

6 August 2018

Hon. Chuck Grassley, Chair
Hon. Dianne Feinstein, Ranking Member
United States Senate
Senate Judiciary Committee
Dirksen Senate Office Building, Rm. 224
50 Constitution Avenue NE
Washington, DC 20002

RE: The Nomination of Judge Brett Kavanaugh to the United States Supreme Court

Dear Senators Grassley and Feinstein,

President Trump's nomination of Judge Brett Kavanaugh to the Supreme Court is a matter of grave concern for the nation's Latinx population. The President has made it clear that he will only nominate judges prepared to criminalize the right to an abortion and the Federalist Society, of which Judge Kavanaugh is a member, has noted that this nominee is especially poised to make that happen. For LatinoJustice PRLDEF, this alone is enough to make us pause. But a broader review of Judge Kavanaugh's record on the bench – all that we have available at this time of the early stages of his vetting – confirms what we suspected and accordingly we cannot support his nomination to the U.S. Supreme Court.

Judge Kavanaugh's jurisprudence is anti-immigrant, anti-worker, and pro-law enforcement. His most notable decision affecting both immigrants' rights and women's rights, *Garza v. Hargan*, limited a young undocumented woman's right to choose, demonstrating that he would lend strong support to Trump's anti-immigrant agenda.¹

Judge Kavanaugh has repeatedly been reluctant to recognize racial animus when considering cases. He is more concerned with deference to precedent or agency decisions than protecting Latinx individuals from racial discrimination. In *Ortiz-Diaz v. U.S.*, while Judge Kavanaugh noted evidence of racial and national origin discrimination against a Latino employee, he ultimately concurred with the majority opinion in that case dismissing the claims because of Circuit precedent.² He concluded that, "cases hold that lateral transfers to different positions or

¹ *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017).

² *Ortiz-Diaz v. United States HUD*, 831 F.3d 488 (D.C. Cir. 2016).

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posts with the same pay and benefits are ordinarily not changes in the "terms, conditions, or privileges" of employment."³ He wrote the, "concurrence simply to note [his] skepticism about those cases"⁴ Thus, even though he believed that "a forced lateral transfer — or the denial of a requested lateral transfer — on the basis of race is actionable under Title VII... Based on [circuit] precedents," he joined the majority opinion.⁵ In 2017, despite concerns that it would negatively impact Latinxs, Judge Kavanaugh upheld an FCC regulation that allowed broadcasters to transmit emergency alerts in English only.⁶ In *In re Charges of Judicial Misconduct* Judge Kavanaugh once again undermined the severity of racial animus.⁷ In *In re Charges of Judicial Misconduct*, a judge repeatedly disparaged Black and Latinx people while on the bench. The defendant appealed his conviction claiming that the judge was biased, as evidenced by her comments on the bench. Despite the judge's comments that "racial groups like African Americans and Hispanics are predisposed to crime" and that "a lot of Hispanic people [are] involved in drug trafficking," This quintessential racial stereotyping employed by a sitting federal judge continues to feed the vilification of the nation's largest racial / ethnic minority – and all of it with no objective basis. Judge Kavanaugh joined the opinion which ultimately could not "find that such a view indicates improper bias or misconduct."⁸ These are just some examples of the ways in which Judge Kavanaugh's refusal to condemn racism has had a direct impact on the ability of Latinxs to immigrate to, work, and live freely in this country.

I. Judge Kavanaugh's jurisprudence on immigration and labor

Judge Kavanaugh does not believe that the constitutionally guaranteed right to an abortion should be extended to undocumented immigrants. In *Garza v. Hargan*, Judge Kavanaugh dissented claiming that the majority had invented a "new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand."⁹ Kavanaugh ultimately rested his opinion on the idea that the transfer of a minor into custody before having an abortion is not an undue burden. However, throughout the opinion, Judge Kavanaugh repeatedly stressed that the plaintiff was "unlawful" and that "[h]er home country does not allow elective abortions," implying that these facts may mean she has no right to an abortion as an undocumented immigrant.¹⁰ In response to this dissent Judge Millett wrote that, "the mere act of entry into the United States without documentation does not mean that an immigrant's body is no longer her or his own. Nor can the sanction for unlawful entry be forcing a child to have a baby."¹¹ Judge Millett's concurring opinion highlights the underlying tone of Judge Kavanaugh's opinion which is that minors and

³ *Id.* at 494.

⁴ *Id.*

⁵ *Id.*

⁶ *Multicultural Media Telecom & Internet Council v. FCC*, 873 F.3d 932, 935 (D.C. Cir. 2017).

⁷ 769 F.3d 762 (2014).

⁸ *Id.* at 773.

⁹ 874 F.3d 735, 752 (D.C. Cir. 2017).

¹⁰ *Id.* at 752-53.

¹¹ *Id.* at 737-38.

undocumented immigrants are not entitled to the same constitutional protections as adult U.S. citizens.

Judge Kavanaugh does not believe that labor protections should cover undocumented immigrants. As the lone dissenter in *Agri Processor Co. v. NLRB*, Judge Kavanaugh wrote that he “would hold that an illegal immigrant worker is not an “employee” under the NLRA for the simple reason that, ever since 1986, an illegal immigrant worker is not a lawful “employee” in the United States.”¹² In *Agri Processor v. NLRB*, Judge Kavanaugh ultimately argued that a union election should be invalidated because it was ‘tainted’ by votes from undocumented immigrants.¹³

Judge Kavanaugh often rules for big businesses in civil rights employment cases.¹⁴ Angela B. Cornell, clinical professor of law at the Labor Law Clinic at Cornell University notes that Judge Kavanaugh “would be trouble for the interests of workplace health and safety” if appointed to the Supreme Court.¹⁵ He routinely dismisses cases finding that the alleged facts are not enough to prove racial, ethnic, or age discrimination.¹⁶ He has even gone as far as to say that discrimination is acceptable in some cases. For example, In *Miller v. Clinton*, Judge Kavanaugh dissented and claimed that the” State Department Basic Authorities Act, as amended in 1994, authorized the State Department to mandate retirement at age 65 for workers such as Miller.”¹⁷ In his view, whether or not the State Department has the ability to discriminate based on age “is not a close call.”¹⁸

II. Judge Kavanaugh’s jurisprudence on voting rights

In *South Carolina v. United States*, Judge Kavanaugh upheld South Carolina’s voter ID law (“Act R54”) that required citizens to show photo ID cards in order to vote or to “state the reason for not having obtained” a photo ID.¹⁹ The Obama administration believed that the law “could disenfranchise tens of thousands of minority voters, who were more likely than whites to lack such IDs.”²⁰ However, Judge Kavanaugh found that the law did not have a discriminatory, retrogressive effect. In particular, he was unwilling to invalidate the law because other, more regressive, policies had been upheld in the past. He found that comparing “South Carolina’s Act R54 to some other States’ voter ID laws—as well as to the Carter–Baker Report’s proposed voter ID reforms—strongly buttresses the conclusion that South Carolina’s law has neither a

¹² *Agri Processor Co. v. NLRB*, 514 F.3d 1, 10 (2008).

¹³ *Id.*

¹⁴ Casey Quinlan, *In Brett Kavanaugh, workers have a justice who will always side with big business*, (July 11, 2018), <https://thinkprogress.org/brett-kavanaugh-sides-with-big-business-not-workers-right-1dcb8c63f619/>.

¹⁵ *Id.*

¹⁶ See *Vatel v. All. of Auto. Mfrs.*, 627 F.3d 1245, 1249 (D.C. Cir. 2011) (arguing that hiring someone of a diverse background made it unlikely that racial animus motivated the dismissal. “when the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to [that person] an invidious motivation that would be inconsistent with the decision to hire”); *Stewart v. St. Elizabeths Hosp.*, 589 F.3d 1305, 1308 (D.C. Cir. 2010); *Baloch v. Kempthorne*, 550 F.3d 1191, 1195 (D.C. Cir. 2008). In each of these cases Kavanaugh viewed the evidence provided by the plaintiffs to be insufficient to prove discrimination.

¹⁷ *Miller v. Clinton*, 687 F.3d 1332 (2012).

¹⁸ *Id.*

¹⁹ *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).

²⁰ <https://www.nytimes.com/2018/07/13/opinion/sunday/voting-rights-voter-id-kavanaugh.html>

discriminatory effect nor a discriminatory purpose. South Carolina's new voter ID law is significantly more friendly to voters without qualifying photo IDs than several other contemporary state laws that have passed legal muster.”²¹ In *South Carolina v. United States*, Judge Kavanaugh also revealed his willingness to accept the government’s stated interests as legitimate. He wrote 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.”²²

This case is particularly troubling from a Latinx voting rights perspective. Early in his administration President Trump established the Presidential Advisory Commission on Election Integrity, ostensibly to document and provide solutions to the so-called voter fraud that could only explain, in his view, the fact that he lost the popular vote in the 2016 election. LatinoJustice along with the Mexican-American Legal Defense Fund intervened in a suit initiated by the NAACP Legal Defense Fund that challenged the legitimacy of the Commission.²³ The legal defense funds argued that the Commission was the product of the President’s intent to discriminate against African-American and Latino voters and that there was no voter fraud to speak of. Eventually, the President dismantled the Commission. The lesson here is that if Judge Kavanaugh concludes that documentation of voter fraud is unnecessary to justify discriminatory legislation undertaken to allegedly curb it, as he did in the South Carolina case above, then he is revealing, once again, that he is prepared to do the President’s bidding if he ascends to the Supreme Court.

III. Judge Kavanaugh’s jurisprudence on criminal justice and policing

In *Wesby v. D.C.*, Judge Kavanaugh argued for an expansive understanding of qualified immunity.²⁴ His understanding of qualified immunity for police officers would grant law enforcement wide latitude to act without consequences. He argued that “regardless of whether the officers had probable cause, they are entitled to qualified immunity because they at least *reasonably could have believed* that they had probable cause.”²⁵ “Therefore, in suits alleging a lack of probable cause to arrest, officers are not liable if they *arguably* had probable cause—that is, if the officer *reasonably could have believed* that there was probable cause to arrest.”²⁶ In short, police officers need not rely on objective elements of probable cause – they merely have to think it’s there. Ultimately, Judge Kavanaugh’s pro-law enforcement views will negatively impact Latinxs as they encounter excessive and aggressive police tactics.

IV. Conclusion

The Supreme Court has always played a vital in protecting civil rights. Throughout history Americans have worked tirelessly to ensure that all Americans have equal opportunities to protect

²¹ *South Carolina v. United States*, 898 F. Supp. 2d 30, 48 (D.D.C. 2012).

²² *Id.* at 44.

²³ *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018).

²⁴ *Wesby v. D.C.*, 816 F.3d 96 (D.C. Cir. 2016).

²⁵ *Id.* at 105.

²⁶ *Id.* at 106.

their bodies, their livelihoods, and their ability to live and work in this country. The Supreme Court represents the last line of defense for this country's most cherished rights, and for our democracy's very stability. The President's selection of Judge Kavanaugh to replace Justice Kennedy may well destroy many of the civil rights victories that have been won in the last half a century. If confirmed, Brett Kavanaugh would be deciding what our Constitution means and how it will affect our lives. His judicial record reveals that he could very well have a devastating impact on voting rights, labor protections, immigrants' rights, reproductive rights, and criminal justice reform. Replacing Justice Kennedy with this nominee — especially during a time in which our system of checks and balances is needed more than ever — would have a lasting and devastating impact on the balance of the Court, and on our country's most long-held and fought-for values. LatinoJustice PRLDEF demands that confirmation is given only to a nominee with a demonstrated commitment to civil rights and to our nation's highest constitutional values and liberties.

Sincerely,

A handwritten signature in black ink, appearing to be "Juan Cartagena", with a large circular flourish on the left and a long horizontal line extending to the right.

Juan Cartagena
President & General Counsel
LatinoJustice PRLDEF

cc: Members of the U.S. Senate Judiciary Committee