

# Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?

BY ASHWIN P. PHATAK<sup>†</sup>

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## I. Introduction

On July 9, 2018, President Trump nominated Judge Brett Kavanaugh to fill the Supreme Court vacancy created by Justice Anthony Kennedy's retirement.<sup>1</sup> After doing so, the White House "immediately played up [Judge Kavanaugh's] pro-business, anti-regulation record."<sup>2</sup> In an email to supporters, the White House highlighted that "Judge Kavanaugh protects American businesses," that he "helped kill President Obama's most destructive new environmental rules," and that he "led the effort to rein in . . . independent agencies . . ."<sup>3</sup> And in a memorandum to the press, the White House touted that Judge Kavanaugh had overruled federal agencies no less than 75 times in cases addressing clean air regulations, consumer protections, and a host of other issues.<sup>4</sup>

Many commentators have agreed that if confirmed, Judge Kavanaugh "could further cement the [high] court's pro-business tilt."<sup>5</sup> For example, the *New York Times* editorial board opined that Judge Kavanaugh will "aggressively" give "big business a leg up on workers, unions, consumers and the

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<sup>†</sup> Ashwin P. Phatak is Appellate Counsel at the Constitutional Accountability Center.

<sup>1</sup> President Donald J. Trump Announces Intent To Nominate Judge Brett M. Kavanaugh to the Supreme Court of the United States, The White House (July 9, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-brett-m-kavanaugh-supreme-court-united-states/>.

<sup>2</sup> Lorraine Woellert, *Trump Asks Business Groups for Help Pushing Kavanaugh Confirmation*, Politico (July 9, 2018), <https://www.politico.com/amp/story/2018/07/09/brett-kavanaugh-business-groups-trump-705800>.

<sup>3</sup> *Id.*

<sup>4</sup> Matthew Goldstein, *Brett Kavanaugh Likely To Bring Pro-Business Approach to Supreme Court*, N.Y. Times (July 10, 2018), <https://www.nytimes.com/2018/07/10/business/kavanaugh-supreme-court-business-regulation.html>.

<sup>5</sup> *Id.*

environment.”<sup>6</sup> One labor attorney warned: “This court will go from a reliably pro-business court to being solidly pro-business. It will be an uphill battle for employees to win many cases, if Judge Kavanaugh gets confirmed. He looks for ways to rule for employers.”<sup>7</sup> In short, Judge Kavanaugh is widely believed to be “a friend of business.”<sup>8</sup>

If Judge Kavanaugh is as friendly to business interests as the White House has promised, he would only reinforce the already pro-business majority at the Supreme Court. While corporations and business should certainly win their fair share of cases when the law is on their side, they fare *disproportionately* well at the Court, as exemplified by the increasing success of the U.S. Chamber of Commerce in its Supreme Court litigation. Since 2010, the Constitutional Accountability Center (CAC) has tracked the Supreme Court activities of the Chamber of Commerce and released empirical studies documenting a sharp increase in the Chamber’s success rate since the start of the Roberts Court.<sup>9</sup> CAC has shown that the Chamber now wins the vast majority of its cases: 70% during the Roberts Court,<sup>10</sup> compared to 56% during the late Rehnquist Court and 43% during the late Burger Court.<sup>11</sup> Furthermore, there is a sharp ideological divide on the Roberts Court in favor of the Chamber, with the Court’s conservatives almost always ruling in favor of the Chamber in closely decided cases.<sup>12</sup>

This Issue Brief analyzes Judge Kavanaugh’s jurisprudence on issues relevant to business and corporate interests on the U.S. Court of Appeals for the D.C. Circuit, the court on which Judge Kavanaugh has sat for over twelve years. The Brief discusses many of Judge Kavanaugh’s opinions in several different issue areas: workers’ rights, employee protections, independent agencies, *Chevron* deference, environmental regulations, multinational corporate liability, and anti-competitive business practices. Across these different issue areas, a common theme emerges: Judge Kavanaugh routinely sides with businesses and employers, and against the government, interest groups, employees, and consumers. Moreover, he has often done so in dissent, staking out positions that his colleagues—sometimes even conservative colleagues—were unwilling to join. Thus, Judge Kavanaugh has demonstrated a pro-business jurisprudence that is often outside the mainstream of the appellate court on which he currently serves. Based on this record, there is significant reason to worry that Judge Kavanaugh, if he is confirmed, will continue the Court’s trend toward improperly favoring the interests of big businesses over all Americans.

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<sup>6</sup> N.Y. Times Editorial Board, *Brett Kavanaugh Will Fit Right In at the Pro-Corporate Roberts Court*, N.Y. Times (July 22, 2018), <https://www.nytimes.com/2018/07/22/opinion/brett-kavanaugh-supreme-court.html>.

<sup>7</sup> Erin Mulvaney, *Brett Kavanaugh ‘Looks for Ways to Rule for Employers’*, Nat’l L.J. (July 12, 2018), <https://www.law.com/nationallawjournal/2018/07/12/brett-kavanaugh-looks-for-ways-to-rule-for-employers/>.

<sup>8</sup> Natasha Bach, *Why Trump Supreme Court Nominee Brett Kavanaugh Is Business’s New Best Friend*, Fortune (July 10, 2018), <http://fortune.com/2018/07/10/brett-kavanaugh-scotus-nominee-business/>.

<sup>9</sup> See *Corporations and the Supreme Court*, Constitutional Accountability Center, <https://www.theusconstitution.org/series/chamber-study/>.

<sup>10</sup> See Brian R. Frazelle, *A Banner Year for Business as the Supreme Court’s Conservative Majority Is Restored | October Term 2017*, Constitutional Accountability Center (July 17, 2018), [https://www.theusconstitution.org/think\\_tank/a-banner-year-for-business-as-the-supreme-courts-conservative-majority-is-restored/](https://www.theusconstitution.org/think_tank/a-banner-year-for-business-as-the-supreme-courts-conservative-majority-is-restored/).

<sup>11</sup> See Doug Kendall, *The Chamber and the Court*, Constitutional Accountability Center (Dec. 21, 2010), <https://www.theusconstitution.org/news/the-chamber-and-the-court/>.

<sup>12</sup> Frazelle, *supra* note 10.

## II. Workers' Rights and the NLRB

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The D.C. Circuit hears many appeals from decisions of the National Labor Relations Board (NLRB), an independent agency that enforces federal labor laws regarding unions and unfair labor practices. In case after case, Judge Kavanaugh has sided with employers against their employees in these types of cases—and often he has done so in dissent from his colleagues, suggesting his pro-business bent may be beyond the mainstream.

For example, in *Agri Processor v. NLRB*, Judge Kavanaugh dissented from a majority opinion holding that undocumented workers are “employees” under the National Labor Relations Act (NLRA) and can therefore benefit from the Act’s protections.<sup>13</sup> Judge Kavanaugh’s dissent would have ensured that such employees remain outside the protection of the law, rendering them unable to unionize and vulnerable to employer abuse. Moreover, his position was not required by the text of the statute. As the majority opinion noted, “we hew closely to the text of the NLRA,” which does not exempt undocumented workers, “while the dissent seeks to abandon [the text] altogether.”<sup>14</sup> Judge Kavanaugh’s dissent also conflicted with the Supreme Court’s decision in *Sure-Tan v. NLRB*, which held that because “undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of ‘employee’ [under the NLRA].”<sup>15</sup> Even Judge Karen L. Henderson, widely considered a conservative jurist, concurred with the majority opinion and counseled that “we must follow *Sure-Tan*’s interpretation until the Supreme Court otherwise directs or the Congress expressly limits the term’s scope.”<sup>16</sup> Judge Kavanaugh believed otherwise.

In many opinions, Judge Kavanaugh has sought to alter doctrines intended to protect workers. For example, in *Southern New England Telephone v. NLRB*, Judge Kavanaugh cabined the long-standing rule under the NLRA that employees have a right to wear union-associated clothing at work,<sup>17</sup> deciding that the employer in that case—AT&T—could forbid its employees from wearing certain union t-shirts while working “when the company reasonably believes the message may harm . . . its public image.”<sup>18</sup> He held this despite the fact that AT&T permitted workers to remain on the job while wearing other shirts with “questionable messages,” like “Support your local hookers.”<sup>19</sup>

Similarly, in *Venetian Casino Resort v. NLRB*, Judge Kavanaugh wrote a majority opinion holding that a casino’s requests that police officers issue criminal citations to union protesters—a move that violates the NLRA—was protected by the First Amendment.<sup>20</sup> To reach this conclusion, Judge Kavanaugh significantly expanded a doctrine that protects companies’ ability to petition the government without running afoul of labor laws. Under this doctrine, “conduct that constitutes a direct petition to

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<sup>13</sup> 514 F.3d 1, 10 (D.C. Cir. 2008).

<sup>14</sup> *Id.* at 7 (internal quotes omitted).

<sup>15</sup> 467 U.S. 883, 892 (1984).

<sup>16</sup> *Agri*, 514 F.3d at 10 (Henderson, J., concurring).

<sup>17</sup> 793 F.3d 93, 94 (D.C. Cir. 2015).

<sup>18</sup> *Id.* at 95.

<sup>19</sup> *Id.*

<sup>20</sup> 793 F.3d 85, 87 (D.C. Cir. 2015).

government, but would otherwise violate the Act, is shielded from liability by the First Amendment.”<sup>21</sup> While the doctrine traditionally refers to activities like companies’ outreach to legislators on policy issues, Judge Kavanaugh’s opinion stretches the concept of a “petition to government” well beyond that traditional context to protect the casino’s requests for police to cite and intimidate union organizers.

In other cases, Judge Kavanaugh has used strained textual arguments to reach anti-worker results. In *Verizon New England v. NLRB*, the NLRB had concluded that Verizon workers could post union signs in their parked cars, even though they had waived their right to picket in a collective bargaining agreement.<sup>22</sup> Judge Kavanaugh disagreed, concluding that the union’s waiver of workers’ “picketing” rights extended to the presence of signs in parked cars. As a dissenting judge pointed out, however, the confrontational aspect inherent in picketing is entirely lacking when signs are left in parked cars.<sup>23</sup> The dissenting judge was also “unaware of any decision considering employees to be engaged in picketing even while in the workplace carrying out their normal functions.”<sup>24</sup> In short, Judge Kavanaugh’s reading of “picket” in his majority opinion construed the contractual language as favorably as possible for Verizon and against its employees.

Judge Kavanaugh has also written several separate opinions questioning pro-worker decisions by the NLRB. In *Island Architectural Woodwork v. NLRB*, a D.C. Circuit panel concluded that a company had violated the law when the company and its spinoff refused to “apply the terms of [the company’s] collective bargaining agreement to [its spinoff]” despite the employees for the spinoff doing “the same work, on the same equipment, in the same building” “under the leadership of the daughter of [the company’s] President and CEO.”<sup>25</sup> Judge Kavanaugh dissented. He would have let the spinoff operate as a non-union shop despite its close connection with the company simply because they were not technically controlled by the same entity. The majority opinion rejected this formalistic approach, instead recognizing that the company had created the spinoff in order to hire non-union labor and “was not a separate and independent employer, but merely [the company’s] alter ego.”<sup>26</sup>

In another case, Judge Kavanaugh used a partial dissent to stake out a different anti-union position. In *Midwest Division—MMC v. NLRB*, the NLRB concluded that a hospital’s peer review board violated the NLRA when it summoned two nurses for possible disciplinary sanctions, but denied their requests for union representation during this process and for additional information about the review board.<sup>27</sup> Though the majority overturned the NLRB’s decision on representation, it did so on the narrow ground that employees do not have a right to union representation in *non-mandatory* investigatory hearings.<sup>28</sup> Judge Kavanaugh would have ruled much more broadly: that rights to union representation “do *not* apply in peer review committee interviews” as a categorical matter because such committee interviews

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<sup>21</sup> *Id.* at 87.

<sup>22</sup> 826 F.3d 480 (D.C. Cir. 2016).

<sup>23</sup> *Id.* at 492 (Srinivasan, J., dissenting).

<sup>24</sup> *Id.*

<sup>25</sup> 892 F.3d 362, 366 (D.C. Cir. 2018).

<sup>26</sup> *Id.*

<sup>27</sup> 867 F.3d 1288, 1292-93 (D.C. Cir. 2017).

<sup>28</sup> *Id.* at 1293.

are not disciplinary processes.<sup>29</sup> In terms of information, Judge Kavanaugh dissented from the majority's holding that the hospital must share information about "the Committee's structure, purpose, and functions" and "the nature of the [specific] allegations" with the nurses before their hearing.<sup>30</sup> Judge Kavanaugh would have held that "the Union's need for that information is minimal at best," and that "the hospital possesses a strong interest in protecting the confidentiality of the peer review process."<sup>31</sup>

Judge Kavanaugh's antipathy towards workers' rights extends beyond the private sector. In *American Federation of Government Employees v. Gates*, Judge Kavanaugh upheld Department of Defense regulations that severely curtailed employees' access to collective bargaining. His opinion held that the "National Defense Authorization Act grants [the Department] temporary authority to curtail collective bargaining for . . . civilian employees."<sup>32</sup> A dissenting judge criticized his opinion as "empower[ing] [the Secretary of Defense] to abolish collective bargaining altogether—a position with which even the Secretary disagrees."<sup>33</sup> Moreover, Judge Kavanaugh upheld the regulations despite the authorizing statute's express textual provision that the Department "ensure that employees may organize [and] bargain collectively."<sup>34</sup>

Finally, Judge Kavanaugh also opposed efforts by workers and unions to ensure that union officers act responsibly. In *International Union, Security, Police and Fire Professionals of America v. Faye*, Judge Kavanaugh dissented from a majority opinion that concluded the Labor-Management Reporting and Disclosure Act provided an implied cause of action to unions to recover against a corrupt officer.<sup>35</sup> Based on a cramped reading of the Act's text, Judge Kavanaugh would have discounted on-point precedent and held that although union members may sue corrupt union officers, "unions [themselves] do not possess a federal cause of action to sue their officers for breaches of fiduciary duties."<sup>36</sup>

### III. Employee and Workplace Protections

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Outside the realm of collective bargaining, Judge Kavanaugh has been no friend to employees seeking to enforce workplace protections regarding safety and non-discrimination. In a prominent case, *SeaWorld v. Perez*, Judge Kavanaugh dissented from a majority opinion upholding an Occupational Safety and Health Agency (OSHA) decision to fine SeaWorld for violating workplace safety rules after an orca killed an employee during a water performance.<sup>37</sup> The majority upheld those fines on the ground that SeaWorld knew that its protections for trainers working with orcas were insufficient. Judge

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<sup>29</sup> *Id.* at 1304 (Kavanaugh, J., concurring in part and dissenting in part).

<sup>30</sup> *Id.* at 1300 (majority opinion).

<sup>31</sup> *Id.* at 1304 (Kavanaugh, J., concurring in part and dissenting in part).

<sup>32</sup> 486 F.3d 1316, 1318 (D.C. Cir. 2007) (emphasis omitted).

<sup>33</sup> *Id.* at 1331 (Tatel, J., dissenting in part).

<sup>34</sup> *Id.* (internal quotes omitted).

<sup>35</sup> 828 F.3d 969 (D.C. Cir. 2016).

<sup>36</sup> *Id.* at 983.

<sup>37</sup> 748 F.3d 1202 (D.C. Cir. 2014).

Kavanaugh dissented and would have ruled in favor of SeaWorld because working with large animals—like “football [or] . . . stock car racing”—comes with a certain necessary amount of danger.<sup>38</sup> Judge Kavanaugh’s dissent repeatedly claimed that SeaWorld could not be held responsible for the “hazards posed by the normal activities intrinsic to an industry.”<sup>39</sup> The majority opinion accused Judge Kavanaugh of “[i]gnoring this court’s precedent regarding congressional purpose and intent” with respect to workplace safety statutes and with “stretching” relevant OSHA precedent “beyond its moorings.”<sup>40</sup> The majority further criticized Judge Kavanaugh’s focus on policy considerations, “hypotheticals,” and generalizations about the “sports and entertainment industries” at the expense of legal reasoning.<sup>41</sup>

In *Howard v. Chief Administrative Officer*, Judge Kavanaugh dissented from a majority opinion which permitted a black congressional staffer to file a race discrimination claim against the Office of the Chief Administrative Officer.<sup>42</sup> Judge Kavanaugh’s dissent would have made it significantly harder for congressional staffers to bring employment discrimination suits in federal court. In his view, the Constitution requires that a suit end as soon as a court concludes that “the employer’s asserted reason for the [employment] decision involves legislative activity protected by the Speech or Debate Clause.”<sup>43</sup> Though the majority opinion demonstrated how the staffer could have stated a claim without discussing legislative activity protected by the Clause, Judge Kavanaugh would have allowed government employers to quash suits so long as their “stated reason for the employment decision is the plaintiff’s performance of legislative activities.”<sup>44</sup>

Judge Kavanaugh also sought to make it harder for government employees doing national security work to challenge employment discrimination. In *Rattigan v. Holder*, a black Jamaican FBI employee alleged that his superiors illegally retaliated against his reports of race and national origin discrimination by flagging him for a security clearance investigation.<sup>45</sup> Dissenting from a majority opinion permitting the suit, Judge Kavanaugh concluded that the suit faced the “insurmountable bar” of requiring the judiciary to “second-guess the FBI’s [national security-related] decision[s].”<sup>46</sup> The majority, however, held that controlling precedent “shields from [judicial] review only those security decisions made by the FBI’s Security Division, not the actions of thousands of other FBI employees.”<sup>47</sup> The majority read the national security exemption narrowly in order to “preserv[e] to the maximum extent possible Title VII’s important protections against workplace discrimination and retaliation.”<sup>48</sup> Judge Kavanaugh did not.

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<sup>38</sup> *Id.* at 1217 (Kavanaugh, J., dissenting).

<sup>39</sup> *Id.* at 1219.

<sup>40</sup> *Id.* at 1211 (majority opinion).

<sup>41</sup> *Id.* at 1212.

<sup>42</sup> 720 F.3d 939, 939, 943 (D.C. Cir. 2013).

<sup>43</sup> *Id.* at 955 (Kavanaugh, J., dissenting).

<sup>44</sup> *Id.* at 957.

<sup>45</sup> 643 F.3d 975, 979 (D.C. Cir. 2011), *judgment vacated*, 2011 WL 4101538 (D.C. Cir. Sept. 13, 2011).

<sup>46</sup> *Id.* at 992 (Kavanaugh, J., dissenting).

<sup>47</sup> *Id.* at 983 (majority opinion).

<sup>48</sup> *Id.* at 984.

Finally, Judge Kavanaugh has concluded that federal civil rights laws do not protect certain government employees, allowing them to be fired based on race, sex, disability, or age. In *Miller v. Clinton*, Judge Kavanaugh dissented from a majority opinion holding that a State Department employee fired on his sixty-fifth birthday could bring an Age Discrimination in Employment Act (ADEA) claim.<sup>49</sup> Judge Kavanaugh expansively interpreted language from a separate law, the Basic Authorities Act, which provides that State Department contracts are to be formed “without regard to such statutory provisions as relate to the negotiation, making, and performance of contracts and performance of work . . .”<sup>50</sup> He believed this language expressly authorized the State Department to require employees to retire at age 65, notwithstanding the ADEA. While the majority opinion acknowledged that the Basic Authorities Act might be ambiguous as to whether government employees were covered, it adopted the “less surprising and more natural reading of the statutory text” to hold that employees like Miller are covered by the ADEA, Title VII, and the Americans with Disabilities Act, noting that “[w]henver Congress has decided to exempt either groups of U.S. citizens or specified circumstances from the coverage of those [civil rights] statutes, it has done so clearly.”<sup>51</sup>

To be sure, Judge Kavanaugh has not always ruled against workers. For example, in *New York-New York v. NLRB*, Judge Kavanaugh upheld the NLRB’s decision that contract employees should receive the same protections as direct employees when they distribute union handbills on employer property.<sup>52</sup> In *Kravis Center v. NLRB*, Judge Kavanaugh affirmed an NLRB ruling that held that the Kravis Center violated the NLRA by unilaterally changing the scope of its employees’ bargaining unit and by withdrawing recognition from the union.<sup>53</sup> And in *International Internship Program v. Napolitano*, Judge Kavanaugh wrote for a unanimous panel in holding that the statutes and regulations supporting the Q-1 visa scheme require that alien workers employed on such visas be paid and receive wages equivalent to those of domestic workers.<sup>54</sup> Moreover, in a concurrence in *Ayissi-Etoh v. Fannie Mae*, Judge Kavanaugh explained his view that being called the n-word once by a supervisor can establish a racially hostile work environment.<sup>55</sup> But these cases are exceptions to the rule. Again and again, Judge Kavanaugh has written opinions ruling against workers and employees and in favor of corporations and employers—often where neither the text of the law nor precedent required such an outcome—and many of these opinions placed him in dissent from and out of step with his colleagues.

## IV. Independent Agencies

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Independent agencies include entities as varied as the Securities and Exchange Commission, the Federal Communications Commission, the Federal Reserve, and the Consumer Financial Protection Bureau

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<sup>49</sup> 687 F.3d 1332 (D.C. Cir. 2012).

<sup>50</sup> 22 U.S.C. § 2669(c).

<sup>51</sup> *Id.* at 1352.

<sup>52</sup> 676 F.3d 193 (D.C. Cir. 2012).

<sup>53</sup> 550 F.3d 1183 (D.C. Cir. 2008).

<sup>54</sup> 718 F.3d 986 (D.C. Cir. 2013).

<sup>55</sup> 712 F.3d 572, 579-81 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

(CFPB), and they serve a critical role in regulating businesses and marketplaces. In particular, the independence of these agencies—that is, the fact that the heads of these agencies cannot be fired at will by the President, but only for good cause—allows them to enact reasonable business regulations without political interference or the undue influence of corporate interests.<sup>56</sup> Judge Kavanaugh, however, has repeatedly expressed hostility toward independent agencies, questioning their constitutionality and whether they are sufficiently accountable to the President.

For instance, Judge Kavanaugh wrote an opinion holding that the CFPB’s leadership structure is unconstitutional because its single director is removable only for cause.<sup>57</sup> This position was ultimately rejected by the *en banc* D.C. Circuit, which noted that “[t]he Supreme Court eighty years ago sustained the constitutionality of the independent Federal Trade Commission, a consumer-protection financial regulator with powers analogous to those of the CFPB,” and that “[t]he Court has since reaffirmed and built on that precedent.”<sup>58</sup> In a dissent from the *en banc* opinion expressing his view that the CFPB’s structure was unconstitutional, Judge Kavanaugh also expressed skepticism about the constitutionality of *all* independent agencies, calling into question the constitutionality of dozens of agencies. He described independent agencies as “a headless fourth branch of the U.S. Government” that “pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.”<sup>59</sup>

Judge Kavanaugh also criticized the Supreme Court’s seminal decision in *Humphrey’s Executor v. United States*, which upheld the constitutionality of independent agencies over 80 years ago.<sup>60</sup> According to Judge Kavanaugh:

The reasoning of *Humphrey’s Executor* is inconsistent with the reasoning in the Court’s prior decision in *Myers*. . . . The *Humphrey’s Executor* decision subsequently has received significant criticism. . . . Moreover, the reasoning of *Humphrey’s Executor* is in tension with the reasoning of the Supreme Court’s recent decision in *Free Enterprise Fund*.<sup>61</sup>

That was not the first time that Judge Kavanaugh expressed his concerns with the long-standing *Humphrey’s Executor* doctrine. In an earlier case regarding the constitutionality of the removal provisions governing the Public Company Accounting Oversight Board, Judge Kavanaugh stated in a dissent that *Humphrey’s Executor* “ha[s] long been criticized by many as inconsistent with the text of the Constitution, with the understanding of the text that largely prevailed from 1789 through 1935, and

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<sup>56</sup> *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 625 (1935).

<sup>57</sup> *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016).

<sup>58</sup> *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 77 (D.C. Cir. 2018).

<sup>59</sup> *PHH Corp.*, 839 F. 3d at 6.

<sup>60</sup> 295 U.S. at 626-32.

<sup>61</sup> *PHH Corp.*, 881 F.3d at 194 n.18 (Kavanaugh, J., dissenting from denial of rehearing en banc). In fact, the Supreme Court actually *reaffirmed* the continuing validity of *Humphrey’s Executor* in *Free Enter. Fund*. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 479 (2010) (“Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.”).



with prior precedents . . .”<sup>62</sup> Though he stated that the Court “cannot, need not, and do[es] not re-litigate” *Humphrey’s Executor* in that case,<sup>63</sup> his criticisms of *Humphrey’s Executor* were hardly veiled.<sup>64</sup>

Judge Kavanaugh has also questioned the accountability of independent agencies. In particular, he has noted that “there is an argument that has been made that courts should be more wary of regulations adopted by independent agencies because those have not been supervised by the President in the way that our constitutional structure would suggest.”<sup>65</sup> This idea of a special skepticism toward regulations enacted by independent agencies is not a part of administrative law and would be a dramatic change, reducing the power of independent agencies to enact regulations designed to help and protect the American people.

In short, if confirmed, there is reason to think that Judge Kavanaugh would conclude that *all* independent agencies violate the Constitution. Even if he did not precipitate such an extreme and dramatic break from existing precedent and practice, he would nonetheless likely vote to minimize the power of independent agencies in more incremental but still revolutionary ways. This would be a sea change in administrative law with profound real-world consequences for the American people.

## V. *Chevron* Deference and the Government’s Ability to Regulate

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Judge Kavanaugh’s attack on independent agencies is not the only way in which he threatens to change the law in ways that would limit the federal government’s ability to function properly. Judge Kavanaugh has also expressed significant hostility toward a decades-old doctrine, *Chevron* deference, which is a cornerstone of administrative law and has long been central to the federal government’s ability to regulate big businesses and protect consumers, the environment, workers, and more. *Chevron* deference provides that courts will defer to an agency’s interpretation of a statute when the “statute is silent or ambiguous with respect to the specific issue” so long as “the agency’s answer is based on a permissible construction of the statute.”<sup>66</sup> Courts routinely rely on *Chevron* in upholding regulations promulgated by agencies as varied as the National Labor Relations Board, the Environmental Protection Agency (EPA), and the Occupational Safety and Health Commission. Judge Kavanaugh, however, has written

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<sup>62</sup> *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 696-97 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *affirmed in part and reversed in part*, 561 U.S. 477 (2010).

<sup>63</sup> *Free Enter. Fund*, 537 F.3d at 697.

<sup>64</sup> See generally Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1472 (2009) (noting that although independent agencies have been held constitutional, “what is constitutional is not always wise” and “there is reason to doubt whether the elaborate system of numerous independent agencies makes full sense today”).

<sup>65</sup> Brett M. Kavanaugh, Lecture, *The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 731 (2014).

<sup>66</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

that *Chevron* deference is “an atextual invention by courts” that is “nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.”<sup>67</sup>

For that reason, it is little surprise that Judge Kavanaugh has recommended limiting the authority that administrative agencies have traditionally exercised in enacting reasonable business regulations. For example, in a dissent from the denial of rehearing *en banc* in a case about the Obama Administration’s net neutrality rules,<sup>68</sup> Judge Kavanaugh advocated for expanding the so-called “major rules” doctrine, whereby “major agency rules of great economic and political significance”<sup>69</sup> cannot be premised on an “ambiguous grant of statutory authority.”<sup>70</sup> Notably, Judge Kavanaugh’s articulation of the “major rules” doctrine is particularly broad. Rather than simply suggesting that agencies do not receive deference from courts when they address major questions (as Chief Justice Roberts has suggested<sup>71</sup>), Judge Kavanaugh’s version of the doctrine would prevent agencies from regulating *at all* as to major questions if “Congress has not clearly authorized the [agency] to issue the rule.”<sup>72</sup>

To determine whether a rule is major, courts should look, in Judge Kavanaugh’s view, to “the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue”—as he styled it, a “know it when you see it” approach.<sup>73</sup> This broad and flexible articulation of the “major rules” doctrine, if adopted by the Supreme Court, would allow courts to prevent agencies from enacting regulations across a wide array of areas.

Applying his heightened “major rules” doctrine, Judge Kavanaugh would have held that the Obama Administration’s net neutrality rule was a major rule because it affected “every Internet service provider, every Internet content provider, and every Internet consumer,” had a large financial impact, and because “Congress and the public have paid close attention to the issue.”<sup>74</sup> Furthermore, he would have held that Congress did not clearly authorize the FCC to issue the net neutrality rule because the statute is

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<sup>67</sup> Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation Judging Statutes*, 129 Harv. L. Rev. 2118, 2150 (2016); see *id.* at 2151 (“We must recognize how much *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope.”).

<sup>68</sup> “Net neutrality” is the principle that Internet service providers (like Comcast or Verizon) must treat all Internet data equally and not discriminate or charge consumers different amounts based on the content of the data.

<sup>69</sup> *U.S. Telecom Ass’n. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

<sup>70</sup> *Id.* at 421.

<sup>71</sup> *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); see Edith Roberts, *Potential Nominee Profile: Brett Kavanaugh*, SCOTUSblog (June 28, 2018), <http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/> (“Kavanaugh’s major-rules doctrine goes even further than the ‘major-questions doctrine’ described by Roberts in *King v. Burwell*.”). In *King v. Burwell*, the Chief Justice held that “question[s] of deep ‘economic and political significance’ that [are] central to [a] statutory scheme” do not receive *Chevron* deference. 135 S. Ct. at 2489 (quoting *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). However, an agency’s rule can prevail if the Court determines that the agency’s interpretation is the best reading of the statute. 135 S. Ct. at 2489 (“[O]ur task is to determine the correct reading of [the statute].”).

<sup>72</sup> *U.S. Telecom Ass’n.*, 855 F.3d at 418.

<sup>73</sup> *Id.* at 422-23.

<sup>74</sup> *Id.* at 423.

ambiguous as to whether Internet service is a telecommunications service.<sup>75</sup> But he could not convince his colleagues on the D.C. Circuit, the majority of whom voted not to rehear the panel decision upholding the rule as a permissible reading of the statute under *Chevron*.<sup>76</sup>

This was not the first time Judge Kavanaugh would have used the “major rules” doctrine to strike down important government regulations on industry. In *Coalition for Responsible Regulation v. EPA*, Judge Kavanaugh dissented from the denial of rehearing *en banc*, writing that he would have vacated an EPA rule that included greenhouse gases within the statutory definition of “air pollutant” for purposes of pre-construction permits for power plants.<sup>77</sup> Judge Kavanaugh lamented that the “EPA’s interpretation will impose enormous costs on tens of thousands of American businesses, with corresponding effects on American jobs and workers,” and opined that the court should not “lightly conclude that Congress intended such major consequences absent some indication that Congress meant to do so.”<sup>78</sup> In short, Judge Kavanaugh would have overturned EPA regulations defining the term “air pollutant” to include greenhouse gases—an interpretation *mandated* by the Supreme Court for another part of the Clean Air Act<sup>79</sup>—because Congress did not explicitly define the term “air pollutant” to include greenhouse gases. Though accepting that “[t]he task of dealing with global warming is urgent and important,” Judge Kavanaugh still would have struck down the rule on the belief that “undue deference or abdication to an agency carries its own systemic costs.”<sup>80</sup>

## VI. Environmental Regulations

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Judge Kavanaugh has routinely sided with industry over the government’s efforts to protect the environment, while concomitantly siding with the government over environmental groups seeking stricter environmental regulations. As discussed above, one major example is his dissent from the denial of rehearing *en banc* where he explained that he would have struck down an EPA rule seeking to regulate greenhouse gas emissions from power plants.<sup>81</sup> But that case is just the tip of the iceberg. In case after

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<sup>75</sup> *Id.* at 424-25.

<sup>76</sup> *Id.* at 382 (order per curiam). Judge Kavanaugh’s dissent in that case is all the more remarkable given that it is in tension with Supreme Court precedent to the contrary. In *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, the Supreme Court had “no difficulty concluding that *Chevron* applie[d]” to the agency’s decision to classify cable broadband as an information service rather than a telecommunications service because the statute’s “silence” on the matter left the FCC “discretion to fill the consequent statutory gap.” 545 U.S. 967, 982, 997 (2005). As Judge Tatel remarked in his concurrence in *U.S. Telecom Ass’n*, “[t]o affirm the FCC’s statutory discretion to select between [telecommunications and information services] was necessarily to countenance the agency’s treatment of cable broadband as a telecommunications service” because those were the only two choices available to the agency. 855 F.3d at 384 (Tatel, J., concurring in the denial of rehearing *en banc*).

<sup>77</sup> 2012 WL 6621785, at \*14 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from the denial of rehearing *en banc*).

<sup>78</sup> *Id.* at 18.

<sup>79</sup> See *Mass. v. EPA*, 549 U.S. 497, 529 (2007) (“air pollutant” includes “all airborne compounds of whatever stripe,” including greenhouse gases).

<sup>80</sup> 2012 WL 6621785, at \*22 (Kavanaugh, J., dissenting from the denial of rehearing *en banc*).

<sup>81</sup> *Id.* at \*14 (Kavanaugh, J., dissenting from the denial of rehearing *en banc*).

case, whether in the majority or often in dissent, Judge Kavanaugh has taken a position against environmental regulations.

First, in *EME Homer City Generation, L.P. v. EPA*, Judge Kavanaugh wrote a majority opinion striking down the EPA's Transport Rule, an important regulation that required industries in upwind states that caused poor air quality in downwind states to reduce their emissions of pollutants.<sup>82</sup> Although the Clean Air Act broadly requires States to prohibit polluters "from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any . . . ambient air quality standard,"<sup>83</sup> Judge Kavanaugh employed a cramped reading of this text to hold that the EPA's rule—which considered the cost to each State to reduce pollution—was unlawful because it could require states to reduce emissions by more than their own contributions to a downwind State's nonattainment.<sup>84</sup> The Supreme Court overturned Judge Kavanaugh's decision in a 6-2 opinion joined by both Chief Justice Roberts and Justice Kennedy.<sup>85</sup> The Supreme Court reasoned that the Clean Air Act "does not require EPA to disregard costs and consider exclusively each upwind State's physically proportionate responsibility for each downwind air quality problem."<sup>86</sup> Moreover, the Court criticized Judge Kavanaugh for not "fac[ing] up to th[e] problem" that "interstate air pollution" is "not . . . simple," and that "where . . . upwind States contribute pollution to more than two downwind receptors, proportionality becomes all the more elusive."<sup>87</sup> The Supreme Court concluded that the EPA's rule "is a permissible, workable, and equitable interpretation" of the Clean Air Act.<sup>88</sup>

Judge Kavanaugh has also been a strong proponent of requiring agencies like the EPA to take into consideration the cost to industries and corporations when crafting environmental rules, a business-friendly position rarely explicitly required by statute. For example, Judge Kavanaugh dissented in *Mingo Logan Coal Co. v. EPA*, in which the majority approved EPA's revocation of a Clean Water Act permit for a coal company to "excavate the tops of several West Virginia mountains, extract exposed coal and dispose of the excess soil and rock in three surrounding valleys containing streams"<sup>89</sup> because it "would result in 'unacceptable adverse effect[s]' to the environment."<sup>90</sup> Judge Kavanaugh believed that the EPA did not take into proper consideration the cost to the coal company and its shareholders of revoking the permit, even though the statute did not explicitly require consideration of costs. In his view, "EPA considered *the benefits to animals* of revoking the permit," but it never considered "the negative financial impacts on [the coal company's] owners and shareholders, including those who relied on the permit . . ."<sup>91</sup> The majority, by contrast, refused to consider the argument that the EPA failed to

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<sup>82</sup> 696 F.3d 7, 11-12 (D.C. Cir. 2012).

<sup>83</sup> 42 U.S.C. § 7410(a)(2)(D)(i).

<sup>84</sup> 696 F.3d at 11.

<sup>85</sup> *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593 (2014).

<sup>86</sup> *Id.* at 1610.

<sup>87</sup> *Id.* at 1605.

<sup>88</sup> *Id.* at 1610.

<sup>89</sup> 829 F.3d 710, 713 (D.C. Cir. 2016).

<sup>90</sup> *Id.* (quoting 33 U.S.C. § 1344(c)).

<sup>91</sup> *Id.* at 731-732 (Kavanaugh, J., dissenting).

consider the cost to its shareholders because the coal company failed to make that argument either before the EPA or in the district court.<sup>92</sup>

Similarly, in *White Stallion Energy Ctr., LLC v. EPA*, Judge Kavanaugh dissented in part from a majority decision which upheld an EPA rule promulgating emissions standards for a number of listed hazardous air pollutants emitted by coal- and oil-fired electric plants.<sup>93</sup> The majority held that the Clean Air Act's instruction that the EPA issue emissions limits that are "appropriate" did not require it to consider costs to the industry.<sup>94</sup> Judge Kavanaugh disagreed, opining that the word "appropriate" unambiguously required the agency to consider costs. He lamented that the majority's holding would "likely knock a bunch of coal-fired electric utilities out of business and require enormous expenditures by other coal and oil-fired electric utilities . . .".<sup>95</sup> While Judge Kavanaugh's view was later approved by the Supreme Court,<sup>96</sup> that only underscores the extent to which Judge Kavanaugh's confirmation would cement a Supreme Court majority skeptical of the EPA's authority to regulate.

By contrast, Judge Kavanaugh has been much more deferential to agencies when environmental groups challenge their rules. In *Natural Resources Defense Council v. EPA*, for example, Judge Kavanaugh wrote an opinion upholding an EPA rule increasing the maximum emissions level for particulate matter from 0.04 lb/ton to 0.07 lb/ton for cement manufacturing plants.<sup>97</sup> In doing so, he agreed with the EPA's reading of the statute, allowing it to consider whether a "proposed emission level[] would be cost-effective" to the cement producing industry, over environmental groups' objections that the EPA should consider only whether "the standard is too expensive for industry to achieve."<sup>98</sup> Notably, Judge Kavanaugh was extraordinarily deferential to the agency in a case where environmental groups were challenging its rule-making, holding that "even if EPA's reading is not the better reading, we conclude that it is still at least a reasonable reading given the various potential meanings of 'cost' in this context."<sup>99</sup> This contrasts with the lack of deference he afforded the EPA in *Mingo Logan Coal Co.* and *White Stallion Energy Center, LLC* when the EPA was challenged by industry players.

This deference to agencies over environmental groups' objections extends beyond the EPA. In *Hoopa Valley Tribe v. FERC*, Judge Kavanaugh upheld the Federal Energy Regulatory Commission's (FERC's) refusal to impose conditions on a hydroelectric plant to preserve a river's trout fishery—specifically, minimum flow requirements and regulations on the rate at which water levels rise or fall due to project operations.<sup>100</sup> The Hoopa Valley Tribe had challenged those regulations because they "h[e]ld[] fishing

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<sup>92</sup> *Id.* at 719-20 (majority opinion).

<sup>93</sup> 748 F.3d 1222, 1222, 1229 (D.C. Cir. 2014).

<sup>94</sup> *Id.* at 1237-39.

<sup>95</sup> *Id.* at 1264 (Kavanaugh, J., dissenting). Judge Kavanaugh went on: "Telling someone that costs will be considered in a regulatory step that occurs *after* they have already had to pay an exorbitant amount and may already have been put out of business is not especially reassuring." *Id.*

<sup>96</sup> *Mich. v. EPA*, 135 S. Ct. 2699 (2015).

<sup>97</sup> 749 F.3d 1055, 1057-58 (D.C. Cir. 2014).

<sup>98</sup> *Id.* at 1060-61 (quoting Pet'rs Br. 34).

<sup>99</sup> *Id.* at 1061.

<sup>100</sup> 629 F.3d 209, 210-11 (D.C. Cir. 2010).

rights in the Klamath River and subsist[ed] in part on the River's trout.”<sup>101</sup> Judge Kavanaugh held that FERC was correct in applying a standard that required it to revoke an existing license only when there were “unanticipated, serious impacts” on fishery resources, and that the Court could not second-guess the agency’s decision concluding that trout were “thriving” despite “some adverse effects.”<sup>102</sup>

Judge Kavanaugh’s part-time deference to agencies does not extend, however, to the government’s attempts to tighten environmental regulations as it receives new scientific information. For example, in *Mexichem Fluor, Inc. v. EPA*, Judge Kavanaugh held that the EPA acted outside its statutory authority when it removed hydrofluorocarbons (HFCs) from the list of safe substitutes that manufacturers may use to replace ozone-depleting substances.<sup>103</sup> The EPA argued that its rule change was permissible under the Clean Air Act, which “allows [the] EPA to ‘change the listing status of a particular substitute’ based on ‘new information’”—in this case, the “[e]merging research” that HFCs “contribute to climate change.”<sup>104</sup> Judge Kavanaugh disagreed. Employing a cramped reading of the statutory term “replace,” Judge Kavanaugh held that once the EPA determined a substance was a safe substitute, it could not change its mind for companies already using that substitute even if new information showed that substitute to have harmful effects.<sup>105</sup> A dissenting judge criticized the majority’s “extreme” interpretation as making “the agency . . . powerless to tell [a] product manufacturer that it could no longer use [a] more risky substitute,” which would “undermine[] Congress’s intent to ‘reduce overall risks to human health and the environment’ in a manner ‘to the maximum extent practicable.’”<sup>106</sup>

Finally, Judge Kavanaugh has favored the EPA over state and local environmental permitting agencies when they have attempted to enforce stricter requirements than the EPA. In *Sierra Club v. EPA*, the D.C. Circuit, in an opinion by one of the court’s relatively conservative jurists, Judge Thomas Griffith, struck down the EPA’s prohibition on state and local permitting agencies supplanting statutory monitoring requirements.<sup>107</sup> As the majority explained, the EPA’s prohibition on supplementary monitoring requirements would “mean[] that some permit programs currently in place do not comply with [Title V of the Clean Air Act] because the [EPA] failed to fix inadequate monitoring requirements before new permits issued, and prohibited state and local authorities from doing so.”<sup>108</sup> Unpersuaded, Judge Kavanaugh dissented and took the position that “the statute grants EPA the authority to determine whether state and local permitting authorities can impose additional monitoring requirements.”<sup>109</sup> This case is just another example of Judge Kavanaugh selectively siding with the government when it takes an anti-environment stance.

Of course, over his long tenure, Judge Kavanaugh has occasionally affirmed the EPA’s attempts to regulate industry. For example, in *National Mining Association v. McCarthy*, Judge Kavanaugh wrote a

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<sup>101</sup> *Id.* at 210.

<sup>102</sup> *Id.* at 212-13.

<sup>103</sup> 866 F.3d 451, 454 (D.C. Cir. 2017).

<sup>104</sup> *Id.* at 456.

<sup>105</sup> *Id.* at 459.

<sup>106</sup> *Id.* at 468 (Wilkins, J., concurring in part and dissenting in part).

<sup>107</sup> 536 F.3d 673, 674 (D.C. Cir. 2008).

<sup>108</sup> *Id.* at 677.

<sup>109</sup> *Id.* at 681 (Kavanaugh, J., dissenting).

majority opinion holding that the EPA's Enhanced Coordination Process that regulated surface coal mining was consistent with the EPA's authority under the Clean Water Act, and that its Final Guidance to States on this issue was not a final agency action and thus could not be reviewed by the courts at the time.<sup>110</sup> Similarly, in *American Trucking Associations, Inc. v. EPA*, Judge Kavanaugh wrote a majority opinion holding that California's rule limiting emissions from in-use non-road engines, like a truck's on-board refrigeration unit, did not violate the Clean Air Act.<sup>111</sup> However, as described above, these cases are exceptions to a much broader pattern of favoring industry interests over the EPA's efforts to protect the environment.

## VII. Multinational Corporate Liability

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Judge Kavanaugh has repeatedly sought to insulate multinational corporations from liability for their misdeeds abroad. For example, in *Doe v. Exxon Mobil Corporation*, eleven Indonesian villagers alleged that Indonesian military forces committed murder, torture, sexual assault, battery, false imprisonment, and other torts against them while guarding Exxon's facilities, and that Exxon was aware of these human rights abuses yet did nothing to stop them.<sup>112</sup> After the district court refused to dismiss the state-law tort claims on political-question grounds, the D.C. Circuit—in an opinion by Judge David Sentelle, widely considered a conservative jurist—held that the court did not have jurisdiction to hear an interlocutory appeal of a political-question defense, and would not grant an order of mandamus overturning the district court's order.<sup>113</sup>

Judge Kavanaugh dissented, expressing a broad view about when foreign policy concerns should prevent individuals from suing corporations for their misdeeds abroad. According to Judge Kavanaugh, because the plaintiffs would have to “prove that members of the Indonesian military engaged in acts of violence in Indonesia against Indonesian citizens,” and because the State Department suggested that “this litigation would harm U.S. foreign policy interests,” the plaintiffs' claims should be barred.<sup>114</sup> And he would have held this despite the exceedingly high bar for invoking the remedy of mandamus—“only upon a showing that the petitioner's right is ‘clear and indisputable,’ and that ‘no other adequate means to attain the relief’ exist.”<sup>115</sup> The Court rejected Judge Kavanaugh's position, and the tort claims proceeded.

The case reached the D.C. Circuit again a few years later, and—again over Judge Kavanaugh's dissent—the Court permitted claims against Exxon Mobil under the Alien Tort Statute (ATS) for violations of customary international law to proceed. The Court held that the ATS does not “support corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of

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<sup>110</sup> 758 F.3d 243, 246-47 (D.C. Cir. 2014).

<sup>111</sup> 600 F.3d 624, 625 (D.C. Cir. 2010).

<sup>112</sup> 473 F.3d 345, 346 (D.C. Cir. 2007).

<sup>113</sup> *Id.* at 345, 357.

<sup>114</sup> *Id.* at 364 (Kavanaugh, J., dissenting).

<sup>115</sup> *Id.* at 367 (quoting *In re Sealed Case*, 141 F.3d 337, 339 (D.C. Cir. 1998)).

nations,” and concluded that the victims did not lack prudential standing to bring their tort claims, among other things.<sup>116</sup>

In a sweeping dissent, Judge Kavanaugh offered four different reasons he would have protected Exxon Mobil from liability for these claims. First, Judge Kavanaugh would have concluded that the ATS simply “does not apply to conduct that occurred in foreign nations.”<sup>117</sup> Second, he would have held that “the ATS does not apply to claims against corporations.”<sup>118</sup> Third, he would have prohibited ATS claims for torture and extrajudicial killing to go forward against a corporation because the analogous Torture Victim Protection Act “does not allow corporate liability or aiding and abetting liability.”<sup>119</sup> Fourth, he would have once again dismissed the ATS suit because “the Executive Branch reasonably explain[ed] that the suit would harm U.S. foreign policy interests.”<sup>120</sup> Unfortunately for the victims in these cases, the Supreme Court has agreed in 5-4 decisions that the ATS does not apply to foreign corporations,<sup>121</sup> and that the ATS does not apply “even where the claims touch and concern the territory of the United States” unless “with sufficient force to displace the presumption against extraterritorial application.”<sup>122</sup> Thus, Judge Kavanaugh would further entrench a majority at the Supreme Court that has shielded corporations from liability under the ATS for human rights violations.

## VIII. Competition in the Marketplace

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Finally, Judge Kavanaugh has issued a number of opinions that side with corporate interests against regulatory agencies seeking to curb anti-competitive business practices. For instance, in an early opinion in *National Fuel Gas Supply Corp. v. FERC*, Judge Kavanaugh struck down a FERC rule which would have required gas pipelines to provide equal and open access to information to all processors, gatherers, producers, distributors, and traders of natural gas, thus avoiding the anti-competitive practice of pipelines granting their own affiliates special preferences.<sup>123</sup> Judge Kavanaugh refused to accept FERC’s worries about the “threat of undue preferences,” and instead adopted the gas industry’s view that “vertical integration creates efficiencies for consumers” and that FERC could not produce enough evidence of abuse to rebut this presumption.<sup>124</sup>

Judge Kavanaugh has also dissented from opinions that sought to prevent anti-competitive business practices. In *Federal Trade Commission v. Whole Foods Market, Inc.*, the D.C. Circuit held that the Federal Trade Commission (FTC) was entitled to a preliminary injunction to block the merger of Whole

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<sup>116</sup> *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011), *judgment vacated*, 527 F. App’x 7 (D.C. Cir. 2013).

<sup>117</sup> *Id.* at 72 (Kavanaugh, J., dissenting in part).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 73.

<sup>120</sup> *Id.*

<sup>121</sup> *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1386, 1407 (2018).

<sup>122</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 108, 124-25 (2013).

<sup>123</sup> 468 F.3d 831, 834 (D.C. Cir. 2006).

<sup>124</sup> *Id.* at 839-840.



Foods and Wild Oats—two premium, natural, and organic supermarkets—on the theory that the merger would create monopolies in the high-end grocery store markets in multiple cities.<sup>125</sup> Judge Janice Rogers Brown, widely considered a conservative jurist, wrote for the majority and concluded that for a core group of consumers who demand natural and organic food products, other supermarkets were not sufficient substitutes for grocery stores like Whole Foods and Wild Oats, and within this sub-market of the broader grocery store market the merger of these companies would allow them to raise prices on consumers.<sup>126</sup> As the Court explained: “The FTC put forward economic evidence . . . showing directly how [premium, natural, and organic supermarkets] discriminate on price between their core and marginal customers, thus treating the former as a distinct market.”<sup>127</sup>

Judge Kavanaugh dissented, refusing to accept that natural and organic supermarkets could constitute a separate market for purposes of deciding whether the merger was anticompetitive.<sup>128</sup> In so holding, Judge Kavanaugh appeared to be more sympathetic to the interests of “antitrust regulators and practitioners” and “potentially merging companies” than consumers who would face higher prices.<sup>129</sup>

Similarly, in *United States v. Anthem, Inc.*, Judge Kavanaugh dissented from a majority opinion that upheld the United States’ blocking of a proposed merger between two health insurance companies, Anthem and Cigna.<sup>130</sup> In doing so, Judge Kavanaugh evinced a strikingly rosy view of what a merger of two health insurance companies would mean for consumers. He believed that because insurance companies act as purchasing agents for employers, allowing the two companies to merge would create “a more powerful purchasing agent than Anthem and Cigna operating independently” which in turn would allow them “to negotiate *lower* provider rates on behalf of its employer-customers” with “cost savings that would be passed through directly to the employer-customers.”<sup>131</sup> However, a concurring judge retorted that the record suggested that “customers would be paying less because they would be getting less in the form of a degraded Cigna product,” and noted the fact that “internal Anthem documents detailed the company’s efforts and specific business options for actively *preventing* [any] savings from being passed through to customers and instead capturing the money for itself.”<sup>132</sup> Notwithstanding this evidence, Judge Kavanaugh would have overturned the district court’s decision to permanently enjoin the merger—and he would have done this despite the deferential abuse-of-discretion standard of review.<sup>133</sup>

Finally, Judge Kavanaugh has also opposed the government’s effort to create rules that maintain competition in anti-competitive industries—for example, the cable television industry. In *Cablevision Systems Corp. v. FCC*, Judge Kavanaugh dissented from the D.C. Circuit’s decision to affirm an FCC rule prohibiting exclusive contracts between cable operators and cable affiliated programming networks—in

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<sup>125</sup> 548 F.3d 1028, 1032 (D.C. Cir. 2008) (opinion of Brown, J.).

<sup>126</sup> *Id.* at 1039-41.

<sup>127</sup> *Id.* at 1041.

<sup>128</sup> *Id.* at 1051 (Kavanaugh, J., dissenting).

<sup>129</sup> *Id.* at 1063.

<sup>130</sup> 855 F.3d 345, 348 (D.C. Cir. 2017).

<sup>131</sup> *Id.* at 372 (Kavanaugh, J., dissenting).

<sup>132</sup> *Id.* at 369-370 (Millett, J., concurring).

<sup>133</sup> *Id.* at 353 (majority opinion).

other words, preventing an operator like Comcast from withholding affiliated networks like Comcast SportsNet Philadelphia from competitors like satellite television providers.<sup>134</sup> The FCC concluded that “in many areas consumers continue overwhelmingly to subscribe to cable,” that “[c]able operators tend to cluster regionally,” and that “[b]ecause of this . . . a single geographic area can be highly susceptible to near-monopoly control by a cable company.”<sup>135</sup> Based on this, the FCC “concluded that vertically integrated cable companies would enter into competition-harming exclusive contracts if the exclusivity prohibition were allowed to lapse.”<sup>136</sup> Judge Kavanaugh rejected all of this, concluding that “[c]able operators no longer possess bottleneck monopoly power,” and that the FCC’s rule was therefore “no longer necessary to further competition . . . .”<sup>137</sup> Moreover, he would have struck down the FCC’s rule under the First Amendment, despite the petitioners having failed to make a specific, as-applied challenge in their briefs.<sup>138</sup>

## IX. Conclusion

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As this Issue Brief has shown, time and again Judge Kavanaugh has sided with corporate and business interests even when consumers, workers, and regulatory agencies had the text of the law and precedent on their side. He has done so across a range of issues, and he has often done so in dissent, staking out positions that are even friendlier to big business than those of some of his conservative colleagues on the D.C. Circuit. As the Senate continues to consider his nomination, Senators should ask him about this record. The American people should know whether Judge Kavanaugh’s confirmation will further cement the pro-business majority at the Supreme Court, and whether he will be a champion of big businesses or all Americans for the decades he could potentially serve on the Court.

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<sup>134</sup> 597 F.3d 1306, 1307-10 (D.C. Cir. 2010).

<sup>135</sup> *Id.* at 1309.

<sup>136</sup> *Id.* at 1313. This was especially so because “the four largest cable operators are . . . vertically integrated with six of the top 20 national networks, some of the most popular premium networks, and almost half of all regional sports networks.” *Id.* at 1314.

<sup>137</sup> *Id.* at 1316 (Kavanaugh, J., dissenting).

<sup>138</sup> *Id.* at 1312 (majority opinion).