



September 4, 2018

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The Natural Resources Defense Council writes to express its opposition to the nomination of Judge Brett Kavanaugh to a lifetime position on the U.S. Supreme Court.

For more than four decades, NRDC has litigated to enforce federal laws and regulations that protect public health and the environment. We value the importance of an independent federal judiciary and do not oppose judicial nominations lightly. NRDC has opposed only one other Supreme Court nominee in the last twenty-five years.

Judge Kavanaugh's nomination, however, poses a unique threat to the principles and public resources we defend on behalf of our three million members and activists. During his tenure on the U.S. Court of Appeals for the D.C. Circuit, Judge Kavanaugh has consistently favored corporate polluters over clean air and water. He has sought to weaken the ability of federal agencies to protect the American people. And if confirmed to the Supreme Court, he may try to close the courthouse doors to individuals and citizen groups like NRDC who wish to enforce the laws that Congress enacted.

The next Supreme Court justice will likely cast the deciding vote on legal questions that will shape the kind of world we leave to our children. As a result, that justice must be devoted to enforcing Congress's laws that protect public health and the environment from harmful pollution. During his time on the D.C. Circuit, Judge Kavanaugh has demonstrated that he does not fulfill that basic requirement.

1. Prioritizing Corporate Polluters Over Clean Air and Water

Judge Kavanaugh has a consistent track record of ruling against important environmental measures designed to protect clean air and water. For example, in 2012 Judge Kavanaugh sought to strike down in its entirety an EPA rule addressing harmful air pollution that crosses state boundaries. Judge Kavanaugh argued that the Clean Air

Act purportedly precluded EPA from considering cost-effectiveness when determining an upwind state's emission-reduction responsibilities, and asserted—in a telling show of hubris—that he “ha[d] no doubt that the agency chose incorrectly.”¹ The Supreme Court reversed Judge Kavanaugh's opinion by a 6-2 vote, however, concluding that his approach ignored the “realities of interstate air pollution,” and affirming that EPA's rule was a “permissible, workable, and equitable interpretation” of the Clean Air Act.²

The cross-state air pollution ruling exhibits Judge Kavanaugh's one-sided view about the role of cost in environmental regulation—a view that consistently puts corporate polluters' interests ahead of clean air and water. His conclusion that the Clean Air Act somehow *prohibited* EPA from considering costs when allocating emission-reduction responsibilities stands in stark contrast with his dissenting opinions in subsequent cases, where he concluded that EPA was *required* to consider costs before either regulating toxic mercury emissions from power plants or prohibiting a coal company from dumping mining waste into valley streams.³ Thus, in Judge Kavanaugh's view, costs *cannot* be considered to justify imposing additional measures on laggard polluters, but *must* be considered when they might support weakening restrictions. In other words, Judge Kavanaugh expresses more concern with the economic bottom line of coal companies' “owners and shareholders”⁴ than with the clean air and water that Congress enacted the underlying environmental statutes to protect.

Judge Kavanaugh's dissenting opinions in these Clean Air Act and Clean Water Act cases also reflect a bias against environmental protection that appears throughout his judicial record. Dissenting opinions are often the most revealing about a judge's individual views of the law. During his time on the D.C. Circuit, Judge Kavanaugh has authored ten dissents in environmental cases: In each one, he argued against the side that sought to protect public health or the environment.⁵ Judge Kavanaugh appears to

¹ *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 37 (D.C. Cir. 2012) (Kavanaugh, J.).

² *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1605, 1610 (2014).

³ See *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1258-66 (D.C. Cir. 2014) (Kavanaugh, J., dissenting); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730-35 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

⁴ *Mingo Logan Coal*, 829 F.3d at 733-34 (Kavanaugh, J., dissenting).

⁵ See *id.*; *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting); *White Stallion*, 748 F.3d at 1258-73 (Kavanaugh, J., dissenting); *Texas v. EPA*, 726 F.3d 180, 199-205 (D.C. Cir. 2013) (Kavanaugh, J., dissenting); *Grocery Mfrs. Ass'n v. EPA*, 704 F.3d 1005-08 (D.C. Cir. 2013) (Kavanaugh, J., dissenting from denial reh'g en banc); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 180-92 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); *Coal. for Responsible Regulation, Inc. v. EPA*, Nos. 09-1322+, 2012 WL 6621785, at *14-23 (Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of reh'g en banc); *Howmet Corp. v. EPA*, 614 F.3d 544, 554-56 (D.C. Cir. 2010) (Kavanaugh, J., dissenting); *Sierra Club v. EPA*, 536 F.3d 673, 680-82 (D.C. Cir.

have *never* authored a dissent arguing in favor of environmental protection.

2. Weakening Agencies' Ability to Protect the American People

Consistent with his views in the above cases, Judge Kavanaugh has voted time and again to restrict the ability of administrative agencies like EPA to carry out their statutory missions to protect the public. Indeed, the White House outwardly boasts about this aspect of his record, highlighting to industry trade groups on the night of his nomination that Judge Kavanaugh overruled federal agencies 75 times in cases involving clean air, consumer protections, and other issues, and specifically “helped kill President Obama’s ... new environmental rules.”⁶

And yet, Judge Kavanaugh often takes a more lenient approach to agency authority when agencies seek to *weaken* environmental protections. For example, during the George W. Bush administration, when other conservative D.C. Circuit judges found that EPA violated the Clean Air Act by weakening requirements for power plants, Judge Kavanaugh dissented and sought to justify the agency’s unlawful deregulation.⁷ And he did the same last year in the first environmental case to reach the D.C. Circuit during the Trump administration, when he voted in favor of then-EPA Administrator Scott Pruitt’s attempt to suspend new emissions restrictions for methane pollution.⁸

Climate change presents a particularly stark example where Judge Kavanaugh has undermined agencies’ ability to protect the public. Judge Kavanaugh has voted repeatedly to strike down EPA’s efforts to regulate greenhouse gases⁹—notwithstanding the Supreme Court’s affirmation that the Clean Air Act authorizes EPA to protect the public from climate pollutants.¹⁰ For example, Judge Kavanaugh last year struck down a sensible EPA rule that required companies to swap out the potent climate pollutants called HFCs for safer, readily available alternatives. His dissenting colleague observed that Judge Kavanaugh’s “cramped” interpretation of the Clean Air Act renders EPA

2008) (Kavanaugh, J., dissenting); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1035-37 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

⁶ See Lorraine Woellert, *Trump Asks Business Groups for Help Pushing Kavanaugh Confirmation*, Politico, July 9, 2018, <https://www.politico.com/story/2018/07/09/brett-kavanaugh-business-groups-trump-705800>.

⁷ *Sierra Club*, 536 F.3d at 680-82 (Kavanaugh, J., dissenting).

⁸ *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017), *reh’g denied* Aug. 10, 2017 (Kavanaugh, J., dissenting).

⁹ See, e.g., *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017) (Kavanaugh, J.); *Texas*, 726 F.3d at 199-205 (Kavanaugh, J., dissenting); *Coal. for Responsible Regulation*, 2012 WL 6621785, at *14-23 (Kavanaugh, J., dissenting from denial of reh’g en banc).

¹⁰ See *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410 (2011); *Mass. v. EPA*, 549 U.S. 497 (2007).

“powerless” and “makes a mockery” of Congress’s stated purpose to “reduce overall risks to human health and the environment.”¹¹ Judge Kavanaugh’s interpretation was so “extreme” that even the industry challengers did not advance it¹², and several major companies—alongside NRDC and seventeen states—have asked the Supreme Court to reverse it.¹³

Judge Kavanaugh has sought to justify his dismal record on climate change by invoking a legal theory he dubs the “major rules doctrine,” which—if adopted by the Supreme Court—would have large deregulatory consequences across many fields, from consumer protection and financial regulation, to healthcare and civil rights, to clean air and water. Judge Kavanaugh’s theory prohibits federal agencies from taking actions with great economic or political significance absent “*clear* congressional authorization.”¹⁴ His view is that while existing law “*allows* an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules.”¹⁵ However, longstanding Supreme Court precedent ensures agencies faced with statutory ambiguity can adopt the rules that experts determine to be reasonable based on real-world conditions. Judge Kavanaugh would discard that sensible approach for the most important questions agency experts face.

This theory is deeply troubling in numerous respects. First and foremost, it precludes agencies from using their existing statutory authority to protect the public from “major” new problems. Instead, an agency would have to return to Congress for new legislation, even if the best reading of the earlier statute indicated that Congress intended to empower the agency to address such problems as they arise. Second, it allows judges to pick and choose when they wish to impose this heightened burden on agency regulations. Judge Kavanaugh admitted there is no “bright-line test that distinguishes major rules from ordinary rules,” and that his theory “has a bit of a ‘know it when you see it’ quality.”¹⁶ Third, as with much of Judge Kavanaugh’s record, the theory has a distinctly one-sided result: it works only to *prevent* agencies from issuing

¹¹ *Mexichem Fluor*, 866 F.3d at 468 (Wilkins, J., dissenting) (quoting 42 U.S.C. § 7671k(a)).

¹² *Id.*

¹³ See *Honeywell Int’l, Inc. v. Mexichem Fluor, Inc.*, No. 17-1703 (S. Ct.); *NRDC v. Mexichem Fluor, Inc.*, No. 18-2 (S. Ct.).

¹⁴ *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh’g en banc).

¹⁵ *Id.* at 419.

¹⁶ *Id.* at 422-23.

new rules, while ignoring entirely that agencies' *failure* to regulate pursuant to existing statutory authority often has great economic or political significance as well.

Judge Kavanaugh has also sought to undermine the ability of Congress to entrust certain decision decisions to “independent agencies”—like the Consumer Product Safety Commission, Federal Energy Regulatory Commission (FERC), and Nuclear Regulatory Commission—which Congress has shielded from undue political influence in order to focus on protecting the public. Recently, when voting to strike down the structure of the Consumer Financial Protection Bureau as unconstitutional, Judge Kavanaugh gratuitously questioned the constitutionality of *all* independent agencies.¹⁷ Perhaps the most remarkable—and disturbing—aspect of this ruling is Judge Kavanaugh’s apparent eagerness to revisit long-settled Supreme Court precedent that has governed the separation of powers among the branches of our government for more than 80 years.

3. Closing Courthouse Doors to Citizens Who Seek to Enforce the Law

Finally, Judge Kavanaugh has expressed extreme views about access to the courts that could severely restrict the ability of citizens—and citizen groups like NRDC—to enforce the laws that Congress has enacted. The legal doctrine of “standing” requires plaintiffs, at the outset of a lawsuit, to identify injuries caused by the challenged action that could be redressed by a favorable court decision. In cases seeking to enforce environmental protections, plaintiffs often satisfy this requirement by pointing to the increased health risks caused by the challenged action. But Judge Kavanaugh, in a case involving automobile safety regulations, questioned whether these types of “increased-risk-of-harm claims” could *ever* satisfy constitutional standing requirements.¹⁸

That view, if adopted by the Supreme Court, could foreclose many of the lawsuits that individuals and groups like NRDC bring to enforce Congress’s laws protecting public health, safety, and the environment. It would make it exceedingly difficult to challenge unlawful actions that expose the public to increased health risks—such as the use of toxic substances in consumer products, the discharge of pollutants into drinking water, or the release of dangerous emissions into the air. Corporate polluters could take such actions with impunity, knowing that citizen groups could not challenge them in court—no matter how blatantly unlawful their actions might be.

¹⁷ *PHH Corp. v. CFPB*, 881 F.3d 75, 179 n.7 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); see also *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (Kavanaugh, J.).

¹⁸ *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1294 (D.C. Cir. 2007) (Kavanaugh, J.) (internal quotation marks omitted).

Meanwhile, Judge Kavanaugh’s approach to standing diverges sharply in cases where corporate plaintiffs bring suit based on perceived economic harms. In those cases, unlike with increased-risk-of-harm claims, Judge Kavanaugh applies a more lenient “common sense” approach to determine whether the plaintiff would face *any* impact to its economic bottom line.¹⁹ Indeed, Judge Kavanaugh is even more lenient than his fellow D.C. Circuit judges in allowing corporate plaintiffs to challenge agency regulations.²⁰ Thus, Judge Kavanaugh’s standing jurisprudence—like so many other aspects of his judicial record—favors corporate profits over protections for public health or the environment.

For the foregoing reasons, we urge you and the other Senate Judiciary Committee members to vote against Judge Kavanaugh’s nomination. At the very least, given the stakes of a lifetime appointment to the Supreme Court, and the significant questions that Judge Kavanaugh’s judicial record raises about his fidelity to the law, the Committee should refrain from sending his nomination to the full Senate until it has had an opportunity to review the complete record of his tenure in the White House.

Sincerely,

A handwritten signature in black ink, appearing to read "Rhea Suh". The signature is fluid and cursive, with a long horizontal stroke at the end.

Rhea Suh
President
Natural Resources Defense Council

¹⁹ *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (Kavanaugh, J.).

²⁰ See, e.g., *Grocery Mfrs. Ass’n*, 693 F.3d at 181-90 (Kavanaugh, J., dissenting); *Morgan Drexen, Inc. v. CFPB*, 785 F.3d 684, 698 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).