from Yale Law School. He clerked for Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit and for Judge Alex Kozsinki of the U.S. Court of Appeals for the Ninth Circuit. He completed a one-year fellowship in the Office of the Solicitor General and then clerked for Justice Anthony Kennedy on the Supreme Court of the United States. After these clerkships, Kavanaugh worked as Associate Counsel in the Office of the Independent Counsel. He then practiced law at the firm of Kirkland & Ellis and joined the George W. Bush Administration as Associate Counsel and then Senior Associate Counsel to the President (2001-2003), and continued to serve as Assistant to the President and Staff Secretary to the President (2003-2006). He has taught courses at Harvard Law School, Yale Law School, and Georgetown University Law Center, and published in a variety of law reviews and newspapers.

Judge Kavanaugh's elite if familiar background stands in contrast with the sort of professional and personal diversity that the Supreme Court has benefited from in the past.³

LGBTQ PROGRESS AND PRECEDENTS SHOULD BE EMBRACED, NOT OVERLOOKED.

In the nearly three decades since he became a practicing attorney, Judge Kavanaugh has a noticeably thin record on issues of LGBTQ equality and nondiscrimination. During his 12 years on the D.C. Circuit, he did not substantively address any of the Supreme Court's seminal LGBTQ decisions in *Lawrence v. Texas*,⁴ *Romer v. Evans*,⁵ *United States v. Windsor*,⁶ or *Obergefell v. Hodges*,⁷ nor its discredited ruling in *Bowers v. Hardwick*.⁸

3 See, e.g., Anthony M. Kennedy, The Voice of Thurgood Marshall, 44 Stan. L. Rev. 1221 (1992).

4 *Lawrence v. Texas*, 539 U.S. 558 (2003).

5 *Romer v. Evans*, 517 U.S. 620 (1996).

6 *United States v. Windsor*, 570 U.S. 744 (2013).

7 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

8 *Bowers v. Hardwick*, 478 U.S. 186 (1986). Judge Kavanaugh fleetingly referenced the *Windsor* decision as part of a string citation in a footnote about the Supreme Court having "invalidated novel congressional statutes that alter the traditional federal state balance." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 24 n.8 (D.C. Cir. 2016). This footnote arose in the context of his recurring focus on separation of powers and where these issues are "not resolved by the constitutional text alone, historical practice matters a great deal in defining the constitutional limits on the Executive and Legislative Branches." *Id.* at 24.

In majority opinions written by other members of the D.C. Circuit, Judge Kavanaugh participated in rulings that passingly cited *Lawrence*, both in the context of terminally ill patients and also regarding the alleged misconduct of another judge. *In re Charges of Judicial Misconduct*, 769 F.3d 762, 780 (D.C. Cir. 2014); *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 706 (D.C. Cir. 2007).

Judge Kavanaugh also joined a unanimous opinion written by another judge about free speech in national parks that briefly cited the Supreme Court 1995 *Hurley* decision (as part of a string citation) for the proposition that "Parades are ... a form of expression, not just motion." *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 514 (D.C. Cir. 2010) (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568 (1995)).

See also *Walker v. McCarthy*, 582 F. App'x 6, 7 (D.C. Cir. 2014) (unpublished) (joining unanimous unpublished opinion about claim by government employee who received officewide email invitation to same-sex wedding).



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More tellingly, Judge Kavanaugh recently gave public speeches extensively praising the late Justice Antonin Scalia and Chief Justice William Rehnquist,⁹ both of whom have some of the most pronounced anti-LGBTQ records of modern jurists. Scalia penned a blistering dissent in *Obergefell*, which he called a “threat to American democracy.”¹⁰ Scalia and Rehnquist (and Justice Thomas) dissented in *Lawrence*, and would have upheld Texas’ law criminalizing same-sex intimate contact.¹¹ During the oral arguments in *Lawrence*, Rehnquist reiterated the harmful and baseless stereotype that gay men are pedophiles when he asked whether states can have laws that “prefer non-homosexuals to homosexuals as kindergarten teachers.”¹² Doubling down on that stereotype, Scalia added that states “[o]nly [need show] that children might be induced to follow the path to homosexuality.”¹³ Justice Rehnquist joined the majority decision in *Bowers*, which upheld a Georgia law requiring “imprisonment of not less than one nor more than 20 years” for private acts of sodomy.¹⁴

In both of Kavanaugh’s keynote speeches, his only reference to nondiscrimination principles was to imply skepticism with the Supreme Court’s decisions about diversity in higher education.¹⁵ He did nothing to distance himself from the extreme and outmoded comments and beliefs advanced by Scalia and Rehnquist.

Moreover, Judge Kavanaugh is generally considered to be an “originalist” by supporters and opponents alike. Several of his cases have suggested an originalist approach to the Constitution and his speeches (alongside the description of Kavanaugh in President Trump’s announcement of the nomination) reaffirm as much.¹⁶ Although originalist arguments have been made in favor of LGBTQ rights, this approach has also often been used as a means to deny the equal dignity of LGBTQ persons.

Still, much of Kavanaugh’s public record on LGBTQ issues remains needlessly cloaked from public review. The years of 2001 to 2006 (when he served in the Bush White House), was an especially consequential period for the LGBTQ rights and marriage equality movement. This era included the *Lawrence v. Texas* decision, multiple pronouncements by President Bush about the institution of marriage and marriage-related amendments to the federal Constitution, and civil rights litigation and referenda at the state and circuit levels. We know troublingly little about Kavanaugh’s position or role on these matters—although it is reasonable to infer he was involved, given the central function of the White House Staff Secretary and Kavanaugh’s record of participating in so many of the politically consequential decisions of the Bush campaign and first term.

9 See Brett M. Kavanaugh, Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions, 92 Notre Dame L. Rev. 1907 (2017), <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4733&-context=ndlr> (hereinafter, “Notre Dame Speech”); Remarks by Brett M. Kavanaugh, From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist, 2017 Walter Berns Constitution Day Lecture, American Enterprise Institute, <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf> (hereinafter “AEI Speech”).

10 *Obergefell*, 135 S. Ct. 2584, 2626 (Scalia, J., dissenting).

11 *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

12 Oral Argument Transcript, *Lawrence v. Texas*, 2003 WL 1702534 at * 20 (U.S. Oral. Arg. 2003).

13 *Id.*

14 *Bowers*, 478 U.S. at 188 n.1 (2003).

15 See Notre Dame at 1917-1918. Kavanaugh also mentioned how the Constitution’s “greatest flaw was the tolerance of slavery.” AEI Speech at 2.

16 See, e.g., *Nat’l Sec. Archive v. C.I.A.*, 752 F.3d 460, 462 (D.C. Cir. 2014) (“The modern application of the deliberative process privilege rests on the same understanding that motivated the Framers in Philadelphia . . .”); *Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (analyzing the history and tradition of the Second Amendment and of gun laws in the United States); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 688 (D.C. Cir. 2008), *aff’d in part, rev’d in part and remanded*, 561 U.S. 477 (2010) (Kavanaugh, J., dissenting) (“it is always important in a case of this sort to begin with the constitutional text and the original understanding, which are essential to proper interpretation of our enduring Constitution”); Remarks by President Trump Announcing Judge Brett M. Kavanaugh as the Nominee for Associate Justice of the Supreme Court of the United States, White House, July 9, 2018 (“a judge must interpret the Constitution as written, informed by history and tradition and precedent”). *But see* Eric Posner, Is Brett Kavanaugh An Originalist?, *EricPosner.com*, July 18, 2018, <http://ericposner.com/is-brett-kavanaugh-an-originalist/>.



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THE RIGHT TO PRIVACY IS ESSENTIAL TO *ROE V. WADE* AND TO THE LGBTQ COMMUNITY.

On several occasions, Judge Kavanaugh has signaled his critical and constrained perspective on the Court's 45-year-old precedent in *Roe v. Wade*,¹⁷ often through his dissenting opinions.

Most distinctly, in a 2017 speech, Kavanaugh hailed the late Chief Justice William Rehnquist as “my judicial hero,” including for the Chief's dissent in *Roe*, which Kavanaugh said helped “stem[] the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition.”¹⁸ The phrase “unenumerated rights” is used to derisively refer to rights that are said not to be rooted in the text and/or tradition of the Constitution. Kavanaugh went on to praise other “important precedent[] limiting the Court's role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy.”¹⁹

Moreover, Judge Kavanaugh's judicial record features two high-profile dissents about reproductive rights. In 2017, a wide majority of the D.C. Circuit, sitting en banc, held that the constitutional right to an abortion applied straightforwardly to a 17-year-old who was several weeks pregnant and in an immigration detention facility.²⁰ Kavanaugh penned a blistering dissent, lambasting the majority for creating a “radical” “new [legal] right,” engaging in policy debates rather than constitutional analysis, and advancing “a philosophy that unlawful immigrant minors have a right to immediate abortion on demand.”²¹ Instead, Kavanaugh would have stressed the government's “interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion.”²²

Similarly, in a 2015 decision about the Affordable Care Acts (ACAs) coverage for contraceptives and certain opt-out procedures, the D.C. Circuit upheld an employer opt-out notice that allowed employees to continue to access contraception.²³ The court reasoned that the dispute was not really about religious beliefs or burdens at all—it was a disagreement “about how the law functions, and therefore whether there is any causal connection at all between employers' opt-out notice and employees' access to contraception.”²⁴ Judge Kavanaugh launched into a lengthy dissent on the grounds that “under *Hobby Lobby*, the [ACA] 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 (submitting the form) or else pay significant monetary penalties.”²⁵ While acknowledging that *Hobby Lobby* suggested there is a compelling interest in facilitating access to contraception, he still would have concluded that the government could have achieved its interest through less restrictive means.²⁶

Noticeably, in both the 2017 and 2015 opinions, Judge Kavanaugh avoided embracing the basic premise

17 *Roe v. Wade*, 410 U.S. 113, (1973).

18 AEI Speech, *supra*, at 6, 16.

19 *Id.* at 16.

20 *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc).

21 *Garza*, 874 F.3d at 752, 756 (Kavanaugh, J., dissenting).

22 *Garza*, 874 F.3d at 752.

23 *Priests for Life v. U.S. Department of Health and Human Services*, 808 F.3d 1 (D.C. Cir. 2015) (per curiam).

24 *Id.* at 2.

25 808 F.3d at 15 (Kavanaugh, J., dissenting).

26 808 F.3d at 15-16 (Kavanaugh, J., dissenting).



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that there is a constitutional right to reproductive autonomy at all—and instead relied on the parties or precedent having already agreed or assumed as much.²⁷

More broadly, Judge Kavanaugh's record on *Roe* suggests that he does not accept the enduring precept that the Constitution protects the right to privacy. *Roe*, it bears recalling, grew out of a long line of cases dating back to 1891 about personal privacy. As *Roe* made clear, the right to privacy “has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.”²⁸ Moreover, *Roe* explained that privacy has multiple groundings in the Constitution, including “at least the roots of that right in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.”²⁹

This extensive series of precedents about privacy has continued long past *Roe*, including through the Supreme Court's affirmation that LGBTQ persons must be treated with equal dignity under the Constitution. For instance, in a 2003 ruling in *Lawrence v. Texas*, striking down a law that criminalized same-sex sexual contact, the Court invoked *Roe* and other decisions that protected the “right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.”³⁰ Furthermore, the Court's 2015 momentous marriage equality decision built upon this logic further: “Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”³¹

Kavanaugh's apparently narrow conception of privacy under the Constitution is also reflected in some of his decisions in the Fourth Amendment context.³²

THE RIGHT TO BELIEVE IS FUNDAMENTAL. THE RIGHT TO DISCRIMINATE IS NOT.

Kavanaugh's record on *Roe* and reproductive rights also underscores how expansive and out-of-the-mainstream his views on religious liberty are. At the constitutional level, freedom of belief, as codified in the First Amendment, is of course fundamental and a central part of our nation's founding documents and history. At a statutory level, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993, supported by a richly diverse coalition of religious and civil rights groups. Designed to protect the rights of religious minorities from unlawful government intrusion, RFRA was seen as an important safeguard for

27 *Garza*, 874 F.3d at 753 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (“All parties have assumed for purposes of this case, moreover, that Jane Doe has a right under Supreme Court precedent to obtain an abortion in the United States.”); *Priests for Life*, 808 F.3d at 22 (Kavanaugh, J., dissenting) (“In particular, Justice Kennedy referred to the ‘premise’ of the Court's decision: namely, its ‘assumption’ that the Government has a ‘legitimate and compelling interest’ in facilitating access to contraception.”) (citations omitted).

28 *Roe*, 410 U.S. at 152–53 (citations omitted).

29 *Roe*, 410 U.S. at 152 (citations omitted).

30 *Lawrence*, 539 U.S. at 564–65 (discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), as “part of the background for the decision in *Roe v. Wade*”).

31 *Obergefell*, 135 S. Ct. at 2599.

32 See, e.g., *Klayman v. Obama*, 805 F.3d 1148, 1149 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc) (“Even if the bulk collection of telephony metadata constitutes a search, the Fourth Amendment does not bar all searches and seizures. It bars only unreasonable searches and seizures. And the Government's metadata collection program readily qualifies as reasonable under the Supreme Court's case law.”) (citation omitted).



our country's most vulnerable groups.

But over the years, this law has been applied in a variety of ways, most prominently by the Supreme Court's decision in *Hobby Lobby*,³³ which turned the original intent of RFRA on its head. By recognizing large corporations as “people” (who are neither vulnerable nor minorities) this decision empowered politically and socially powerful entities to cite RFRA as a legal means to discriminate and marginalize truly vulnerable groups including women and LGBTQ people. Although the *Hobby Lobby* decision dealt directly with access to reproductive care and contraceptives, its reasoning could be used as a means to discriminate—including by employers to deny LGBTQ people access to other critical health care services including hormone therapy for transgender people, infertility treatment for same-sex couples, or PrEP.³⁴ Some businesses are already leaning on this troubling decision to deny basic healthcare to LGBTQ people.

The unfortunate reality is that religious beliefs have long been used as a basis to deny LGBTQ people access to basic civil rights. However, exactly what *Hobby Lobby* will mean for LGBTQ rights hinges on the future composition of the Supreme Court. If a justice like Kavanaugh is confirmed, then the logic of *Hobby Lobby* could be further extended to allow discrimination against LGBTQ people at work, school, and beyond under the guise of religious expression.³⁵

Kavanaugh's interpretation of RFRA in the *Priests for Life* case³⁶ is especially illuminating in several respects. The contraceptive coverage at issue there already provided a simple opt-out procedure for religious objectors that consisted of a one-page form³⁷ and had a *de minimis* impact on religious exercise. Yet Kavanaugh went out of his way to expansively construe *Hobby Lobby* and advance a broad view of what constitutes “complicit[y] in moral wrongdoing”—he would have refused to examine that claim, even “if the religious organizations are misguided in thinking that [the ACA] scheme ... makes them complicit in facilitating contraception or abortion[.]”³⁸ The majority of the D.C. Circuit pointed out that Kavanaugh and the other dissents “perceiv[ed] in *Hobby Lobby* a potentially sweeping, new RFRA prerogative for religious adherents to make substantial-burden claims based on sincere but erroneous assertions about how federal law works.”³⁹ All told, if Kavanaugh was so eager to enlarge *Hobby Lobby* and RFRA to turn a one-page opt-out form into a constitutionally actionable infringement upon religion, then he seems all-too-ready to carve out any number of other religious exemptions into statutory and constitutional law.

Moreover, Kavanaugh's other professional activities suggest that religious exemptions are areas where he has pre-formed and proactive views of what the law should be. From 1999 to 2001 (relatively early in the religious liberty legal movement) Kavanaugh served as Co-Chair of the Federalist Society's Religious Liberties Practice Group, School Choice Subcommittee.⁴⁰ While in private practice, he worked on *Santa Fe*

33 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

34 See, e.g., Caroline Mala Corbin, *What Does Hobby Lobby Mean for LGBTQ Rights?*, HRC Blog (July 1, 2016), <http://www.hrc.org/blog/what-does-hobby-lobby-mean-for-lgbtq-rights>; Sarah Warbelow, *Hobby Lobby's Implications for the LGBT Community*, HRC Blog (June 30, 2014), <http://www.hrc.org/blog/hobby-lobbys-implications-for-the-lgbt-community>; *HRC Responds to Supreme Court Ruling in Hobby Lobby*, HRC Blog (Jun 30, 2014), <http://www.hrc.org/blog/hrc-responds-to-supreme-court-ruling-in-hobby-lobby>.

35 *Id.*

36 808 F.3d at 15 (Kavanaugh, J., dissenting).

37 26 C.F.R. § 54.9815-2713A(a); Ctrs. for Medicare & Medicaid Servs. Form No. CMS-10459: Coverage of Certain Preventive Services under the Affordable Care Act (2015).

38 808 F.3d at 17, 19 (Kavanaugh, J., dissenting).

39 808 F.3d at 2.

40 United States Senate Committee on the Judiciary, Questionnaire for Nominee to the Supreme Court at 6, [https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20S.JQ%20\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20S.JQ%20(PUBLIC).pdf).



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Independent School District v. Doe, a case involving the prayers that were delivered over a public address system before each school football game; Catholic and Mormon students and their parents challenged the practice under the Establishment Clause. Kavanaugh served as counsel of record for an amicus brief in support of the school district, arguing that “offense at one’s fellow citizens is not and cannot be the Establishment Clause test, at least not without relegating religious organizations and religious speakers to bottom-of-the-barrel status in our society—below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes, all of whom may use the neutrally available public square and receive neutrally available government aid.”⁴¹ The Supreme Court, in a decision joined by Justice Kennedy and others, rejected those arguments, and ruled that the school’s policy on pre-game prayers violated the Establishment Clause.⁴²

ACCESS TO HEALTHCARE AND REPRODUCTIVE SERVICES ARE VITAL TO LGBTQ PEOPLE.

Kavanaugh’s time on the bench also reveals two troubling trends that could restrict critical access to health care for LGBTQ persons across America.

First, Kavanaugh’s constrained view of *Roe* and privacy would likely impact the availability of contraceptive and reproductive health care services. While the ruling in *Roe* was focused on the availability of abortion, its legal reasoning was intertwined with the Supreme Court’s prior decisions about the availability of contraception. Indeed, it has been black letter law for over half a century that states cannot ban the purchase of contraceptives, such as condoms or birth control pills.⁴³ These constitutional protections are widely relied upon: 99% of women aged 15-44 who have ever had intercourse have used at least one form of contraception.⁴⁴ Many in the LGBTQ community, particularly lesbians, bisexual women, and transgender men, have a real need for access to contraception for various healthcare needs, including the prevention of pregnancy and family planning, as well as for the treatment of medical conditions like endometriosis, polycystic ovarian syndrome, and migraines.⁴⁵ Kavanaugh’s willingness, for instance, in *Priest for Life*, to view access to contraception as a form “complicit[y] in facilitating contraception or abortion,” even when that claim may be “misguided,”⁴⁶ is deeply disconcerting.

Second, Kavanaugh has launched several broader attacks on the constitutionality and structure of the Affordable Care Act, a statute which has made health care coverage a reality for many LGBTQ individuals and their families for the first time. For example, in *Seven-Sky v. Holder*, the D.C. Circuit rejected a sweeping challenge to the ACA individual mandate.⁴⁷ Judge Kavanaugh dissented at length, ostensibly on jurisdic-

41 Brief of Amici Curiae Congressman Steve Largent and Congressman J.C. Watts in Support of Petitioner, *Santa Fe Independent School Dist. v. Doe*, 1999 WL 1272963 at *29 (U.S. Amicus. Brief, 1999).

42 530 U.S. 290 (2000).

43 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

44 Guttmacher Institute, Contraceptive Use in the United States, September 2016, <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states>.

45 See, e.g., Aaron Rodriguez, *Trump’s Proposal to Dismantle ACA Contraceptive Mandate Puts Employers in Charge of Women’s Health*, May 31, 2017, HRC.org, <https://www.hrc.org/blog/trumps-proposal-to-dismantle-aca-contraceptive-mandate-puts-employers>.

46 808 F.3d at 17, 19 (Kavanaugh, J., dissenting) (emphasis added).

47 *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).



tional grounds and not expressing a view on the merits, but in reality signalling his antagonism to the ACA. Namely, he called the individual mandate “unprecedented on the federal level in American history” and a “significant expansion” of congressional authority.⁴⁸ Kavanaugh also suggested that “the President might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional.”⁴⁹ Although Kavanaugh’s dissent would “leave[] momentous constitutional issues for another day,”⁵⁰ the Supreme Court unanimously rejected Kavanaugh’s jurisdictional arguments, and a majority of the Court upheld the individual mandate as a constitutionally valid tax.⁵¹ In other challenges to the ACA too, Kavanaugh indicated a readiness to consider arguments as to why the landmark health care law was unconstitutional.⁵²

The bottom line of Kavanaugh’s approach to contraceptives and federal health care laws is to threaten the access to reproductive and health care services which have proven to be so essential for LGBTQ people. Quality, culturally competent care is critical to ensuring that LGBTQ people receive the information and support they need—yet it is already too often out of reach for many members of our community, due to hesitancy on the part of many physicians to inquire about sexual activity, together with bias or a lack of knowledge regarding LGBTQ people. By repeatedly dissenting on issues involving contraception and the constitutionality of the ACA, Kavanaugh’s jurisprudence suggests these vital laws could be in jeopardy.

FEDERAL NONDISCRIMINATION PROTECTIONS SHOULD BE APPLIED EVENHANDEDLY.

With respect to nondiscrimination claims based in federal statutes, Kavanaugh’s record is decidedly mixed.

In the context of discrimination at the voting booth, Kavanaugh wrote a troubling opinion upholding South Carolina’s voter identification law under Section 5 of the Voting Rights Act, which bars state laws that have either the purpose or the effect “of denying or abridging the right to vote on account of race or color.” Kavanaugh reasoned that because South Carolina’s particular combination of laws allowed “citizens with non-photo voter registration cards to still vote without a photo ID so long as they state the reason for not having obtained one,” it did “not have a discriminatory or retrogressive effect” and was “not enacted for a discriminatory purpose.”⁵³ Kavanaugh acknowledged that the “South Carolina law . . . may have run into problems under Section 5,” absent certain newly added provisions about reasonable impediments to voting.⁵⁴ That opinion spurred a separate concurrence (by an appointee of President George W. Bush), who felt the need to underscore the “vital function that Section 5 of the Voting Rights Act,” including its “deterrent

48 *Id.* at 51-52 (Kavanaugh, J., dissenting).

49 *Id.* at 50 (Kavanaugh, J., dissenting).

50 *Id.* at 54 (Kavanaugh, J., dissenting).

51 *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

52 Compare *Sissel v. U.S. Dept. of Health and Human Services*, 799 F.3d 1035 (D.C. Cir. 2015) (rejecting a constitutional challenge to the ACA under the Origination Clause) with *id.* at 1049 (Kavanaugh, J., dissenting) (suggesting that the ACA constituted a piece of legislation that raised tax revenues, and therefore was subject to the Origination Clause, but that the court should have “vacate[d] the panel opinion and rule[d] for the Government on the ground that the [ACA] originated in the House and thereby complied with the Origination Clause.”).

53 *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).

54 *Id.* at 40.



effect.⁵⁵ Kavanaugh's decision predated the Supreme Court's 2013 *Shelby County* ruling,⁵⁶ which effectively gutted Section 5 of the Voting Rights Act and ushered in a wave of voter identification laws—many of which have disenfranchised communities of color and already been struck down by other circuits as discriminatory. Were Kavanaugh to carry on his views about the constitutionality of voter identification laws, it could do great damage to voting rights and the political participation of communities of color, in particular.

In the context of employment discrimination, Kavanaugh's track record is even more varied: On multiple occasions, Kavanaugh chose to dissent in cases where the majority upheld a claim or finding of discrimination, suggesting he may look for ways to narrow such civil rights claims or statutes, rather than go to a jury or otherwise succeed. For example, in a case that allowed certain race discrimination claims by a congressional employee to proceed,⁵⁷ Kavanaugh dissented on the grounds that, under the Constitution's Speech or Debate Clause, courts "must dismiss a discrimination suit against a congressional employing office if the employer's stated reason for the employment decision is the plaintiff's performance of legislative activities."⁵⁸ In an age discrimination case involving the State Department's mandatory retirement policy,⁵⁹ Kavanaugh dissented and criticized the majority opinion for creating a "smokescreen," and "stacking the deck with inapposite interpretive presumptions, and raising the specter of rampant race, sex, and religious discrimination."⁶⁰ In another racial discrimination case involving retaliation in the form of reporting unfounded security concerns against an employee,⁶¹ Judge Kavanaugh would have dismissed the case altogether, reasoning that security clearance decisions are not reviewable.⁶²

SEPARATION OF POWERS PREVENTS THE OVER-CONCENTRATION OF POWER. IT IS NOT AS AN EXCUSE FOR DISEMPOWERING FEDERAL AGENCIES.

A distinctive theme in Kavanaugh's judicial record is the separation of powers. Separation of powers is a principle of constitutional design that aims to avoid the concentration of power and establish checks and balances among the three branches of the federal government. Yet, Kavanaugh seems to envision separation of powers much more expansively—and he seems to see such constitutional problems quite regularly.⁶³

55 *Id.* at 53-54 (D.D.C. 2012) (Bates, J., concurring).

56 *Shelby Cty v. Holder*, 570 U.S. 529 (2013).

57 *Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 720 F.3d 939 (D.C. Cir. 2013).

58 720 F.3d at 956-57 (Kavanaugh, J., dissenting); *id.* at 956 ("Put simply, the majority opinion's test is inconsistent with Speech or Debate Clause principles because it necessarily will require congressional employers to either produce evidence of legislative activities or risk liability. Under the Constitution's Speech or Debate Clause, Article I congressional employers cannot be put to this kind of choice by an Article III federal court.").

59 *Miller v. Clinton*, 687 F.3d 1332 (D.C. Cir. 2012) (ADEA and Basic Authorities Act).

60 *Id.* at 1357 (Kavanaugh, J., dissenting).

61 *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012).

62 689 F.3d at 776 (Kavanaugh, J., dissenting) ("If Congress wishes to re-strike the balance between personnel and employment discrimination laws on the one hand and national security on the other, it is free to do so—either broadening or narrowing the scope of the protection for agencies' security clearance decisions. Until Congress does so, however, I would apply *Egan* according to its terms. Here, Rattigan claims that FBI officials improperly decided to report him to security clearance investigators. Under *Egan*, we cannot second-guess the FBI's decision. For that reason, Rattigan's suit faces an insurmountable bar, and we must dismiss it.").

63 See, e.g., Brett M. Kavanaugh, Separation of Powers During the 44th Presidency and Beyond, 93 Minn. L. Rev. 1454 (2009).



Time and time again, Kavanaugh's raises separation of powers as a means of limiting federal agencies or narrowly interpreting federal statutes. This is perhaps most striking in *PHH Corp. v. Consumer Financial Protection Bureau*,⁶⁴ involving a major structural challenge to the Consumer Financial Protection Bureau (CFPB). Kavanaugh wrote the initial opinion for a three-judge panel criticizing "independent agencies [as] . . . a headless fourth branch of the U.S. Government."⁶⁵ "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," Kavanaugh further explained.⁶⁶ The D.C. Circuit, sitting en banc, vacated Kavanaugh's opinion and sent the case back to the lower court on the grounds "[t]he Supreme Court eighty years ago sustained the constitutionality of [another] independent . . . consumer-protection financial regulator with powers analogous to those of the CFPB."⁶⁷ Kavanaugh took a similar approach to separation of powers in several other CFPB-related cases.⁶⁸

In various other contexts, ranging from federal oversight of environmental protection,⁶⁹ highway safety,⁷⁰ the accounting profession,⁷¹ and prosecutorial discretion,⁷² Judge Kavanaugh seems to see novel separation of powers problems when others had not viewed them before. Were Kavanaugh to be confirmed and to apply this more broadly in his jurisprudence, it could regularly disempower federal agencies and narrow federal laws, which often serve as crucial bulwarks against LGBTQ discrimination.

A FAIR CONFIRMATION HEARING REQUIRES FULL ACCESS TO A NOMINEE'S PUBLIC RECORD.

Finally, it must be noted, that among the substantive and circumstantial concerns with Kavanaugh's nomination, the restricted access to swathes of his public record is deeply problematic. What limited records are available from before he joined the bench offers us only glimpses into his fuller corpus of work: Initial FOIA requests have already revealed that Kavanaugh was privy to White House email correspondence regarding "Marriage Protection Week" in 2003 and indicated that there are over 400,000 pages of potentially relevant other material on file. We can glean certain insights about his views on racial discrimination or on Presidential immunity. For example, in *Rice v. Cayetano*,⁷³ he co-authored an amicus brief with Robert Bork arguing against Hawaii's state constitutional provisions about native Hawaiians.⁷⁴ Kavanaugh published about investigations by special counsel and suggested, among other things, that a sitting President should

64 839 F.3d 1 (D.C. Cir. 2016), vacated and remanded, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

65 839 F.3d at 6.

66 839 F.3d at 6.

67 881 F.3d 75, 77.

68 See, e.g., *John Doe Co. v. CFPB*, 849 F.3d 1129 (D.C. Cir. 2017); *Morgan Drexen, Inc. v. CFPB*, 785 F.3d 684 (D.C. Cir. 2015).

69 *Mexichem Fluor, Inc. v. Env'tl. Prot. Agency*, 866 F.3d 451, 453 (D.C. Cir. 2017); *Coal. for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785 (D.C. Cir. 2012) (dissenting from the denials of rehearing en banc).

70 *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1291 (D.C. Cir. 2007).

71 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008).

72 *In re Aiken Cty.*, 725 F.3d 255, 264 (D.C. Cir. 2013).

73 528 U.S. 495 (2000).

74 Brief of Amici Curiae Center for Equal Opportunity, et al., in Support of Petitioner, *Rice v. Cayetano*, 1999 WL 345639 (U.S.), 1-2 (U.S. Amicus Brief 1999); see also Brett Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, Wall St. J., Sept. 27, 1999.



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not be subject to criminal indictment until he leaves office or is removed—which raise serious questions about how Kavanaugh might handle (or recuse) himself were a presidential indictment- or impeachment-related issue to reach the Supreme Court.⁷⁵ Combined with his unique views on separation of powers, the net effect of Kavanaugh's ideological stances could be to diminish federal agencies and statutes while centralizing and aggrandizing executive power in the Office of the President.

Unfortunately, much of Kavanaugh's public record as a counsel and Staff Secretary in the Bush White House remains undisclosed, notwithstanding prior practice and pending FOIA lawsuits. By contrast, during Justice Elana Kagan's confirmation hearing, the White House voluntarily released her emails and documents from her prior White House service within a few weeks of her nomination,⁷⁶ and well in advance of her June 28, 2010, hearing before the Senate Judiciary Committee hearing. Indeed, for Kagan's nomination, the Senate Judiciary Committee paused confirmation hearings while the William J. Clinton Presidential Library and Museum released nearly every email Kagan had ever written in government (roughly 170,000 pages).

In order to fully and fairly examine Kavanaugh's views on constitutional doctrine and matters of public concern, the Senate Judiciary Committee should be able to duly vet Kavanaugh's full record and ask about his decisions as an official in the Bush Administration.

75 Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 *Geo. L.J.* 2133 (1998).

76 Julie Hirschfeld Davis, *Kagan e-mails go public as hearings approach*, NBC News, June 18, 2010, <http://www.nbcnews.com/id/37777375/ns/politics/t/kagan-e-mails-go-public-hearings-approach/#.W1ji-NhKjOR>.