

**Report of the American Civil Liberties Union
on the Nomination of Judge Brett M. Kavanaugh
to Be Associate Justice of the
United States Supreme Court**

August 15, 2018

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INTRODUCTION

By policy, the ACLU does not endorse or oppose nominees or candidates for political or judicial office. Accordingly, we do not take a position on the nomination of Judge Brett M. Kavanaugh to the United States Supreme Court. We offer this analysis of his decisions and writings on issues of individual rights and liberties to help inform the confirmation process.

Judge Kavanaugh has served as a judge on the United States Court of Appeals for the District of Columbia Circuit since 2006, and he has written approximately 300 opinions. In what follows, we focus on the most significant opinions in areas of civil liberties and civil rights.

As a whole, Kavanaugh's record reflects a consistently conservative jurist. He voted to allow the federal government to continue blocking an immigrant minor's access to abortion, where it had no justification for doing so. He favors executive power, and he has been reluctant to enforce any limits on the president or the executive branch in the context of national security and foreign affairs. He is particularly skeptical about international law constraints on government power, even in the context of human rights and the laws of war. He has interpreted the Fourth Amendment to permit sweeping collection of Americans' phone records by the National Security Agency and to allow random drug testing of federal employees and extensive "stop-and-frisk" searches. And he found no First Amendment problem with an official requirement that federal grantees adopt a pledge against their will as a condition of receiving federal funding, but he deemed a rule requiring "net neutrality" to violate the First Amendment rights of internet service providers.

Judge Kavanaugh's record on many civil rights issues is relatively sparse. He has few significant or revealing opinions on women's rights, racial justice, or disability rights, and none on the death penalty or LGBT rights. We have summarized the most significant of his opinions in these areas, but taken together, they offer little guidance as to how he is likely to rule as a Supreme Court justice. Although he has acknowledged the harms of domestic violence and maintained that a single racial epithet can establish a hostile work environment under Title VII, he has more often ruled against than for civil rights complainants, and before he was a judge, he wrote an amicus brief that calls into question whether he would support affirmative action.

REPRODUCTIVE RIGHTS

There are serious concerns about Judge Kavanaugh's stance on the fundamental constitutional right to abortion, particularly in light of President Donald J. Trump's vow to appoint Supreme Court justices committed to overturning *Roe v. Wade*. In Judge Kavanaugh's only decision involving abortion, *Garza v. Hagan*, he would have allowed government officials to obstruct, at least temporarily, a woman's right to abortion, in circumstances where the government had no compelling justification for doing so.

The plaintiff in the case, Jane Doe, was a pregnant 17-year-old unaccompanied immigrant minor who was abused by her parents in her home country. After she came to the United States without her parents, she was detained and placed in the government's custody in a private shelter that contracted with the federal government. Jane Doe repeatedly requested an abortion, but the Trump administration ordered the private shelter where she was staying to prevent her from going to any abortion-related appointments.

When the ACLU, representing Jane Doe's guardians, secured an emergency order from the district court allowing Doe to have the abortion, the government appealed. Over a vigorous dissent by Judge Patricia Millett, Judge Kavanaugh wrote a decision that allowed the government to further obstruct Jane's abortion. No. 17-5236, 2017 WL 9854552 (D.C. Cir. Oct. 20, 2017). The decision allowed the government 11 more days to search for a sponsor to whom Jane could be released. But the government had been unsuccessful in finding a sponsor for the prior six weeks.

As Judge Millett put it, there was no "reason to think that a sponsor" could be found in "short order." 2017 WL 9854555, at *4. At the time of Judge Kavanaugh's decision, the government had delayed Doe's abortion for almost four weeks. If no sponsor was found at the end of the 11-day period, Judge Kavanaugh stated that Jane Doe could return to the district court, and were she to obtain another injunction then the government could appeal again, likely causing Doe to delay her abortion for "multiple more weeks." *Id.* at *1. The full court of appeals reviewed the case on an emergency basis and reversed Judge Kavanaugh's decision, ordering the government to allow Doe to have an abortion without further delay. 874 F.3d 735 (D.C. Cir. 2017).

The full court largely adopted the reasoning in Judge Millett's dissent, which explained that Judge Kavanaugh had ignored both the harm to Jane Doe and binding Supreme Court precedent. Judge Millett wrote that forcing Jane Doe to remain pregnant against her will sacrificed her "constitutional liberty, autonomy, and personal dignity for no justifiable government reason." 2017 WL 9854555, at *1.

Judge Kavanaugh issued his own dissent from the full court's opinion, saying the court had "badly erred in this case" by relying on "a constitutional principle as novel as it is wrong." 874 F.3d at 752. But as the full court of appeals found, this case

presented a straightforward question: May the federal government effectively deny a young woman an abortion? The Supreme Court has held for more than 40 years that the government may not deny women an abortion. Judge Kavanaugh's decision would have forced Jane Doe to remain pregnant — not just the 11 days to allow the government to try to find the illusory sponsor but an unknown longer period to allow the appeals process to play out a second time. (No sponsor ever was found for Jane Doe. She aged out of the program months later.) Each week of delay increases the risks associated with abortion. Moreover, had the courts not intervened, Jane Doe could have been pushed so far into her pregnancy that abortion was no longer legally available.

Given his decision in the *Garza* case and President Trump's promise to nominate only justices who would overturn *Roe v. Wade*, there is cause for concern that Kavanaugh would provide the fifth vote to eliminate any right to abortion or weaken it to permit all manner of unjustified restrictions. The result could be as disastrous as an outright overruling of *Roe*, leaving women without access to abortion in large swaths of the country.

NATIONAL SECURITY, INTERNATIONAL LAW, AND HUMAN RIGHTS

Judge Kavanaugh has a well-developed record in cases involving national security and human rights. That record shows his extreme deference to presidential war power and national security claims, an unwillingness to enforce international law absent express incorporation by the political branches, and a tendency to find obstacles to holding government officials accountable for constitutional and human rights abuses in national security cases.

Remedies for Rights Violations

Kavanaugh has repeatedly argued that the courts should play an extremely narrow role in the national security context, and on that basis, he has voted to deny remedies for people who allege serious constitutional violations and human rights abuses.

Kavanaugh joined a 2-1 panel opinion in *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015), denying a remedy to an American citizen detained and abused by FBI agents overseas. Amir Meshal alleged that the agents violated the Fourth and Fifth Amendments when they secretly detained him in three African countries for four months and threatened him with torture, disappearance, and death. The Supreme Court had recognized a damages remedy is available against federal officials who commit Fourth and Fifth Amendment violations in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). But the panel majority refused to recognize a remedy for Meshal because he was abused in the context of a criminal counter-terrorism investigation overseas. In his concurrence, Kavanaugh stated that permitting a damages claim might make officials “more hesitant in investigating and interrogating suspected al Qaeda members abroad.” *Meshal*, 804 F.3d at 431 (Kavanaugh, J., concurring).

In *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009), Judge Kavanaugh joined another 2-1 panel opinion holding that private contractors are immune from liability for human rights abuses when the contractors operate under military control. Iraqi nationals brought suit against two corporations that provided interrogation and interpretation services to the U.S. military at Abu Ghraib prison. The plaintiffs alleged that the companies’ employees had “beaten, electrocuted, [and] raped” them. *Id.* at 17 (Garland, J., dissenting). The panel ruled that state law tort claims against military contractors are preempted wherever the contractor is “integrated into combatant activities over which the military retains command authority.” *Saleh*, 580 F.3d at 9. The panel reasoned that the aims of “deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors” are inapplicable in wartime. *Id.* at 7.

Kavanaugh wrote the opinion in *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008), holding that courts cannot review allegations of executive branch wrongdoing if the claims challenge national security or foreign affairs decisions. In *Harbury*, the widow of a Guatemalan rebel fighter sued CIA agents for conspiracy to imprison, torture, and execute her late husband. She alleged that the conspiracy was part of

the CIA's effort to hire and train Guatemalan army officers to gather information about the rebel forces. The panel held that the claims presented a nonjusticiable political question.

Kavanaugh's concurrence in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc) also shows his inclination to dismiss cases alleging government misconduct where national security or foreign affairs are at issue. In *El-Shifa*, the owners of a pharmaceutical plant destroyed by a U.S. missile strike in Sudan brought suit under the Alien Tort Statute seeking a declaration that the United States violated international law by failing to compensate them for the mistaken destruction of their property. The owners also claimed that government statements wrongly associating them with Osama bin Laden and chemical weapons production were defamatory. The D.C. Circuit held that the claims presented a political question. Kavanaugh agreed the claims should be dismissed, but he argued that the political question doctrine should apply to cases raising constitutional claims, and not "in cases alleging statutory violations," because applying it in that context would favor the executive branch over Congress. *Id.* at 857 (Kavanaugh, J., concurring in the judgment). Instead, he would have held that the claims failed on the merits because they did not state a cause of action.

War Powers, International Law, Guantánamo Detention, and Military Commissions

Judge Kavanaugh believes that the president has inherent authority to hold prisoners in wartime without congressional authorization and without the need to abide by international law. He has set out these views in cases where the government did not even make such expansive claims.

For example, in *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010), a Guantánamo detention case, Judge Kavanaugh wrote separately to maintain that executive war powers allow the president to detain noncitizen prisoners without congressional authorization." *Id.* at 39 (Kavanaugh, J., concurring).

Judge Kavanaugh has repeatedly opined — contrary to Supreme Court precedent — that international law does not constrain the government's war powers and should be ignored when construing congressional war-related enactments. Other judges on the D.C. Circuit have rejected or declined to join these aspects of his opinions. For example, in his majority opinion in *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012), *overruled by Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014), Kavanaugh added a footnote, which the rest of the panel did not join, expressing his belief that "Congress's war powers under Article I are not defined or constrained by international law." He elaborated: "The U.S. Constitution does not give the international community—either directly, or indirectly through the vehicle of international law—a judicially enforceable veto over Congress's exercise of its war powers." *Id.* at 480 n 6.

Kavanaugh has also maintained that international treaties signed by the U.S. should be ignored when courts construe statutes, at least when related to war

powers. That view would upend more than two centuries of settled statutory interpretation doctrine, called the *Charming Betsy* canon, which instructs courts to interpret domestic statutes consistently with international law unless Congress clearly states otherwise. In *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010), Judge Kavanaugh wrote separately to argue that courts can only look to international law when Congress expressly incorporates it into a statute, and that in any event, courts should not apply the *Charming Betsy* canon to war-related statutes, in order to preserve maximum flexibility for the president.

Kavanaugh has also joined or written numerous D.C. Circuit opinions that have turned judicial habeas review of Guantánamo detention into a virtual rubber stamp. For example, Kavanaugh joined the panel opinion in *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), which considered the standard judges should apply in reviewing detention challenges. Even though the government and the petitioner agreed on a higher standard, the panel suggested that the government may only have to put forward some evidence in support of its contentions, a highly deferential standard.

In a decision examining the legality of continued detention under the 2001 Authorization for Use of Military Force in *Ali v. Obama*, 736 F.3d 542, 543 (D.C. Cir. 2013), Judge Kavanaugh stated that he understood the concern that “this is a long war with no end in sight,” but he held that “it is not the Judiciary’s proper role to devise a novel detention standard that varies with the length of detention.” Kavanaugh’s panel opinion prompted Judge Edwards to charge that “the law of the circuit has stretched the meaning of the [2001 Authorization for the Use of Force (‘AUMF’)] and the [National Defense Authorization Act] so far beyond the terms of these statutory authorizations that habeas corpus proceedings like the one afforded Ali are functionally useless.”

In Judge Kavanaugh’s view, the government may use military commissions (and not the federal courts) to prosecute purely domestic law crimes so long as the government determines the crimes to be committed by “enemies” of the United States. See *Bahlul v. United States*, 840 F.3d 757, 771 (D.C. Cir. 2016) (Kavanaugh, J. concurring). According to his view, trial by military commission is permissible for individuals suspected of terrorism — including people arrested inside the United States. See *id.* at 773 (D.C. Cir. 2016) (Kavanaugh, J. concurring). While Judge Kavanaugh has expressed this opinion only as to noncitizens, such a broad view of military jurisdiction over domestic crimes would appear to reach citizens as well. See *Ex Parte Quirin*, 317 U.S. 1, 37–38 (1942) (holding that a saboteur’s U.S. citizenship was irrelevant to a commission’s authority to try him for law-of-war offenses). As other judges on the D.C. Circuit pointed out, the logic of Judge Kavanaugh’s view is that the U.S. could take “three U.S. citizens [who] sent \$200 to the humanitarian wing of an organization that the United States designated a foreign terrorist organization, earmarked for training in human-rights advocacy that the donors hope will turn the organization away from terrorist activities” and

“ship[them] off to a military base” to be tried by military commission. *Bahlul v. United States*, 840 F.3d at 837 (Rogers, Tatel, and Pillard, JJ., dissenting).

Judge Kavanaugh believes that international law norms that the political branches have not incorporated into domestic U.S. law, including the laws of war, are not judicially enforceable limits on the scope of detention authorized by Congress in the AUMF. See *Al-Bihani v. Obama*, 619 F. 3d 1 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of en banc rehearing).

In his lengthy opinion concurring in denial of en banc rehearing in *Al-Bihani*, Judge Kavanaugh opines that international law, including the laws of war, deserve the respect of the United States and that U.S. violations of international law may undermine U.S. standing in the international community and may result in retaliation against U.S. personnel abroad. *Al-Bihani*, 619 F.3d at 11. However, Judge Kavanaugh believes that it is for Congress and the president alone — not the courts — to determine whether and how the government should comply with its international legal obligations. *Id.* at 12. In particular, Judge Kavanaugh believes that unless one of the political branches incorporates international law into a federal statute, regulation, or self-executing treaty, it is *not* enforceable by federal courts. *Id.* at 31.

Judge Kavanaugh’s position conflicts with a 200-year-old statutory interpretation doctrine, the *Charming Betsy* canon, under which courts must interpret domestic statutes consistently with international law unless Congress explicitly states otherwise. *Murray v. Schooner Charming Betsy*, 2 Cranch 64 (1804). In *Al-Bihani*, Kavanaugh stated that courts may not invoke international law under the *Charming Betsy* doctrine to limit the scope of the president’s war powers under the AUMF: “to the extent there is ambiguity in a statutory grant to the President of war-making authority,” it is for the president to resolve the ambiguity, not the judiciary. *Al-Bihani*, 619 F. 3d at 10.

In *Al-Bihani*, Judge Kavanaugh also maintained more broadly that customary international law does not form part of federal common law enforceable by U.S. courts. *Al-Bihani*, 619 F. 3d at 18–19. As such, this view conflicts with the Supreme Court’s opinion in *Sosa v. Alvarez-Machain*, which found that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.” 542 U.S. 692, 729–30 (2004) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 396 (1964); *The Paquete Habana*, 175 U.S. at 700 (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination”); *The Nereide*, 9 Cranch. 388 (1815); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (recognizing that “international disputes implicating ... our relations with foreign nations” are one of the “narrow areas” in which “federal common law” continues to exist). Contrary to this precedent, Kavanaugh contends that customary international law forms part of U.S. domestic law enforceable in U.S. courts only if it is explicitly incorporated into statute, regulation, or a self-executing treaty. *Id.* at 18.

The Alien Tort Statute and Human Rights

For several decades, the Alien Tort Statute (“ATS”) has been the principal way for U.S. courts to adjudicate violations of fundamental human rights. The Supreme Court in recent years has narrowed its application. Judge Kavanaugh, it appears, is inclined to narrow it still further.

In *Saleh v. Titan*, 580 F. 3d 1 (D.C. Cir. 2009), Judge Kavanaugh joined a 2-1 panel opinion holding government contractors immune from torture claims brought under the ATS when the contractors operate under the control of the U.S. military. Plaintiffs, Iraqi nationals, alleged that the contractors had conspired with the U.S. military to torture and abuse them at the Abu Ghraib prison. The opinion narrows the types of torture claims that plaintiffs may bring under the ATS, holding that U.S. courts should only recognize claims that are comparable to those Congress authorized under the Torture Victim Protection Act (“TVPA”).

In *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), 15 Indonesian villagers alleged that Exxon Mobil (Indonesia) had committed murder, torture, sexual assault, battery, and false imprisonment in violation of the ATS, state law, and the TVPA. The district court dismissed the claims. On appeal in a 2-1 panel decision, the D.C. Circuit affirmed the dismissal of the TVPA claims but reversed dismissal of the ATS claims.

Dissenting, Judge Kavanaugh argues that the ATS claims should be dismissed too, for four reasons: (1) the ATS does not apply to overseas conduct; (2) the ATS does not apply to claims against corporations because customary international law does not recognize corporate liability; (3) even if customary international law recognizes corporate liability for torture and extrajudicial killing, those claims are only enforceable under the ATS if they are comparable to claims authorized by Congress under the TVPA — which the Supreme Court has held does not apply to corporations; and (4) litigation of the ATS claims in U.S. courts could harm U.S. relations with Indonesia. *Exxon*, 654 F.3d at 73–74 (Kavanaugh, J., dissenting)

Notably, other circuits — and the Supreme Court — have considered and rejected these grounds for dismissing ATS cases. In *Kiobel*, the Supreme Court rejected Kavanaugh’s view on the extraterritorial application of the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (holding that federal courts have jurisdiction over ATS claims that “touch and concern” the United States). *See also Al Shamari v. CACI Premier Technology, Inc.*, 758 F. 3d. 516 (4th. Cir. 2014) (applying *Kiobel*’s “touch and concern” test to find jurisdiction over claims of torture committed by U.S. government contractors in Iraq).

Every circuit to consider corporate liability under the ATS, other than the Second, also has concluded that corporations are not immune from suit under the ATS. *See Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F. 3d 1013 (7th Cir. 2011); *Doe v. Nestle USA, Inc.*, 766 F. 3d 1013 (9th Cir 2014); *Romero v. Drummond Co.*, 552 F. 3d 1303 (11th. Cir. 2008) (finding corporations are proper defendants for claims

brought under the ATS). *See also* United States as Amicus Curiae Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. Dec. 2011) (arguing that corporations may be found liable for violations of customary international law). *But see* *Jesner v. Arab Bank* (holding that *foreign* corporations may not be defendants in ATS suits).

And, relying on the congressional intent reflected in the TVPA’s legislative history — in particular, the view that the ATS should remain “intact” — all circuits to have considered the TVPA/ATS issue, other than the Seventh, have found that the scope of the ATS remains undiminished by the enactment of the TVPA. *See Kadis v Karadzic*, 70 F. 3d 232, 241 (2d Cir. 1995) (quoting H.R. Rep. No. 102-367 at 4 (1991)); *compare Sarei v. Rio Tinto, PLC*, 487 F. 3d 1193, 1197 (9th Cir. 2007); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F. 3d 1242, 1250–51 (11th Cir. 2005) *with Enahoro v. Abubakar*, 408 F. 3d 877, 884–86 (7th. Cir. 2005).

Finally, in support of reason four, Judge Kavanaugh cites footnote 21 in *Sosa* to find that: “when the Executive Branch reasonably explains that adjudication of a particular lawsuit would adversely affect U.S. foreign policy interests, the court should dismiss the lawsuit.” *Exxon*, 654 F.3d at 88. But *Sosa* footnote 21 notes only that such interests may be entitled to significant weight, not absolute deference. And the Supreme Court has long condemned unquestioning deference to executive branch complaints about the foreign policy implications of litigation. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

FREEDOM OF SPEECH AND ASSOCIATION

Judge Kavanaugh has not participated in many significant First Amendment speech or association cases. His jurisprudence suggests that, where the precedent is clear, he faithfully applies the law. Where the case law offers ambiguity, however, he has shown a willingness to restrict speech rights. *See, e.g., Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008); *DKT International v. USAID*, 477 F.3d 758 (D.C. Cir. 2007).

Anti-SLAPP

In *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015), Kavanaugh wrote for a unanimous panel holding that: (1) a federal court exercising diversity jurisdiction may not apply D.C.'s Anti-SLAPP Act special motion to dismiss provision, but it must instead apply the Federal Rules of Civil Procedure; (2) under D.C. law, questions cannot constitute defamation. Yasser Abbas, the son of the president of the Palestinian Authority, alleged that a Foreign Policy Group article defamed him by questioning whether he benefited from government corruption. The Foreign Policy Group moved to dismiss the lawsuit under D.C. Anti-SLAPP Act, which allows a defendant to file a special motion to dismiss "any claim arising from an act in furtherance of the right of advocacy on issues of public interest." *Id.* at 1332.¹

Judge Kavanaugh held that the Anti-SLAPP Acts' pretrial dismissal provisions are procedural rules that conflict with the Federal Rules of Civil Procedures, which establish the exclusive standards for granting pre-trial judgment to defendants in federal civil litigation. *Id.* at 1333–36. The First, Second, Fifth, and Ninth Circuits have applied anti-SLAPP acts' pretrial dismissal provisions to federal proceedings, while the Seventh and D.C. Circuits have refused to apply the provisions. 19 *Federal Practice & Procedure* § 4509 nn.128–33 and accompany text (2d ed.2014). Although Kavanaugh refused to apply the D.C. Anti-SLAPP Act to dismiss the lawsuit, he dismissed the case under Federal Rule of Civil Procedure 12(b)(6), because the defendants' questions about whether Abbas benefited from corruption could not constitute defamation under D.C. law. *Id.* at 1337–39. Kavanaugh wrote that allowing a defendant to be held liable for asking questions would "necessarily ensnare a substantial amount of speech that is essential to the marketplace of ideas and would dramatically chill the freedom of speech in the District of Columbia." *Id.* at 1339.

¹ "Like the various States' anti-SLAPP laws, the D.C. Anti-SLAPP Act makes it easier for defendants sued for defamation and related torts to obtain quick dismissal of harassing lawsuits." *Id.* Under the Anti-SLAPP law, if a defendant makes a "prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest," the plaintiff must demonstrate that the claim is likely to succeed on the merits. *Id.* If the plaintiff fails to demonstrate likelihood of success on the merits, the claim must be dismissed. While a special motion to dismiss under the Anti-SLAPP Act is pending, discovery is stayed except for limited purposes. *Id.*

Conditions on Federal Funds

In *DKT International v. USAID*, 477 F.3d 758 (D.C. Cir. 2007), Judge Kavanaugh joined the unanimous panel opinion by Judge Randolph upholding the government’s “anti-prostitution pledge” requirement for receiving certain federal funds. DKT International mounted a First Amendment challenge to the U.S. Agency for International Development’s requirement that private organizations receiving federal funds from the HIV/AIDS program certify that they have “a policy explicitly opposing prostitution and sex trafficking.” *Id.* at 760. DKT argued that the certification requirement “violates the First Amendment because it constrains DKT’s speech in other programs for which it does not receive federal funds and because it forces DKT to convey a message with which it does not necessarily agree.” *Id.* at 761.

The D.C. Circuit rejected both arguments. It held that the government may “constitutionally communicate a particular viewpoint through its agents and require those agents not convey contrary messages” and that the government’s programmatic goals for the HIV/AIDS funding would be “confused” if grant recipients “could advance an opposite viewpoint in their privately-funded operations.” *Id.* at 762–63. It also held that DKT was free to advocate its viewpoint in its privately-funded programs by “setting up a subsidiary organization” that could make the required certification to receive the federal funds. *Id.* at 764. The Supreme Court reached the opposite in *Agency for Int’l Development v. Alliance for Open Society Int’l*, 570 U.S. 205 (2013).

Forums v. Government Speech

In *Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008), a challenge to the Department of Defense’s regulations prohibiting discussion of any “political” issues in DoD’s Civilian Enterprise Newspapers (“CENs”), the panel characterized the case as about nonpublic forums. Kavanaugh concurred “to point out that . . . there is a far easier way to analyze this kind of case under Supreme Court precedents”: “[t]hese military-run newspapers and the advertising space in them are not forums for First Amendment purposes but instead are the Government’s own speech.” *Id.* at 898.

In other words, rather than accept the government’s characterization of the advertising section as a channel for others’ communication, Kavanaugh wrote separately to offer an alternative framing that would extend the government-speech doctrine and remove the First Amendment protection that the rest of the panel recognized applies to the forum at issue. Moreover, unlike the rest of the panel, he highlighted the fact that CENs are “*military* newspapers” and that, because “[the] law [of the military] is that of obedience,” *id.* at 899 (quoting *Parker v. Levy*, 417 U.S. 733, 744 (1974), “review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar

laws or regulations designed for civilian society,” *id.* at 899 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

Net Neutrality

In *United States Telecom Association v. FCC*, 855 F.3d 381 (2017), Judge Kavanaugh dissented from the D.C. Circuit’s denial of petitions for en banc rehearing of the case challenging the FCC’s 2015 Open Internet Order. While his colleagues argued that the order did not implicate the ISPs’ First Amendment rights because it applied only to ISPs that have put themselves forth as neutral conduits to all online content, Kavanaugh maintained (correctly, in our view) that the order must be subject to intermediate scrutiny because ISPs may engage in editorial discretion, which is protected by the First Amendment. Kavanaugh wrote that this follows from the Supreme Court’s decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

At the same time, he signaled that “the Supreme Court could always refine or reconsider” those decisions, that “critics advance very forceful arguments” regarding how those decisions “constrain[] the Government’s ability to regulate the commercial marketplace,” and that “the Supreme Court [may] someday overrule or narrow the cases.” 855 F.3d at 418, 430. Judge Kavanaugh determined that the order failed intermediate scrutiny because the FCC failed to demonstrate (incorrectly, in our view) that ISPs possess market power, and his analysis appears to undervalue the government’s interests in “diversifying and increasing content,” which he states are “important . . . in the abstract.” *Id.* at 433.

RELIGION

Judge Kavanaugh has demonstrated a troubling hostility toward the bedrock constitutional principle of separation of church and state. Just last year, in a [Constitution Day lecture](#) for the American Enterprise Institute, Kavanaugh praised former Chief Justice William Rehnquist for redirecting the Supreme Court from its robust enforcement of the wall separating church and state toward an understanding that the “wall metaphor was wrong as a matter of law and history.” Calling Rehnquist his “first judicial hero,” Kavanaugh lauded Rehnquist’s successful effort to weaken constitutional protections against governmental funding of religious institutions as well as Rehnquist’s less fruitful campaign to reverse the court’s longstanding prohibitions against “state-sponsored religious prayer” in public schools.

Although Judge Kavanaugh’s judicial record on the Establishment Clause is limited, it aligns with the public comments noted above. In *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010), the D.C. Circuit ruled against the plaintiffs in a challenge to the incorporation of various religious elements, including official prayers, into the presidential inauguration ceremony. A majority of the three-judge panel held that the plaintiffs — who were nontheists, humanists, atheists, and others — did not have legal standing to bring their claims. Kavanaugh disagreed with the panel’s conclusion on standing, but he nevertheless concurred in the judgment against the plaintiffs, applying an exceedingly deferential test that would allow a broad array of government-sponsored religious activity. Writing for the majority in another case involving an Establishment Clause claim, Kavanaugh took a narrower view of standing, ruling that Protestant Navy chaplains had failed to allege that they had personally suffered harm because of the Navy’s purportedly decades-long practice of favoring Catholic chaplains over chaplains of other faiths. See *Chaplaincy of Full Gospel Churches v. United States Navy (In re Navy Chaplaincy)*, 534 F.3d 756 (D.C. Cir. 2008).

Kavanaugh has written few free exercise opinions. One recent case, though, suggests he has an expansive view of religious exemptions, even when those exemptions could harm others. In *Priests for Life v. H.H.S.*, 808 F.3d 1 (D.C. Cir. 2015) (per curiam), the D.C. Circuit considered a religious-liberty challenge to regulations addressing the requirement under the Affordable Care Act that employer health plans include insurance coverage for contraceptives. The federal government had created an accommodation for nonprofit employers with religious objections to covering birth control, allowing the objecting employers to submit a simple form indicating their desire to opt-out of the requirement (at which point the employer’s health insurance company would independently pay for the coverage). Even with the benefit of that accommodation, though, the plaintiffs in *Priests for Life* argued that the mere act of submitting the basic opt-out form impermissibly burdened their religious exercise.

A three-judge panel of the D.C. Circuit rejected those arguments, and the full court

declined to reconsider that decision. In a lengthy dissent, Kavanaugh concluded that, under the Religious Freedom Restoration Act (“RFRA”), the nonprofit employers should not be required to convey their religious objections to their insurer or even to tell the government who their insurance company is. In his view, courts should accept plaintiffs’ claims of “substantial burden” under RFRA, no matter how remote or attenuated the harm as long as the underlying religious beliefs are sincere. Kavanaugh’s approach to religious exemptions in *Priests for Life* conflicts with the vast majority of courts of appeals to consider the same issue — eight of nine of which rejected RFRA challenges to the accommodation.

Judge Kavanaugh’s sympathy for religious-exemption claims is not boundless, however. As a member of the panel in *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011), he rejected a RFRA challenge to a D.C. ordinance prohibiting the defacement of public property. The plaintiffs were religious groups who sought to write messages in chalk on the sidewalk in front of the White House to protest the administration’s support for abortion rights and the anniversary of *Roe v. Wade*. In his short concurrence, Kavanaugh wrote that “no one has a First Amendment right to deface government property.” Likewise, in *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), Judge Kavanaugh was part of a three-judge panel that rejected a RFRA claim brought by a plaintiff who had been convicted of a felony and argued that collecting his DNA for inclusion in a federal database violated his religious-freedom rights.

CRIMINAL LAW

Sentencing

Judge Kavanaugh supports a strong mens rea requirement for proof of criminal offenses, and he believes the Constitution bars judges from using acquitted conduct to increase a sentence. As a general matter, however, he supports only limited appellate review of criminal sentencing decisions.

Mens Rea

Judge Kavanaugh believes that unless Congress plainly indicates otherwise, the government must prove the defendant's mens rea, or intent to commit a crime, for each element of the offense. In *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012), Judge Kavanaugh, joined by Judge Tatel, dissented “emphatically” from the court's en banc decision that 18 U.S.C. § 924(c)(1)(B)(ii), which imposes a mandatory 30-year sentence for any person who carries a machine gun while committing a crime of violence, does not require the government to prove that the defendant knew the weapon he was carrying was capable of firing automatically. *Id.* at 529 (Kavanaugh, J., dissenting). Judge Kavanaugh argued that the Supreme Court's has long applied a traditional presumption of mens rea, and he criticized the majority's opinion for “sidestep[ping] the presumption of mens rea by treating the automatic character of the gun as if it's a sentencing factor, not an element of the [relevant] offense.” *Id.* at 528-9.

Appellate Sentencing Review

Judge Kavanaugh believes that appellate courts may engage in only very limited appellate review of sentences for substantive reasonableness. In *In re Sealed Case*, 527 F.3d 188 (D.C. Cir. 2008), the court vacated the defendant's sentence to twice the top of the sentencing guidelines range based on the district judge's “plain error” failure to provide a statement of reasons. Judge Kavanaugh dissented, arguing that “the District Court adequately explained the [] sentence and easily satisfied the procedural requirements.” *Id.* at 194 (Kavanaugh, J., dissenting). He also concluded that the sentence was substantively reasonable. In Kavanaugh's judgment, “appellate review is for abuse of discretion and is limited to assessing only whether certain procedural requirements were met and whether the sentence is substantively ‘reasonable.’” *Id.* at 194. He acknowledged that under this view, “[w]hether a sentence will be within, shorter than, or longer than the Guidelines range for any given defendant will depend largely on one primary factor: which district judge is assigned to the case.” *Id.* at 199.

He consistently applies this limited review across the board, whether a sentence is above or below the guidelines' range. In *United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008), Kavanaugh rejected the government's appeal of the defendant's below-guidelines sentence of probation and a fine, explaining that “[t]his case exemplifies our deferential substantive review of sentences—including outside-the-Guidelines sentences—in the wake of *Booker* and *Gall*.” *Id.* at 1090 (internal

citations omitted). He added that “it will be the unusual case when we reverse a district court sentence—whether within, above, or below the applicable Guidelines range—as substantively unreasonable.” *Id.*

Use of Acquitted Conduct in Sentencing

Judge Kavanaugh believes that a judge’s use of acquitted conduct to increase a sentence violates the Constitution. In *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015), the court issued a per curiam denial of two defendants’ petitions for rehearing en banc. Judges Kavanaugh and Millett each concurred, with Judge Kavanaugh writing to underscore Judge Millett’s assertion that — as Justices Scalia, Thomas, and Ginsburg believe — the use of acquitted conduct to increase a sentence is unconstitutional. He also encouraged district court judges to “disclaim reliance on acquitted or uncharged conduct” in individual cases until Congress and the Sentencing Commission systematically change federal sentencing since the Supreme Court would not likely remedy the problem. *Id.* at 928 (Kavanaugh, J., dissenting).

Fourth Amendment

Most of Judge Kavanaugh’s Fourth Amendment decisions involve noncontroversial applications of settled law, and therefore afford particular insight into his views in this area. There are a handful of cases, however, that provide clues to his jurisprudential approach. He seems to take an expansive view, in particular, of the government’s ability to conduct warrantless searches where it has “special needs” beyond ordinary criminal law enforcement. And in a case involving GPS surveillance, he proposed a trespass-focused analysis of the Fourth Amendment that was adopted by the Supreme Court when that court took up the case.

Special Needs Doctrine

The “special needs” or “administrative search” doctrine permits the government to conduct warrantless searches in contexts where it is furthering “special needs” beyond ordinary criminal law enforcement. In these settings, the courts apply a balancing test that looks to the importance of the government’s interest, the extent of the intrusion on privacy, and whether other constraints exist to protect privacy. Applying this doctrine, Judge Kavanaugh voted to uphold the NSA’s bulk collection of Americans’ call records as constitutional. *See Klayman v. Obama*, 805 F.3d 1148 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc). Larry Klayman challenged the government’s bulk collection of the phone records of millions of Americans under Section 215 of the USA Patriot Act. After the district court issued a preliminary injunction, finding that the program violated the Fourth Amendment, *see Klayman v. Obama*, 142 F. Supp. 3d 172, 178 (D.D.C. 2015), the D.C. Circuit granted a stay pending appeal. *See Klayman v. Obama*, 2015 WL 9010330 (D.C. Cir. Nov. 16, 2015).

Concurring in the denial of rehearing, Kavanaugh wrote that, in his view, the suspicionless mass collection of Americans’ call records is “entirely consistent with

the Fourth Amendment.” *Klayman*, 805 F.3d at 1148. He did not even view the collection as a search requiring Fourth Amendment scrutiny. *Id.* at 1149. He stated that even if the government’s program triggered Fourth Amendment protection, it was reasonable because the “critical national security need outweighs the impact on privacy,” and “the Government’s program fits comfortably within the Supreme Court precedents applying the special needs doctrine”— which allows warrantless searches for purposes other than ordinary criminal law enforcement where the intrusion is otherwise constrained. *Id.* After the Second Circuit held this program unauthorized, Congress amended Section 215 to end bulk surveillance.

In *National Federation of Federal Employees–IAM v. Vilsack*, 681 F.3d 483 (D.C. Cir. 2012), also involving the “special needs” test, Kavanaugh dissented from a panel’s conclusion that a policy implementing random drug testing of United States Forest Service employees was unconstitutional under the Fourth Amendment. The panel held that the Forest Service had failed to demonstrate that “special needs” excused the individualized suspicion requirement of the Fourth Amendment in the context of a drug-testing program for staff engaged in work with at-risk youths at various educational and vocational training facilities. *See id.* at 485–86. Calling the Forest Service’s drug-testing policy “a solution in search of a problem,” the court held that the government had not offered any “foundation for concluding there is a serious drug problem among staff that threatens these interests and thus renders the requirement for individualized suspicion impractical.” *Id.* at 486.

Kavanaugh dissented, arguing that “Supreme Court precedent and common sense strongly support this narrowly targeted drug testing program.” *Id.* at 499 (Kavanaugh, dissenting). He explained that “[b]y establishing reasonableness as the legal test, the text of the Fourth Amendment requires judges to engage in a common-law-like balancing of public and private interests to determine the constitutionality of particular kinds of searches and seizures.” *Id.* He placed drug testing alongside other modern “new technologies to search or surveil individual citizens” that present “[d]ifficult Fourth Amendment issues.” *Id.* (citing *Jones*, 565 U.S. 400 (2012) (GPS); *Kyllo v. United States*, 533 U.S. 27 (2001) (thermal imaging); *Florida v. Riley*, 488 U.S. 445 (1989) (helicopter surveillance); *Katz v. United States*, 389 U.S. 347 (1967) (listening devices)).

In Kavanaugh’s view, the government’s interest in maintaining a “limited program require[ing] drug tests only for government employees who work at specialized residential schools for at-risk youth” was “strong.” *Id.* at 500. And he minimized the interests “on the individual privacy side of the ledger” because the “program—while no doubt intrusive and annoying like all drug testing—entails only a urine sample produced in private,” without “requir[ing] observation or a physically invasive procedure.” *Id.* at 501. Further, “this drug testing program reveals only whether the employee has used drugs; it does not disclose other private information—a fact the Supreme Court has noted in upholding other drug testing policies.” *Id.* He concluded that based on this analysis, “it seems eminently sensible to implement a narrowly targeted drug testing program for the schools’ employees. In these limited

circumstances, it is reasonable to test; indeed, it would seem negligent not to test.” *Id.* at 502.

Trespass and the Fourth Amendment

In *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010), Judge Kavanaugh wrote a dissent from the denial of rehearing en banc that previewed the property-based claims relied on in the Supreme Court’s eventual ruling in that case, *see* 565 U.S. 400 (2012). The original appellate panel had held that prolonged GPS tracking of a car violates reasonable expectations of privacy and therefore is a search under the Fourth Amendment. Judge Kavanaugh’s dissent from denial explained that he believed that under *United States v. Knotts*, 460 U.S. 276 (2010), the tracking of a car’s movements in public is not a search. *See* 625 F.3d at 770 (Kavanaugh, J., dissenting from denial of rehearing en banc).²

But he also noted that he did not “think the Government necessarily would prevail in this case” because the alternative property-based argument raised by the defendant “poses an important question and deserves careful consideration by the en banc Court.” *Id.* As Judge Kavanaugh saw it, “[t]he key . . . question, therefore, is whether the police’s installation of a GPS device on one’s car is an ‘unauthorized physical encroachment within a constitutionally protected area’ in the same way as installation of a listening device on a heating duct in a shared wall of a row house.” *Id.* at 772 (quoting *Silverman v. United States*, 365 U.S. 505, 510 (1961)). “Without full briefing and argument,” Judge Kavanaugh did “not yet know whether [he] agree[d] with that conclusion.” *Id.* Of course, that property-based argument was the basis for the Supreme Court’s subsequent holding that the installation and monitoring of the GPS constitutes a search.

Stop and Frisk

In *United States v. Askew*, 482 F.3d 532 (D.C. Cir. 2007), *reh’g en banc granted, judgment vacated* (July 12, 2007), *on reh’g en banc*, 529 F.3d 1119 (D.C. Cir. 2008), Kavanaugh held that it was constitutional for the police to unzip a man’s shirt during a stop-and-frisk for identification purposes, in order to allow a witness to see his clothing underneath an outer jacket. *Id.* at 545. Kavanaugh also found that the police conducted a constitutionally reasonable search when they later completely unzipped the man’s jacket to uncover a gun underneath. *Id.* at 547. Ordinarily, a search during a “stop-and-frisk” must be limited to a frisk of the outer clothing to determine whether the suspect is armed — not to search for evidence. When the D.C. Circuit later reheard the case en banc and vacated his earlier ruling, Kavanaugh dissented. 529 F.3d at 1149–65 (en banc). He argued that the police should be authorized to move or unzip a person’s clothing for identification purposes

² That position was rejected by five Justices in concurring opinions in *Jones*, *see* 565 U.S. at 413 (Sotomayor, J., concurring); *id.* at 418 (Alito, J., concurring in the judgment), and now appears to be foreclosed by the Supreme Court’s recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

if there is reasonable suspicion that he is involved in criminal activity and that to rule otherwise 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.” *Id.* at 1162.

Qualified and Absolute Immunity

Judge Kavanaugh supports a broad view of “qualified immunity,” immunizing government officials from liability for constitutional rights violations where their actions are not clearly unconstitutional. But in at least one case, he has insisted on limits to “absolute immunity.” In *Wesby v. D.C.*, 816 F.3d 96 (D.C. Cir. 2016) (Kavanaugh, J., dissenting), police officers arrested partygoers for trespassing based on the officers’ incorrect belief that a lack of actual permission was wholly sufficient to establish probable cause (the partiers told the officers that an acquaintance was renting the house and had given them permission to be there). The partygoers subsequently sued the officers for false arrest. A panel of CADC found for the partygoers (note: the panel opinion was ultimately reversed by the U.S. Supreme Court *sub nom D.C. v. Wesby*, 138 S.Ct. 577 (2018) (Thomas, J.)). The officers sought en banc review, which CADC denied. Judge Kavanaugh wrote a lengthy dissent from the en banc denial, contending that even if the officers lacked probable cause to carry out the arrests, they were entitled to qualified immunity because the officers “reasonably could have believed” that the partygoers were lying about what their acquaintance had told them regarding permission. Notably, this argument was based not on a detailed analysis of the facts, but rather on an apparent blanket rule that officers “are entitled to make reasonable credibility judgments and to disbelieve protests of innocence.”

In *Taylor v. Reilly*, 685 F.3d 1110, 1117-18 (D.C. Cir. 2012) (Kavanaugh, J., concurring), Kavanaugh concurred in the decision that parole commissioners retain qualified immunity from suit, but he wrote separately to emphasize that because parole commissioners are not independent and are removable at will by an executive branch officer, they are *not* like judges or agency adjudicators making judicial or quasi-judicial rulings and thus are not entitled to absolute immunity. *See also Moore v. Hartman*, 704 F.3d 1003 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) (Judge Kavanaugh asserted that because the First Amendment law in the context of this case is not clear, the suit should have been dismissed on qualified immunity grounds).

Prosecutorial Misconduct/Brady

In *United States v. Williams*, 836 F.3d 1, 19 (D.C. Cir. 2016) (Kavanaugh, J., concurring), the government prosecuted an Air Force member for the death of a fellow member as part of a violent hazing ritual. The prosecutor incorrectly stated during closing that the victim’s consent to the ritual could not be considered for any purpose; in fact, it could be considered to negate the malice aforethought required for second-degree murder, which would have left the jury with manslaughter. The majority held that the prosecutor’s statement was prejudicial error that was not

later cured, and therefore the second-degree murder conviction was vacated. Kavanaugh concurred to *buttress* the majority's holding that the "prosecutor's statement was an incorrect statement of the law" and that the judge did not cure the error via instruction. Kavanaugh pointed out that the defendant had committed a "heinous crime," but Kavanaugh was "unwilling to sweep that [prosecutorial error] under the rug," particularly in light of the vast sentencing disparity between second-degree murder and manslaughter.

DEATH PENALTY AND PRISONERS' RIGHTS

Judge Kavanaugh's position on the death penalty is largely unknown. He has never ruled on a death penalty appeal, and he was not questioned directly about his position on the death penalty during his confirmation hearings in 2004 and 2006. There is therefore little indication as to how Judge Kavanaugh would rule in death penalty cases.

In a Freedom of Information Act ("FOIA") case brought by a death row inmate, Judge Kavanaugh concurred in part and dissented in part in a case involving the FOIA request of Texas death row prisoner, who maintained his innocence. The F.B.I. had claimed exemptions to production for certain documents. The majority ruled that the public's interest in knowing whether the F.B.I. had documents that could corroborate the prisoner's innocence claim trumped the F.B.I.'s interest in redacting certain individuals' personal information. Kavanaugh dissented, arguing that the records at issue fell within a public records exemption and the court should not carve out a death penalty exception to the rule. Kavanaugh joined the majority in holding that other portions of the records related to informants were not exempt under FOIA. *Anthony Roth, on Behalf of Lester L. Bower, Jr., v. U.S. Dept. of Justice*, 642 F.3d 1161 (D.C. Cir. 2011).

In *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147 (D.C. Cir. 2017), Judge Kavanaugh wrote for the court in a unanimous opinion construing the Prison Litigation Reform Act ("PLRA")'s "three strikes" provision, which bars prisoners from *in forma pauperis* status if they have filed three previous lawsuits that have been dismissed for failure to state a claim or as malicious or frivolous. Judge Kavanaugh concluded that a lawsuit — in which the district court declines to exercise supplemental jurisdiction over state law claims, but it does not dismiss those claims for failure to state a claim, or as frivolous or malicious — does not count as a "strike" under the PLRA. *Fourstar*, 875 F.3d at 1151-53. Rather, only suits that are dismissed in their entirety for a reason enumerated in the statute will count as a "strike" for PLRA purposes. Thus, only one of the suits that *Fourstar* had previously filed, which was dismissed as frivolous, properly counted as a PLRA "strike."

Judge Kavanaugh also concluded that a district court may not simply defer to an earlier district court's contemporaneous decision to label a dismissal as a "strike." *Fourstar*, 875 F.3d at 1152. Instead, each court must make its own determination about what counts as a "strike," regardless of how the judge who dismissed the case characterized the dismissal at the time. According to Judge Kavanaugh, the government's position to the contrary would result in "grossly inequitable and even absurd results." *Id.*

VOTING RIGHTS

Judge Kavanaugh has written only one significant opinion on voting rights, *South Carolina v. United States*, 898 F.Supp.2d 30 (2012), a three-judge D.C. District Court decision under Section 5 of the Voting Rights Act (“VRA”).

The court upheld South Carolina’s voter identification requirement under Section 5 preclearance review. Judge Kavanaugh rejected an objection to the law that had been interposed by the Department of Justice, as well as opposition to the law raised by private parties, including several represented by the ACLU. The decision was a loss for VRA enforcement.

There are, however, aspects of the decision that suggest that Judge Kavanaugh may take a pragmatic rather than ideological approach to voting rights issues: (1) the decision blocked South Carolina’s law for the 2012 presidential election, due to concerns that it could not be implemented in an orderly manner in time for that election, and thus risked disenfranchisement of African-American voters; and (2) the decision, in upholding South Carolina’s law, focused largely on a particular mitigating provision that purportedly would enable any voter who lacked ID to vote.

South Carolina’s voter ID law requires voters to show one of a limited set of forms of government-issued identification when casting a ballot, including a non-photographic voter registration card. *See* 898 F. Supp, 2d at 33-34. The Department of Justice, as well as private intervenors represented by the ACLU, objected to the law under Section 5 of the VRA, which among other things, prohibits changes to voting laws that would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer v. United States*, 425 U.S. 130, 141 (1976).

While litigation was pending, South Carolina adopted a very broad interpretation of its law’s “reasonable impediment” exception, which provided that “if a voter has ‘a reasonable impediment that prevents the elector from obtaining photographic identification the voter may complete an affidavit at the polling place attesting to his or her identity.’” *South Carolina v. United States*, 898 F.Supp.2d at 34. Under South Carolina’s broad interpretation of that provision, “state and county officials may not review the reasonableness of the voter’s explanation,” and “[s]o long as the voter does not lie about his or her identity or lie about the reason he or she has not obtained a photo ID, the reason that the voter gives must be accepted by the county board, and the ballot must be counted.” *Id.* The Justice Department and private intervenors contended that this was an overly broad reading of the exception, the plain text of which appeared to be stricter, and were skeptical that the law would be implemented in such an accessible way in practice. *See id.* 37.

Judge Kavanaugh, writing for the panel, determined that these concerns were unfounded, and he concluded that South Carolina’s new voter ID law did not violate the Voting Rights Act. In so ruling, Judge Kavanaugh relied heavily on the “reasonable impediment” provision, calling it “expansive” and emphasizing that it “allows 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.” *Id.* at 32. Kavanaugh noted that “[w]ithout the reasonable impediment provision, the law thus would have raised difficult questions under the strict effects test of Section 5 of the Voting Rights Act,” 898 F.Supp.2d at 50, but he stopped short of saying that the law would not have passed muster without the exception. The other two judges on the panel went farther in that regard in their concurring opinions. The court nonetheless blocked the law for the 2012 presidential election due to concerns about the feasibility of orderly implementation.

WOMEN'S RIGHTS

Judge Kavanaugh has not ruled on many cases involving women's rights, but he has rejected some discrimination claims on the facts. He has expressed an understanding of the psychology surrounding domestic abuse.

In *Vatel v. Alliance of Auto. Mfrs.*, Judge Kavanaugh ruled against a gender discrimination claimant who alleged that she was fired because of her race and gender. *See* 627 F.3d 1245 (D.C. Cir. 2011). The plaintiff brought a claim under the District of Columbia Human Rights Act ("DCHRA") after she was terminated from her position as a president's assistant. Although the DCHRA is not a federal employment statute, claims brought under it are interpreted by the courts in the same way as claims under federal anti-discrimination laws. *See id.* at 1246. Judge Kavanaugh's treatment of DCHRA claims is therefore indicative of how he would treat federal discrimination claims. Writing for the panel, Kavanaugh affirmed the district court's grant of summary judgment for the employer, finding probative the fact that the president had selected the plaintiff to be his assistant less than a year before her dismissal.

In *Breeden v. Novartis Pharms. Corp.*, 646 F.3d 43 (D.C. Cir. 2011), an employee sued her former employer, alleging violations of the Family and Medical Leave Act ("FMLA"). The plaintiff told her employer that she was pregnant and would be taking FMLA leave. She was subsequently reassigned to allegedly inferior sales accounts and later terminated. When she complained about her new assignments, she claimed that her supervisor said "well, you're not coming back from maternity leave anyway, right?" *Id.* at 47. Her supervisor also questioned her extensively about her fertility treatments and whether she would return to Novartis after giving birth. A jury found for the plaintiff and awarded her damages, but the district court then granted judgment as a matter of law for the defendants, holding that no reasonable jury could have reached a verdict for the plaintiff. The court of appeals affirmed. It reasoned that, even though her new accounts were smaller and less prestigious than her old accounts, these were "intangible" factors that did not factor in determining whether the two positions were identical and that she could not show she had been demoted for taking leave. *Id.* at 51.

Judge Kavanaugh's opinion in *United States v. Nwoye* demonstrates a sympathetic and nuanced understanding of intimate partner violence and its effects. *See* 824 F.3d 1129 (D.C. Cir. 2016). In that case, a woman challenged her conviction for conspiring with her boyfriend to extort money on the ground that she was not allowed to have an expert testify at her trial about battered woman syndrome. Her boyfriend repeatedly beat her, controlled her bank accounts, constantly monitored her, and threatened to kill her. The court ruled in her favor, finding that expert testimony on battered woman syndrome can be relevant to a duress defense. Judge Kavanaugh's opinion in *Nwoye* was the first time the D.C. Circuit ruled on the admissibility of expert testimony on battered woman syndrome in support of a duress defense. Judge Kavanaugh noted that "[w]omen in battering

relationships are often hypervigilant to cues of impending danger and accurately perceive the seriousness of the situations before another person who had not been repeatedly abused might recognize the danger,” (internal citations omitted) and that “[b]attered women face significant impediments to leaving abusive relationships,” citing the risk of an escalation in violence, isolation, and financial control as examples of such impediments. *Id.* at 1137. Judge Kavanaugh’s opinion in *Nwoye* is an encouraging sign of his understanding of the psychology of domestic abuse.

IMMIGRANTS' RIGHTS

Because the D.C. Circuit hears relatively few immigration cases, Judge Kavanaugh's record on immigrants' rights is somewhat sparse. However, the evidence that is available offers no cause for optimism; he has consistently ruled against noncitizens in immigration cases and in other contexts. His separate opinions in four cases are particularly notable: *Agri Processor Co., Inc. v. NLRB*, *Fogo de Chao v. U.S. Dep't. of Homeland Sec.*, and *Garza v. Hargan*, in which he dissented, and *Kiyemba v. Obama*, in which he concurred.

In *Agri Processor Co., Inc. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1031 (2009), members of the United Food and Commercial Workers Union ("UFCW") filed an unfair practice charge against their employer, meat processor Agri Processor, after it refused to bargain with the union. The company argued that most of the workers were undocumented and that undocumented workers 1) did not count as "employees" protected by the National Labor Relations Act ("NLRA"), and 2) could not belong to the same bargaining unit as legal workers. The administrative law judge and National Labor Relations Board ("NLRB") rejected these arguments under *Sure-Tan, Inc. v. NLRB*, a 1984 Supreme Court decision that held that undocumented workers "plainly come within the broad statutory definition of 'employee'" under the NLRA. *Sure-Tan, Inc., v. NLRB*, 467 U.S. 883, 891-92 (1984). The company petitioned for review. Judge Tatel, writing for the panel, explained that neither the Immigration Reform and Control Act of 1986 ("IRCA") nor *Hoffman Plastic Compounds, Inc. v. NLRB*, both of which post-dated *Sure-Tan*, called its holding into question. *Agri Processor*, 514 F.3d at 8.

Kavanaugh dissented. Disagreeing with every court of appeals to have considered the issue before or since, he would have held that in passing IRCA, Congress had rejected *Sure-Tan's* reading of the NLRA. Judge Kavanaugh focused on a single sentence in *Sure-Tan*: "Since the employment relationship between an employer and an undocumented alien is hence not illegal under the INA [[Immigration and Naturalization Act]], there is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA." *Sure-Tan*, 467 U.S. 883 at 882-883. He maintained that, in passing IRCA two years after *Sure-Tan*, Congress changed the employment relationship between employers and undocumented workers to supersede the *Sure-Tan* decision — even though IRCA did not address the question directly and even though neither IRCA nor any other enactment amended the relevant provisions of the NLRA. *Agri Processor*, 514.F3d at 12-13 (Kavanaugh, J., dissenting) (citations omitted). As Judge Tatel explained for the majority, this is a logical error: Kavanaugh's opinion relied on the fact that the court had written, "Because not A, not B," but it did not mean that once A occurred, B would follow. *Id.* at 8 (Tatel, J.) ("But this does not logically follow, as an example illustrates: Because it is not cold outside, it is not snowing. It is now cold outside, therefore it must be snowing.") (citing PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 323 (9th ed. 2005)).

Kavanaugh also maintained that the *Hoffman* court “made clear that, in the wake of IRCA, illegal immigrant workers are not entitled to any remedies under the NLRA.” *Id.* at 13. *But see Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (noting, without questioning the propriety of this relief, that the employer had already been subjected to sanction including “orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights.”). Kavanaugh also went out of his way to outline arguments why the undocumented workers’ votes should not, as a policy matter, be counted in union elections: Both “legal workers, whose votes may have been diluted,” and the employer, “who may have to bargain with a union that would not have been certified but for the votes of the illegal immigrant workers,” would have reason to seek to disqualify the votes. *Id.* Both the en banc D.C. Circuit and the Supreme Court refused to rehear the case, and since *Agri Processor*, no court has adopted Kavanaugh’s position. *Agri Processor Co., Inc. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1031 (2009).

Fogo de Chao, Inc. v. U.S. Dept. of Homeland Sec., 769 F.3d 1127 (D.C. Cir. 2014), is another immigrant labor case. Fogo de Chao, a restaurant, appealed a U.S. Citizenship and Immigration Services (“USCIS”) determination that chefs trained in Brazilian cooking did not possess the specialized knowledge required to qualify for L1-B visas. The panel ruled for the restaurant, concluding that the USCIS appeals office had “erred in adopting a categorical prohibition on any and all culturally acquired knowledge supporting a ‘specialized knowledge’ determination.” 769 F.3d at 1139. The panel also found that the appeals office’s factual determination regarding the specific applicant was not supported by substantial evidence. *Id.*

Kavanaugh dissented. He focused not on the rule’s categorical nature but on its substance, asserting that “one’s country of origin, or cultural background, does not constitute specialized knowledge.” *Id.* at 1152 (Kavanaugh, J., dissenting). He reasoned that accepting the argument that cultural background can constitute specialized knowledge “would gut the specialized knowledge requirement and open a substantial loophole in immigration laws.” *Id.* He characterized the case as being about Fogo de Chao’s “desire to cut labor costs masquerading as specialized knowledge” and whether “mere economic expediency” could “authorize an employer to displace American workers for foreign workers.” *Id.* at 1153.

In *Fogo*, Kavanaugh presented himself as a textualist: “In our constitutional system, Congress and the President determine the circumstances under which foreign citizens may enter the country. The judicial task is far narrower: to apply the immigration statutes as written.” *Fogo de Chao*, at 1153-54 (Kavanaugh, J., dissenting). However, his categorical exclusion of “cultural background” from “specialized knowledge” found no support in the text of the statute itself and instead focused on his policy judgment that the panel majority had “open[ed] a substantial loophole” that would further the restaurant’s “desire to cut labor costs.”

Judge Kavanaugh’s recent dissent in *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017), discussed in detail in the Reproductive Rights section above, is instructive from an immigrants’ rights perspective because of what Kavanaugh chose *not* to join. Judge Henderson, who joined Kavanaugh to form the panel majority, would have held that the minor had “never entered the United States as a matter of law and [could not] avail herself of the constitutional rights afforded those legally within our borders.” 874 F.3d at 746-47 (Henderson, J., dissenting). Instead, Kavanaugh noted that “all parties have assumed . . . that unlawful immigrant minors such as Jane Doe have a right under Supreme Court precedent to obtain an abortion” and focused his dissent on whether or not the government’s refusal to allow her to do so while it sought a sponsor constituted an undue burden. *Id.* at 753.

Finally, in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), Kavanaugh concurred to opine negatively on the due process rights of inadmissible aliens. Judge Ginsburg’s decision for the panel relied on the Supreme Court’s decision in *Munaf v. Geren*, 553 U.S. 674 (2008), to reject the petitioners’ contention they were entitled to notice and judicial review of government decisions to transfer them from custody on Guantánamo to foreign nations where they faced a risk of being tortured. Judge Ginsburg’s decision for the panel treats the *Kiyemba* petitioners’ claims as straightforwardly controlled by *Munaf*. Kavanaugh wrote separately to “emphasize” several points. Most significantly, Kavanaugh compared the Uighur detainees’ case to a “standard immigration case involving inadmissible aliens at the U.S. border.” *Id.* at 519. In such a case, Kavanaugh argued, the “governmental interest in transfer would be compelling,” “inadmissible aliens at the border . . . have no constitutional right to enter the United States,” and “the United States has a very strong interest in returning the aliens to their home countries or safe third countries so that they will not be detained indefinitely in facilities run by the United States—a scenario that can trigger a host of security, foreign policy, and domestic complications. That governmental interest applies at least as strongly in the case of these Guantánamo detainees.” (Citation omitted).

RACIAL JUSTICE

There are three notable trends in Kavanaugh’s record on race: (1) his support for a “colorblind” reading of the Constitution; (2) his relatively expansive interpretation of racial discrimination prohibited by Title VII; and (3) his deference to government actors, both in terms of official immunity and agency decision-making.

Support for the “Colorblind” Constitution

Prior to becoming a judge, Kavanaugh co-wrote an amicus brief on behalf of the Center for Equal Opportunity, which has been described as “a group that opposes race-based affirmative action in college admissions.”³ The brief was not related to affirmative action but rather to Hawaii’s election law, which allowed only native Hawaiians to vote in state elections for the Office of Hawaiian Affairs. Brief for Center for Equal Opportunity et al. as Amici Curiae Supporting Petitioners 4, *Rice v. Cayetano*, 528 U.S. 495 (2000).⁴ (John Roberts, then in private practice, defended the law for Hawaii).

Kavanaugh’s brief argued that strict scrutiny applied to all racial classifications and that a compelling interest that justifies racial classification only exists in “situations where there is an imminent threat to life or limb (as in a prison race riot)” or for “remedial settings,” very strictly defined. *Id.* at 16. This would appear to preclude consideration of race for affirmative action purposes. The Supreme Court struck down the law in a 7-2 decision, *Rice v. Cayetano*, 528 U.S. 495 (2000). When asked about the brief and its implications for affirmative action in 2004 as part of his confirmation for the D.C. Circuit Court, Kavanaugh said only: “The Supreme Court has decided many cases on affirmative action programs and, if confirmed, I would faithfully follow those precedents.”⁵

In *Greater New Orleans Fair Housing Action Center v. U.S. Dept. of Housing & Urban Development*, 639 F.3d 1078 (D.C. Cir. 2011), Kavanaugh joined the majority opinion (written by Judge Williams), rejecting Black plaintiffs’ disparate-impact claim that the formula used for a grant program to help homeowners rebuild after hurricanes violated the antidiscrimination provisions of the Fair Housing Act (“FHA”). The court could have rested on its conclusion that “plaintiffs’ facts are at

³ Mel Lenor, POLITICO, *A dig through Kavanaugh’s record on education finds plenty of material* (July 10, 2018), <https://www.politico.com/newsletters/morning-education/2018/07/10/a-dig-through-kavanaughs-record-on-education-finds-plenty-of-material-274850>.

⁴ <https://www.findlawimages.com/efile/supreme/briefs/98-818/98-818fo3/98-818fo3.pdf>. Notably, Kavanaugh also represented as amici in the same brief University of Michigan Professor of Philosophy Carl Cohen, who is identified as “serv[ing] for many years in the leadership of the American Civil Liberties Union.”

⁵ POLITICO, *supra* note 1.

best sketchy even on the implausible resource-gap theory”⁶ that plaintiffs suggested as a benchmark. *Id.* at 1088. But the opinion went further to point out that greater consideration of the racial impact of a grant formula on minorities raises questions about treatment of whites. *Id.* (“Choice of a benchmark is further complicated by uncertainty whether one need consider only the impact on minority groups. As Title VII permits white employees to bring job discrimination claims, white grant recipients might, on the size-of-grant standard, be able to make a prima facie case of disparate impact. In the face of this legal uncertainty, adoption of the size-of-grant benchmark would put OCD—and other agencies trying to develop formulae for comparable grants—in a damned-if-you-do, damned-if-you-don't quandary.” (internal citations omitted).

Expansive View of Liability for Racial Discrimination Under Title VII

Kavanaugh’s record on Title VII racial discrimination claims is sympathetic to such claims. He joined the majority opinion to hold that a supervisor’s use of an unambiguous racial epithet such as the n-word could constitute a hostile work environment. *See Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013). In his concurrence, Judge Kavanaugh opined that even a single verbal incident, if sufficiently severe, can create a hostile work environment actionable under Title VII. He went on to discuss the particular racial hostility associated with the n-word, stating, “[n]o other word in the English language so powerfully or instantly calls to mind our country’s long and brutal struggle to overcome racism and discrimination against African-Americans.” *Id.* at 580 (Kavanaugh, J., concurring).

Kavanaugh has also urged the court to expand the category of actionable adverse employment actions. In *Ortiz-Diaz v. United States Department of Housing & Urban Development, Office of the Inspector General*, 867 F.3d 70 (D.C. Cir. 2017) (Kavanaugh, J. concurring), Kavanaugh urged the D.C. Circuit to definitively establish that “all discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII,” reasoning that Title VII plainly prohibits an employer from transferring, or not transferring, an employee because of her race. *Id.* at 81.

Deference to Government Agents

Absent clear statutory language to the contrary, Kavanaugh has deferred to governmental actors and decision making in racial discrimination cases.

In *Foote v. Moniz*, 751 F.3d 656 (D.C. Cir. 2014), Judge Kavanaugh, writing for the majority, found that a job applicant’s Title VII claim against the Department of Energy was insulated from judicial review because it concerned a substantial national security interest. Similarly, in *Howard v. Office of Chief Administrative Officer of U.S. House of Representatives*, 720 F.3d 939 (D.C. Cir. 2013), Kavanaugh,

⁶ The “resource-gap” theory came from a study finding that some of the formula’s metrics, like property value and insurance coverage, were drastically lower in Black communities than in white ones. 639 F.3d at 1081–82.

in dissent, maintained that an employment discrimination case against a federal congressional office should be dismissed once the employer asserts a reason for the alleged discriminatory action that involves legislative activity protected by the Speech or Debate Clause.

Kavanaugh has elevated national security concerns over workplace discrimination. In *Rattigan*, a jury found that the FBI violated Title VII of the Civil Rights Act of 1964 by launching a security investigation of a Black FBI agent working in Saudi Arabia, in retaliation for his filing an internal complaint alleging religious, racial, and national-origin discrimination. See *Rattigan v. Holder*, 689 F.3d 764, 768 (D.C. Cir. 2012). The majority in *Rattigan* held that the plaintiff's discrimination claims could proceed if he could show that the employees acted with a retaliatory or discriminatory motive.

Kavanaugh dissented, arguing that the Supreme Court's decision in *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988), barred all judicial review of agency actions related to security clearances, including discrimination claims. 689 F.3d at 774. In Judge Kavanaugh's view, any decisions touching on the security clearance process should be insulated from judicial review, even if those decisions are blatantly motivated by racial bias or were knowingly based on false information.

Kavanaugh has also shown deference to agency decision makers. Writing for the majority in *Multicultural Media, Telecom and Internet Council v. Fed. Communications Commn.*, 873 F.3d 932 (D.C. Cir. 2017), Kavanaugh held that the Communications Act did not require FCC to make broadcasters translate emergency alerts and broadcast them in languages other than English, deferring to the agency's decision-making. Similarly, in *Hoopa Valley Tribe v. F.E.R.C.*, 629 F.3d 209 (D.C. Cir. 2010), the tribe requested the Federal Energy Regulatory Commission ("FERC") impose conditions on annual licenses given to power company to preserve Klamath River's trout fishery. Kavanaugh sided with FERC stating that this controversy was an example of factual dispute implicating substantial agency expertise.

But where the text is clear, Kavanaugh has been willing to find against an agency. In *Navajo Nation v. United States Dep't of Interior*, 852 F.3d 1124 (D.C. Cir. 2017), the Navajo Nation alleged that the Bureau of Indian Affairs ("BIA") violated the Indian Self Determination and Education Assistance Act for failing to disperse funding. The court held that: 1) deadline for BIA approval began to run on the date the tribe hand-delivered its proposal; 2) tribe's silence in response to BIA assertions did not equitably estop the tribe from disputing timeliness of BIA's response; 3) partial government shutdown did not equitably toll deadline. Judge Kavanaugh concurred and wrote a short opinion suggesting that, under the right circumstances, the statute might be equitably tolled because of a government shutdown, but not here because BIA had plenty of time to reopen it after the 90-day statutory deadline.

DISABILITY RIGHTS

While Judge Kavanaugh's legal writings have expressed sympathy for the needs of people with disabilities and their struggles with government bureaucracies, his opinions have not been particularly receptive to disability rights claimants.

Judge Kavanaugh appears to empathize with families who have disabled family members, especially in regard to their struggles with government bureaucracies. For example, in reversing an order adverse to an applicant for Social Security Administration childhood disability benefits, Judge Kavanaugh repeatedly referenced the lengthy delay experienced by the applicant's family members:

"The Rossello family's journey through the Social Security Administration's hearing process began more than 15 years ago. ... As a result of bureaucratic delays, the Rossellos' case has dragged through the Social Security Administration and the courts for more than 15 years. We reverse the District Court's judgment and direct it to promptly remand the case to the Social Security Administration for the agency to expeditiously resolve the Rossellos' claim for childhood disability benefits on behalf of Cristina." *Rossello ex rel. Rossello v. Astrue*, 529 F.3d 1181, 1182, 1183, 1187 (D.C. Cir. 2008). And, in reversing an order in favor of a formerly incarcerated special education student, Judge Kavanaugh wrote, "We understand and appreciate the desire of Antonio Hester, his family, and his representatives to secure additional special education services." *United States v. Knight*, 824 F.3d 1105, 1110 (D.C. Cir. 2016).

But Kavanaugh has generally ruled against disability claims. In *Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376 (D.C. Cir. 2007), for example, three women with intellectual disabilities who had been deemed incompetent to make medical decisions for themselves had each been subjected to elective surgeries without their consultation or consent. Two of the surgeries were abortions, one over the express objections of the woman, and the third was eye surgery. D.C. officials with the Mental Retardation and Developmental Disabilities Administration ("MRDDA") had provided the medical consent, without consulting with or notifying either the three women or their designated legal representatives. The three women sued MRDDA on behalf of themselves and a class of people with intellectual disabilities, asserting violations of their substantive and procedural due process rights under the Fifth and Fourteenth Amendments.

The district court certified a class, granted summary judgment to the plaintiffs, and enjoined D.C. from using any policy that would allow city officials to consent to elective surgical procedures for plaintiffs and the class members without due process of law. The court noted:

In the District of Columbia, "every person has the right, under the common law and the Constitution, to accept or refuse medical treatment. This right of bodily integrity belongs equally to persons who are competent and persons who are not." *Does v. D.C.*, 374 F. Supp. 2d 107, 112–13 (D.D.C. 2005) (citing *In re A.C.*, 573 A.2d 1235, 1247 (D.C.1990)).

Under the district court’s order, before D.C. officials could grant — or refuse — consent for any elective procedure, they first had to make and document good faith efforts to understand the patient’s own wishes. If “the wishes of the patient are unknown and cannot be ascertained,” then MRDDA officials must still “consider the totality of the evidence to attempt to determine, for herself, the subjective desires of the patient.” *Does I through III v. D.C.*, 232 F.R.D. 18, 34 (D.D.C. 2005).

The district court rejected MRDDA officials’ assertion that ascertaining the wishes of their clients is an impossible charge, writing, “This argument offends both common sense and the dignity of retarded citizens; [e]ven a legally incompetent, mentally retarded individual may be capable of expressing or manifesting a choice or preference’ regarding medical treatment.” *Does v. D.C.*, 374 F. Supp. 2d 107, 115 (D.D.C. 2005).

On appeal, Judge Kavanaugh wrote the circuit court opinion reversing the district court. He found that people with intellectual disabilities should have no say in rejecting unwanted medical procedures. The opinion held that people with intellectual disabilities deemed legally incapable of making medical decisions could not express “their true wishes with respect to a recommended surgery.” *Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376, 381 (D.C. Cir. 2007).

Judge Kavanaugh has also rejected employees’ claims of retaliation, despite strong documentation of employer harassment after the employee filed a complaint, *Baloch v. Kempthorne*, 550 F.3d 1191 (D.C. Cir. 2013), and in another case, despite clear documentation that poor performance reviews started only after the employee filed a discrimination complaint – preceded by almost 15 years of unblemished work history, *Johnson v. Interstate Management Company, LLC.*, 849 F.3d 1093 (D.C. Cir. 2017).

In other employment cases, Judge Kavanaugh found for a public school system that rejected a deaf applicant for an IT job, despite the interviewer asking the applicant how he communicated in offices where no one knew sign language, *Adeyemi v. D.C.*, 525 F.3d 1222 (D.C. Cir. 2008). And in *Stewart v. St. Elizabeth’s Hospital*, 589 F.3d 1305 (D.C. Cir. 2010), Kavanaugh found for the employer, asserting that the hospital had no reason to know the employee had a disability, despite the fact that she was hired through the “patient hire” program for hospital residents with disabilities.