

A REPORT ON SUPREME COURT NOMINEE BRETT KAVANAUGH

Prepared by representatives of Suit Up Maine, Maine Family Planning, Immigrant Legal Advocacy Project, Natural Resources Council of Maine, and States United to Prevent Gun Violence

To help inform our senators as they prepare for one-on-one meetings with Supreme Court nominee Brett Kavanaugh later in August, Suit Up Maine (SUM) invited representatives from several Maine organizations to meet with the senior aides who advise Sen. Angus King (I) and Sen. Susan Collins (R) on judicial nominees. We shared our concerns about the nominee's record and judicial philosophy as they pertain to specific cases that will likely come before the court in the coming year, the outcomes of which will affect the health, civil rights, environment, and economic stability of Mainers. During the August Senate recess, leaders of SUM and representatives from [Maine Family Planning](#), [Immigrant Legal Advocacy Project](#), [Natural Resources Council of Maine](#), and [States United to Prevent Gun Violence](#) met with Katie Brown, legislative counsel to Sen. Collins, and Sanjay Kane, legislative assistant to Sen. King, and other staff members.

The following report, prepared by the organizations above and with additional background from [League of Women Voters of Maine](#), [Maine Equal Justice Partners](#), [Maine Consumers for Affordable Health Care](#), [OUT Maine](#), [Equality Maine](#), and [GLAAD](#), was shared with these aides, who will join the senators for their one-on-one meetings with the nominee. Collectively, the organizations that helped prepare this report represent tens of thousands of Maine constituents. We are sharing it publicly as a resource for our members as they express their concerns to senators Collins and King, as well as for others around the country who are arranging similar meetings with their own senators and staff. Issues covered include reproductive rights, executive powers, the Affordable Care Act, environmental protections, immigrants' rights, LGBTQ rights, gun reform legislation, religious liberty, and voting rights.

You can learn more about Kavanaugh in Suit Up Maine's [Call to Action](#).

REPRODUCTIVE RIGHTS

Prepared and presented by Cait Vaughan, community organizer for [Maine Family Planning](#), which operates 18 direct-service clinics and sub-contracts with Planned Parenthood to provide services in southern Maine. MFP administers the state's Title X family planning program and serves 23,000 women, men, and teens annually.

Judge Kavanaugh's rulings in several recent reproductive rights cases and a speech given just last year on *Roe v. Wade* raise a number of concerns about the nominee's intentions with regard to constitutional protections for reproductive rights for women, including abortion access. Some of these issues and questions are included below.

[Roe v. Wade \(1973\)](#)

Our Concern: In a September 18, 2017 speech to the American Enterprise Institute about the legacy of Justice William Rehnquist, Judge Brett Kavanaugh stated that he agrees with Rehnquist's dissenting opinion (7-2) in the Supreme Court's 1973 decision of *Roe v. Wade*. We view this public pronouncement as just one of the multiple ways Judge Kavanaugh has displayed extreme hostility to abortion rights.

Text for Reference: "Rehnquist's dissenting opinion did not suggest that the Constitution protected no rights other than those enumerated in the text of the Bill of Rights. But he stated that under the Court's precedents, any such unenumerated right had to be *rooted in the traditions in conscience of our people*. Given the prevalence of abortion regulations both historically and at the time, Rehnquist said he could not reach such a conclusion about abortion. He explained that a law prohibiting an abortion, even where the mother's life was in jeopardy, would violate the Constitution, but otherwise he stated the states had the power to legislate with regard to this matter...In this context, it's fair to say that Justice Rehnquist was not successful in convincing a majority of the justices in the context of abortion either on *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of *stare decisis*. But *he was successful in stemming the general tide of free willing judicial creation of unenumerated rights that were not rooted in the nation's history and tradition.*"

Question for Judge Kavanaugh:

► Given your very recently espoused support of Justice Rehnquist's minority dissenting opinion in *Roe v. Wade*, do you view *Roe v. Wade* as settled law and legitimate legal precedent?

[Garza v. Hargan \(2017\)](#)

Our Concern: In this recent case concerning an undocumented minor's access to abortion while in Office of Refugee Resettlement (ORR) custody, Judge Kavanaugh dissented with majority opinion allowing Jane Doe to access an abortion. We are concerned that his views regarding an undocumented minor's rights while in U.S. government custody and on U.S. soil undermines the validity and tenets of *Roe v. Wade*. We are concerned that Kavanaugh's view in this case opens up a Pandora's Box with regards to the constitutional right to abortion laid out in *Roe v. Wade*—for immigrant individuals as well as all pregnant people.

Text for Reference: Kavanaugh "[characterized] the en banc majority's decision as creating '[a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand](#)'." He said requiring the government to assist the girl in obtaining an abortion would ignore the government's

[“permissible interest in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion.”](#)

Question for Judge Kavanaugh:

▶ **Do you believe that constitutional rights for individuals residing on U.S. soil and/or in U.S. custody must be upheld, regardless of citizenship status?**

[Priests for Life v. HHS \(2015\)](#)

Our Concern: Judge Kavanaugh dissented in this case concerning a mandate within the Affordable Care Act to require employers to provide contraceptive coverage to employees or to complete an opt-out form process. Judge Kavanaugh considered completing the opt-out form to be a significant burden on employers’ religious rights. We are concerned about the separation of religion and government, and believe setting such a low bar for “significant burden” will mean loss of birth control coverage & other essential protections under the Affordable Care Act (ACA). We are concerned about upholding the right to privacy established by the Supreme Court in *Griswold v. Connecticut* (1965) as it applies to one’s right to access birth control today, regardless of employers’ personal beliefs.

Text for Reference: “In a dissent, he expressed sympathy for the religious challengers. Making reference to the Supreme Court’s ruling in *Burwell v. Hobby Lobby*, he wrote that ‘the regulations substantially burden the religious organizations’ exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs’.”

Question for Judge Kavanaugh:

▶ **Do you believe that individual religious beliefs held by employers should not interfere with—and do not rise above—an individual’s right to basic health care coverage and privacy, including reproductive privacy?**



EXECUTIVE POWERS

Prepared and presented by Karin Leuthy, founder and co-leader of [Suit Up Maine](#), an all-volunteer, statewide progressive group of more than 5,400 Mainers that seeks to create and foster a more informed and engaged electorate.

Among the more concerning aspects of Kavanaugh’s record—on and off the bench—are his opinions on powers of the executive branch. The Judiciary Committee has requested records from Kavanaugh’s time as associate counsel to Independent Prosecutor Kenneth Starr and his tenure as associate counsel in the White House Counsel’s Office under President George W. Bush. But it is his writings for various law reviews that raise the most questions.

[1998 Starr Report](#)

Kavanaugh's first-hand experience working on an independent counsel investigation of a sitting president should provide unique insight to how he would handle issues that could come before the court as a result of Special Counsel Mueller's investigation. We are interested in knowing whether he would consider it appropriate to apply the same standards to current and future presidents, and how he differentiates the role of independent versus special counsel investigations.

Questions for Judge Kavanaugh:

- ▶ **The Starr report listed Clinton's repeated refusals to testify as grounds for impeachment. Do sitting presidents have an obligation to answer questions as part of a criminal investigation?**
- ▶ **The Starr Report also listed Clinton's lies and denials to aides, senior officials, and the general public as grounds for impeachment. When does presidential lying become an impeachable offense?**
- ▶ **How do you square your intensive work on the Clinton investigation with your contemporaneous opinions that such investigations should not take place?**

Kavanaugh's 1998 *Georgetown Law Journal* article, "[The President and the Independent Counsel](#)" and his 2009 *Minnesota Law Review* article, "[Separation of Powers During the 44th Presidency and Beyond](#)"

Two months before the Starr Report's publication in 1998, Kavanaugh wrote an extensive article devoted to the relationship between sitting presidents and independent/special counsels. He would go on to repeat much of this in his [2009 Minnesota Law Review article](#) that is currently receiving a great deal of attention. His opinions on this matter have changed little since 1998, and the narrative that he "later expressed misgivings" about the nature of independent/special counsel investigations would appear to be inaccurate. In the 1998 article, he proposes statutory language to establish that a sitting president cannot be indicted, states that no attorney general or special counsel has the credibility required to rise above accusations of political motivation, and states that a remedy to presidents attacking independent counsels they deem politically motivated is to give presidents the authority to dismiss them. Passages of particular interest from the 1998 article include:

- "A serious question exists as to whether the Constitution permits the indictment of a sitting President. Regardless how the Supreme Court ultimately would rule on that question, however, Congress should enact legislation clarifying the proper procedure to follow when there are serious allegations of wrongdoing against the President. In particular, Congress should clarify that a sitting President is not subject to criminal indictment while in office."

Question for Judge Kavanaugh:

- ▶ **Are there any circumstances under which you believe a sitting president should be indicted while in office, such as ongoing crimes that put our national security or critical democratic systems at risk?**

- "In an investigation of the President himself, no Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated—whether in favor of the President or against him, depending on the individual leading the investigation and its results.

In terms of credibility to large segments of the public (whose support is necessary if a President is to be indicted), the prosecutor may appear too sympathetic or too aggressive, too Republican or too Democrat, too liberal or too conservative.”

Questions for Judge Kavanaugh:

▶ **Federal judges and Supreme Court justices are chosen by presidents and confirmed by politicians, just like attorneys general. What gives a Supreme Court Justice the necessary credibility to avoid charges that he or she is politically motivated when deciding cases involving the president?**

▶ **Do you believe that a public perception of political motivation should determine whether or not a crime deserves to be investigated?**

- “The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate—and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.”

Questions for Judge Kavanaugh:

▶ **You already stated that no attorney general or special counsel has the credibility to avoid charges of political motivation. Do you believe that members of congress have the necessary credibility to avoid charges of political motivation?**

▶ **Without a criminal investigation conducted by apolitical career experts in law enforcement and led by either an independent or special counsel, how should members of congress properly investigate actions that could be impeachable offenses?**

- “The President is not simply another individual. He is unique. He is the embodiment of the federal government and the head of a political party. If he is to be removed, the entire government likely would suffer, the military or economic consequences to the nation could be severe, and the President’s political party (and the causes he champions) would almost certainly be devastated. And, Prosecution or nonprosecution of a President is, in short, inevitably and unavoidably a political act. Thus, as the Constitution suggests, the decision about the President while he is in office should be made where all great national political judgments in our country should be made—in the Congress of the United States.”

Question for Judge Kavanaugh:

▶ **Do you believe that for presidents, political judgement has greater weight than criminal justice?**

- “As an extreme hypothetical, some might ask what would happen if the President murdered someone or committed some other dastardly deed. In such a case, we can expect that the President would be quickly impeached, tried, and removed; the criminal process then would commence against the President. There is simply no danger that such crimes would go criminally unpunished; the only question is when they can be punished.”

Questions for Judge Kavanaugh:

▶ Many in Congress today would argue with your theory that there is “no danger” of dastardly deeds going unpunished, especially when a single political party holds power in both executive and legislative branches. What is the remedy when dastardly deeds go unpunished?

▶ Besides murder, what other deeds would you consider “dastardly”? Sexual assault? Paying hush money to a mistress before an election? Colluding with a foreign power to interfere in an election? Obstructing justice? How is it determined whether an act is dastardly or not?

▶ Wouldn't it be prudent to apply due process for any accusation of dastardly conduct by launching an independent investigation, rather than leave the issue to the whims of political friends and foes?

- “Currently, a President can complain that an independent counsel is politically motivated while implying that he is powerless to do anything about it. This essentially gives the President and his surrogates freedom to publicly destroy the credibility of the independent counsel, and to cleverly avoid questions about why the President does not remove him. Congress should give back to the President the full power to act when he believes that a particular independent counsel is ‘out to get him.’ Such a step not only would make the special counsel accountable, but it also would force the President and his surrogates to put up or shut up.”

Questions for Judge Kavanaugh:

▶ Does your advice to Congress—that it should give the president the power to fire the person leading an investigation against him—apply equally to independent and special counsel investigations?

▶ Explain how an investigator who is fired by the person he is investigating makes the investigator accountable. Was Nixon justified in dismissing DOJ staff in the Saturday night massacre, even though the courts ruled his actions illegal? Since no other citizens can summarily dismiss a criminal investigation against them, doesn't this imply that a president is above the law?

▶ How do you square this article, with its repeated rejection of the value of independent counsel investigations, with your work on the Starr report in the very same year? Should the public also brand you as politically motivated?

Kavanaugh's 2014 *Notre Dame Law Review* Article, [“Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution”](#)

Kavanaugh describes his constitutional approach as “textualist.” In this article he examines some of the most expansive powers afforded the president and argues that the president's powers to pardon or to choose to not investigate or prosecute a crime are absolute. Kavanaugh wrote, “Everyone agrees that the pardon power gives the President absolute, unfettered, unchecked power to pardon every violator of every federal law. Obviously, there are political checks against doing that, or against using the pardon power in an arbitrary manner. But in terms of raw constitutional power, that is the power the President has. Moreover, it is long settled that the power to pardon includes the power to pardon violations of a law at any time after commission of the act. In other words, a pardon does not need to wait for a conviction. Now if the President has the absolute discretion to pardon individuals at any time after commission of the illegal act, it necessarily seems to follow that the President has the corresponding power not to prosecute those individuals in the first place.”

Questions for Judge Kavanaugh:

- ▶ Describe the “political checks” that would prohibit a president from abusing his pardon power. As part of the president’s “absolute, unfettered, unchecked power to pardon,” can the president pardon himself, or imply that he will pardon in order to affect the course of an investigation?
- ▶ If the president has the corresponding power not to prosecute individuals who commit crimes, can he prohibit the prosecution of his own crimes?
- ▶ If a president is granted permission to continue with criminal acts throughout his time in office, wouldn’t that erode public faith in government and damage it beyond repair?



ENVIRONMENT

Prepared and presented by Kristin Jackson, federal project outreach coordinator for the [Natural Resources Council of Maine](#), a nonprofit organization with more than 20,000 members and supporters that seeks to protect, restore, and preserve Maine’s environment.

To date, the Supreme Court has established precedents underscoring the EPA’s authority to enforce bedrock public health protections like the Clean Air Act and Clean Water Act. Several of these issues could again come before the court, carrying [significant environmental implications](#) in the form of the Trump administration’s proposed repeal of the Clean Power Plan, as well as cases that question the EPA’s ability to regulate greenhouse gas emissions and water pollution. If Kavanaugh wins a seat on the Supreme Court, these bedrock environmental policies could be undercut, making it harder for the agency to carry out its mission of protecting our health and the environment. Kavanaugh has made himself known as an influential critic of sweeping environmental regulations. While serving on the Court of Appeals for the DC Circuit, he voted in a number of high profile cases to limit EPA protections involving issues like climate change and pollution, including the cases below.

[Coalition for Responsible Regulation, Inc v. EPA, 2012](#)

In the 2012 court case *Coalition for Responsible Regulation, Inc. v. EPA*, Kavanaugh dissented from a denial of rehearing, questioning the EPA’s authority to safeguard the American people from climate pollution under the Clean Air Act. This case raises the serious question of whether Kavanaugh believes the EPA has the authority to establish safeguards that protect us from catastrophic climate change.

[White Stallion Energy CTR, LLC v. EPA, 2014](#)

The 2014 *White Stallion Energy Ctr., LLC v. EPA* case upheld the EPA’s first emission standards for mercury and other harmful air pollutants from coal and oil-fired power plants. Kavanaugh’s constant siding with industry officials is apparent in this case, in which he stuck to his pattern of opposing federal environmental safeguards by using costs- to-industry arguments to invalidate fundamental EPA clean air and water protections. Despite the EPA’s findings of dangerous health effects of mercury exposure which justify the these mercury safeguards, Kavanaugh dissented from the majority and argued against the rule on the false premise that EPA completely ignored costs. Later in 2015, conservative justices on the Supreme Court agreed with Kavanaugh in a 5-4 decision in *Michigan v. EPA*.

[EME Homer City Generation, LP v. EPA, 2015](#)

In 2015, Kavanaugh wrote an opinion overturning an EPA rule aimed at controlling the vexing problem of air pollution drifting across state lines, also known as the Good Neighbor Rule. This rule would have lowered sulfur dioxide emissions by 73 percent and nitrogen oxide emissions by 54 percent, and prevented 34,000 premature deaths. Kavanaugh's opinion reflects his disposition to dismantle EPA's ability to tighten environmental standards, delivering a major blow to communities suffering from upwind polluters.

[Mingo Logan Coal Co. v. EPA, 2016](#)

The 2016 court case Mingo Logan Coal Co v. EPA underscored Kavanaugh's insistence on prioritizing costs to industry over costs to safety and human and environmental health. Undeterred by studies that concluded dumping waste from mountaintop removal coal mining into streams would have an "unacceptable adverse effect" to the environment, Kavanaugh dissented from a majority conservative opinion that affirmed EPA's revocation of the company's permit to dump waste. He faulted the EPA for not engaging in a cost-benefit analysis before revoking the permit. Kavanaugh's opinion, which the court did not adopt, would have allowed the company to continue devastating waterways and wildlife upon which local Appalachian communities depend upon.

[Mexichem Fluor, Inc v. EPA, 2017](#)

In the 2017 court case Mexichem Fluor Inc. v. EPA, Kavanaugh demonstrated his consistent inclination to block the authority of the EPA and invalidate crucial environmental safeguards. In this case, Kavanaugh ruled that the EPA cannot require companies to replace potent heat-trapping chemicals, hydrofluorocarbons (HFCs), with other substances.

Question for Judge Kavanaugh:

► Are you committed, unequivocally, to defending the people's right to access the courts to hold the government and powerful corporations accountable to the rule of law as it relates to preserving clean air and clean water, and ensuring a safe and healthy environment for children, families, communities, and workers?

Chevron Deference

In the opinions above and others, Kavanaugh has articulated that the agency should only issue a new rule if Congress has granted them explicit, precise rules to do so in a piece of legislation—in stark disagreement with the precedent known as the [Chevron Deference](#). This is one of the most important principles in administrative law, and was coined after a landmark case, [Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc](#) (1984.) The Chevron Deference states that when a legislative delegation to an administrative agency on a particular issue or question is not explicit but rather implicit, a court may not substitute its own interpretation of the statute for a reasonable interpretation made by the administrative agency. Thus, if the administrative agency has made a reasonable interpretation of legislation in their rulemaking, it should be upheld by the court. However, Kavanaugh has repeatedly ruled that EPA only has the authority to enact rules that are explicitly and precisely dictated to them by legislation. Because of his disagreement with the Chevron Deference, Kavanaugh has repeatedly ruled against EPA protections that are interpreted from the Clean Air Act and the Clean Water Act. During the Obama Administration, he heard three major cases about EPA's authority under the Clean Air Act, and in every case, he opposed the EPA's position.

Question for Judge Kavanaugh:

▶ Do you agree with the precedent decided in *Chevron USA, Inc v. NRDC*, known as the Chevron Deference, that states when a legislative delegation to an administrative agency on a particular issue or question is not explicit but rather implicit, a court may not substitute its own interpretation of the statute for a reasonable interpretation made by the administrative agency?



AFFORDABLE CARE ACT

Prepared and presented by Kelli Whitlock Burton, co-leader of [Suit Up Maine](#), with background information from [Maine Consumers for Affordable Health Care](#) and [Maine Equal Justice Partners](#).

Much has been made of Judge Kavanaugh’s dissent in a case that challenged the constitutionality of the individual mandate in the Affordable Care Act. His dissent in that case, which upheld the mandate, argued that the mandate was a tax and that courts couldn’t rule on a constitutionality of a tax until it had been levied. He skirted the issue on that ruling but with the Trump administration’s continued attempts to do what Congress has been unable to accomplish and gut the ACA, finding out where Judge Kavanaugh stands on the ACA is critical.

[Texas v. United States, 2018](#)

Our Concern: The [Trump administration has joined](#) with 20 states in *Texas v. United States*, a lawsuit claiming that Congress’ repeal of the ACA’s individual mandate penalty (as part of the 2017 tax law) makes the mandate itself unconstitutional. Plaintiffs—which includes Maine’s Gov. Paul LePage—argue that the courts should strike down the entire ACA, including its protections for people with pre-existing conditions and its mandated coverage of prenatal care, mental health services, and treatment for substance use disorder. If this case reaches the Supreme Court, the court could choose to strike down the entire law, as the plaintiffs ask. That would take health insurance away from 17 million Americans who have obtained coverage under the ACA. Alternatively, the court could choose not to strike down the entire law, but to rule that insurers are no longer obligated to provide coverage to people with pre-existing conditions, women, and the elderly at the same rate as younger and/or healthy people.

Questions for Judge Kavanaugh:

▶ Does the repeal of the individual mandate penalty render the entire ACA unconstitutional or would you adhere to the principle of severability?

▶ Has the Trump administration’s undermining of the ACA violated the Constitutional mandate that the president must “take care that the laws be faithfully executed” and if so, can the “take care” clause be asserted against a sitting president?

Related to this case is a comment made in a footnote in [Judge Kavanaugh’s dissent to *Seven-Sky v Holder*](#), a case concerning the constitutionality of the individual mandate penalty in the ACA. In this footnote, Kavanaugh wrote in a [footnote](#) (#43): “Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.” This would seem to imply that Kavanaugh believes it is within

President Trump’s discretion to decline to enforce provisions within the ACA (or any law, for that matter) if the President believes those provisions to be unconstitutional—even if a court disagrees.

Question for Judge Kavanaugh:
► Is it your position that President Trump could stop enforcing aspects of the ACA that he has state he does not agree with, such as mandatory coverage of mental health treatment and contraceptives?

oo

IMMIGRANTS’ RIGHTS

Prepared and presented by Susan Roche, executive director, and Julia Brown, advocacy and outreach attorney, both of the [Immigrant Legal Advocacy Project \(ILAP\)](#), Maine’s only comprehensive, state-wide immigration legal services organization, providing direct legal services to more than 3,000 clients across the state each year.

Brett Kavanaugh’s writings and dissents indicate he does not believe that Constitutional protections should apply to immigrants, minorities, LGBTQ individuals, and other vulnerable communities. There are two cases in particular that are of concern because they demonstrate Judge Kavanaugh’s opinion that immigrants should not be afforded the same Constitutional protections as those afforded to U.S. Citizens. In his dissenting opinions, Judge Kavanaugh also demonstrates his propensity to ignore precedent when it relates to immigrants’ rights. This is troubling not only for immigrants’ rights, but also for other important precedents including reproductive justice. In both cases below, Judge Kavanaugh parts with the majority opinions and goes out of his way to find that immigrants should not be protected by the Constitution. This is especially concerning at a time when there are so many devastating policies coming out of this administration, many of which will continue to come before the Supreme Court. These policies, exacerbated by anti-immigrant and racist rhetoric, are creating a climate of intense fear in Maine’s immigrant communities. We have seen the impact at ILAP. Many of our clients are being separated from their families and are facing separation or deportation under these new policies.

[Garza v. Hargan \(2017\)](#)

Majority Holding and Kavanaugh Dissent: In October of 2017, Judge Kavanaugh issued a dissenting opinion in *Garza v. Hargan*. The majority held that a seventeen year old girl in immigration detention had the right to access an abortion. Judge Kavanaugh disagreed, arguing that that she should not. His analysis focused on the fact that she was an immigrant.

Facts and Procedural History: Jane Doe was 17 years old. She was being held in immigration detention in Texas when she learned that she was pregnant. She made the decision, due to her circumstances, to terminate the pregnancy, a decision that was approved by a Texas court, in accordance with Texas law. A federal district court ruled that she should be allowed the medical procedure. The government appealed. A three judge panel (Kavanaugh, Henderson, Millett) ruled that the girl had to first extract herself from immigration custody in order to exercise her right to have the procedure. An en banc panel (all 17 DC Circuit Court of appeals judges) overturned the panel’s ruling. As the majority opinion states:

“Where the government bulldozed over constitutional lines was its position that—accepting J.D.’s constitutional right and accepting her full compliance with Texas law—J.D., an unaccompanied child, has the burden of extracting herself from custody if she wants to exercise the right to an abortion that the government does not dispute she has. The government has insisted that it may categorically blockade exercise of her constitutional right unless this child (like some kind of legal Houdini) figures her own way out

of detention by either (i) surrendering any legal right she has to stay in the United States and returning to the abuse from which she fled, or (ii) finding a sponsor—effectively, a foster parent—willing to take custody of her and to not interfere in any practical way with her abortion decision.”

Judge Kavanaugh Dissent: In his dissent, Judge Kavanaugh stated that the majority opinion “is ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. government detention to obtain immediate abortion on demand, thereby barring any government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision. The majority’s decision represents a radical extension of the Supreme Court’s abortion jurisprudence.” *Garza v. Hargan*, 874 F.3d 735 at 752. This dissent is concerning because Judge Kavanaugh focuses on the fact that the detained girl was an immigrant to find that she did not have a right to an abortion. This raises questions as to how Judge Kavanaugh might rule on other cases related to the rights of detained immigrants and detained immigrant children. It is particularly troublesome in light of the Administration’s recent “zero tolerance” policy and the separation of children and families at the border.

Question for Judge Kavanaugh:

► Are undocumented immigrant adults and children protected by the Constitution while in U.S. custody?

[Agri Processor Co. v. National Labor Relations Board, 2008](#)

Majority Holding and Kavanaugh Dissent: Judge Kavanaugh dissented in this case, arguing that undocumented workers should not be protected by workers’ rights covered in the NLRA. The Majority had held that undocumented workers are “employees” protected by the National Labor Relations Act (NLRA) and rejected Agri Processor Co.’s argument that their workers’ vote to unionize was invalid because some of those who voted were undocumented workers. Judge Kavanaugh disagreed, and said that he would have invalidated the vote because some of the workers who voted were undocumented. His dissent is particularly troubling because he declined to follow Supreme Court precedent.

Facts and Procedural History: Agri Processor Co. is a wholesaler of kosher meat products based in Brooklyn, New York. In September 2005, the company’s employees voted to join the United Food and Commercial Workers union because of poor working conditions. The company refused to bargain with the workers, claiming that most of those who voted were undocumented immigrants. The company argued that undocumented immigrants are prohibited from unionizing because they do not qualify as “employees” protected by the NLRA. The DC Circuit Court panel found that the company’s argument ignored both the Act’s plain language and binding Supreme Court precedent, and denied its petition for review. The majority relied upon *Sure Tan, Inc, v. N.L.R.B.*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984), in which the Supreme Court had held that the term “employee” in the NLRA *does* include undocumented immigrants.

Judge Kavanaugh Dissent: In his dissent, Judge Kavanaugh stated: “I would hold that an illegal immigrant worker is not an ‘employee’ under the NLRA for the simple reason that, ever since 1986, an illegal immigrant worker is not a lawful ‘employee’ in the United States.” He failed to provide an implied appeal analysis that is required to demonstrate why the 1986 statute implied an appeal of the 1984 Supreme Court decision in *Sure-Tan*. Judge Kavanaugh was the only dissenter in this case. Judge Henderson, a conservative judge appointed by President Reagan, issued a concurrence in which she pointed out Judge Kavanaugh’s failure to follow Supreme Court precedent when she states, “Nonetheless, *Sure-Tan* concluded that the broad statutory definition of employee in the NLRA does not exclude an illegal immigrant and we must follow

Sure-Tan’s interpretation until the Supreme Court otherwise directs or the Congress expressly limits the term’s scope.”

Question for Judge Kavanaugh:
▶ **Are undocumented immigrant workers covered by protections in the NLRA? If not, how do you reconcile that with Supreme Court precedent that maintains the NLRA does apply to undocumented immigrant workers?**

Additional Concerns

- **Travel ban:** We have clients who are separated from children and spouses abroad because of the travel ban. Even though there is a provision for waivers in humanitarian cases, very few have been granted. These are not clients who are security risks. Many have been separated from children and other family members during war and are now trying to reunify.
- **DACA:** DACA rescission is impacting many Mainers who came to the U.S. as children with their parents through no fault of their own. They have followed the law and applied for and renewed their DACA status each year. They are working, going to school, and helping to support their US Citizen siblings in many cases. They are now facing potential deportation to countries they don’t know.
- **Temporary Protected Status (TPS):** We have many clients throughout the state from El Salvador, Honduras and Haiti -including blueberry workers Downeast and seafood processors in Portland-who have been living in our communities for decades in legal status. Most of them have U.S. Citizen children and have been working in the same jobs for years. Losing TPS will tear apart these families and communities. This will also impact businesses and our economy.

Other attacks on asylum seekers and immigrants

- **Numerous memoranda and proposed regulations will restrict asylum protections**, make it harder for poor people to reunite with their US Citizen family members, and will keep more families separated. The creation of a Denaturalization Task Force has also caused great anxiety in our immigrant communities. Recent actions by Attorney General Jeff Sessions have also contributed to a decimation of rights for asylum seekers. Recently, in [Matter of A-B-](#), the Attorney General certified a case to himself and overruled Board of Immigration Appeals precedent, holding that most domestic violence victims can no longer qualify for asylum. This opinion is having a significant impact on many asylum seekers in Maine. Many are victims of domestic violence, FGM, and honor killings, and now they will not qualify for asylum and may face deportation.
- **Executive efforts to chip away at immigrant protections** are having a significant impact on our immigrant communities in Maine. Many of these issues have or will appear before the Supreme Court. It is extremely troubling to consider that Judge Kavanaugh, who does not believe immigrants should have Constitutional protections, might be on the Supreme Court deciding these cases.
- Economic reports indicate that Maine is an aging state with a decreasing workforce. Businesses are reporting that they cannot find workers. **Immigrants are the only growing portion of our population** and many are coming with professional backgrounds and skills needed by employers in Maine. Many unskilled workers are immigrants who are known for being hard working and committed employees who are valued especially in rural areas that rely upon migrant farmworkers. If our immigration and employment laws and policies do not protect immigrants, we will not be able to attract and retain immigrant workers in our communities. This will have a detrimental impact on our communities and our economy.



LGBTQ RIGHTS

Prepared and presented by Kelli Whitlock Burton, co-leader of [Suit Up Maine](#), with background information from [Equality Maine](#), [OUT Maine](#), and [GLAD](#).

There is very little in Judge Kavanaugh’s writings, rulings, or speeches to hint at how he might rule in any number of cases concerning the rights of LGBTQ individuals that will likely come before the court in the coming year or two. This places an especially high burden on senators to uncover the nominee’s stance on the legal precedent and his interpretation of Constitutional protections.

Title VII Protections

Our Concern: The Equal Employment Opportunity Commission maintains that protections afforded under [Title VII of the 1964 Civil Rights Act](#) extend to LGBTQ employees. Two cases will come before the Supreme Court that could undo these critical protections. Rulings from the 2nd ([Zarda v Altitude Express](#)) and the 6th ([EEOC v Harris Funeral Home](#)) U.S. Circuit Courts that found that LGBTQ individuals are a protected class under Title VII are being appealed to the Supreme Court by groups attempting to restrict LGBTQ civil rights.

In the latter, the respondent is the EEOC. The Trump administration filed a brief in *Zarda v. Altitude Express* arguing that Title VII does NOT protect LGBTQ workers. It is expected that the administration will not defend the EEOC in the Harris case. If the Supreme Court were to rule that Title VII does not protect against discrimination based on sexual orientation and gender identity, the ruling could affect the interpretation of discrimination under other federal laws, such as Title IX of the Education Amendments Act, the Fair Housing Act, and the Affordable Care Act. Under this scenario, LGBTQ individuals would have no recourse when they are denied housing, health care, education or employment.

Questions for Judge Kavanaugh:

- ▶ Do protections afforded under Title VII of the Civil Rights Act of 1964 extend to gay and/or transgender employees?
- ▶ Given your writings and comments on executive powers, if the president set aside protections the courts have ruled extend to LGBTQ individuals, would you uphold his right to do so?

Marriage Equality

Our Concern: In 2015, the Supreme Court legalized same-sex marriage in [Obergefell v. Hodges](#). However, a Texas Supreme Court ruled in June 2017 in [Pidgeon v. Turner](#) that *Obergefell* did not “address and resolve” the question of benefits for same-sex couples. The case revolved around a suit that claimed taxpayers should not have to pay for benefits of same-sex spouses of city employees. The U.S. Supreme Court declined to hear the case and it is now going to state court after being remanded out of federal court. If this case or another one making a similar argument make it before the high court, a judgment in favor of the plaintiffs would gut marriage equality by leaving legally married same-sex couples without any of the privileges afforded to heterosexual married couples.

Question for Judge Kavanaugh:

- ▶ Does the *Obergefell* ruling convey all of the same rights and privileges of heterosexual marriage to same-sex married couples, without exception?

Transgender Military Ban

Our Concern: Multiple federal courts have blocked President Trump’s ban on transgender individuals in the military. But it is unlikely that the administration will relent in its efforts to discriminate against transgender individuals. If a case such as [Doe v. Trump](#), [Stockman v. Trump](#) or any of the other transgender military ban cases makes its way to the high court, a ruling that allows the federal government to discriminate against transgender people would open the door to widespread discrimination in the workplace, housing, health care and education.

Question for Judge Kavanaugh:

► Are transgender individuals a protected class under federal anti-discrimination laws?

oo

GUN REFORM

Prepared and presented by Nick Wilson, executive director of the [States United to Prevent Gun Violence](#), a grassroots network of 32 state affiliates with more than 8,000 members in Maine.

Judge Brett Kavanaugh’s approach to Second Amendment analysis is far outside the mainstream of other conservative judges and in direct opposition to the values and principles of most Mainers. Judge Kavanaugh rejects the idea that courts should consider public safety when judging gun cases.

[Heller v. District of Columbia, 2010](#)

Dissenting in this follow-on case to the landmark 2008 U.S. Supreme Court 5-4 ruling in [District of Columbia v. Heller](#), Judge Kavanaugh expressed the radical view that there is an “absence of a role for judicial interest balancing or assessment of costs and benefits of gun regulations.” His record suggests that he would disregard public safety justifications for gun safety laws and instead consider only “text, history, and tradition.” In the same dissent, he wrote that “semi-automatic rifles have traditionally not been banned and are in common use today, and are thus protected” by the Second Amendment, contradicting four federal circuit court of appeals who have upheld current assault weapon bans. Kavanaugh argues that there is no constitutional difference between assault weapons and handguns and considers modern laws invalid when considered against regulations made in 1791. He concluded his dissent with another argument not shared by mainstream judges: that because most states do not require registration of firearms, it is unconstitutional to have a mandatory registration law. This radical view would empower judges to strike down life-saving law enforcement tools like domestic violence restraining orders, large capacity magazine regulations, and “red flag” laws because they lack historical support. For example, domestic abuse wasn’t a crime in the United States until the mid-1800 but is one of the gravest issues facing women in Maine.

Judge Kavanaugh’s extremist views have not been adopted by any court since the original *Heller* decision ten years ago. Even Judge Kavanaugh’s Republican-appointed colleagues on the D.C. Circuit disagree with his interpretation of the Second Amendment. His record suggests that he will trample states rights by invalidating state laws regulating the carrying of concealed firearms and weaken the barriers for legally prohibited persons like domestic abusers from accessing guns. [According to the Guardian](#), “Trump’s latest

constitutional tradition, all citizens are equally American, no matter what God they worship or if they worship no god at all,” but then went on to say that “we ... cannot dismiss the desire of others in America to publicly ask for God’s blessing on certain government activities and to publicly seek God’s guidance for certain government officials.”

Questions for Judge Kavanaugh:

- ▶ **Do others’ perceptions of religion’s importance outweigh the moral views held by the person taking the oath?**
- ▶ **Can an atheist be sworn in as president or government official without swearing “so help me God” or placing hand on a bible, torah, or koran?**

Other questions on religious freedom

- Have you ever argued in support of a religious freedom case that involved Islam? Do you believe that sharia law poses a threat to our judicial system?
- Do you believe that federal tax dollars should be spent on Islamic schools?
- What is the constitutional remedy when the actions of an individual claiming religious liberty result in discrimination against another individual?
- Can moral conviction only be held by those who subscribe to established religions? What protections are afforded to those with strong moral convictions who are not religious?
- Would it be acceptable for an atheist baker to refuse to bake a wedding cake for a catholic couple on the grounds that the baker is morally opposed to the church’s doctrines that discriminate against women?
- As a catholic, do you rank “God’s law” above the constitution? What role does the Bible have in American law?



VOTING RIGHTS

Prepared by Kelli Whitlock Burton, co-leader of [Suit Up Maine](#), with background information from [League of Women Voters of Maine](#).

In 2013, the Supreme Court struck down a key enforcement provision of the 1965 Voting Rights Act in [Shelby County v. Holder](#), ruling that the act’s provision requiring states with a history of discrimination to receive federal approval before changing voting laws was unconstitutional. Within weeks of the ruling, several states introduced a range of laws to limit voting access, laws that studies show disproportionately affect people of color and the poor. That was followed by racially gerrymandered legislative districts; reduced polling places in poor, mostly-minority communities; and voter ID laws. Kavanaugh’s position on the voting ID laws is clear: In 2012, he wrote the majority opinion in [South Carolina v. Holder](#), ruling that South Carolina’s voter ID law did not violate the Voting Rights Act. Cases that could determine everything from who gets to vote to the make-up of the U.S. House of Representatives are making their way through the court system and will rise to the Supreme Court soon.

Politically Partisan and Racial Gerrymandering

Our Concern: The Supreme Court recently issued rulings in two partisan gerrymandering cases—[Gill v. Whitford](#) (Wisconsin) and [Benisek v. Lamone](#) (Maryland). In both cases, the court issued no ruling on the

cases' merits, instead remanding them back to the lower courts to determine if the plaintiffs met the technical requirement of having "standing" to sue. This ruling keeps the Wisconsin and Maryland challenges alive and opens the door for the high court to hear a racial gerrymandering case from North Carolina next year ([League of Women Voters v. Rucho](#) and [Common Cause v. Rucho](#)). In a [concurring opinion](#) on Gill v. Whitford, Justice Elena Kagan criticized the practice of partisan gerrymandering: "More effectively every day, that practice enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches. None of those facts gives judges any excuse to disregard Article III's demands. The Court is right to say they were not met here. But partisan gerrymandering injures enough individuals and organizations in enough concrete ways to ensure that standing requirements, properly applied, will not often or long prevent courts from reaching the merits of cases like this one." Kagan went on to offer a potential constitutional argument—the First amendment claim of right to freedom of association—again partisan gerrymandering: "As so formulated, the associational harm of a partisan gerrymander is distinct from vote dilution," she wrote. "Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party."

Question for Judge Kavanaugh:
▶ Does partisan gerrymandering violate citizens' First Amendment claim of the right to freedom of association?

Reapportionment

Our Concern: A decision by the Trump administration to add a citizenship question to the 2020 census has prompted several lawsuits claiming the move discriminates against ethnic minorities for political gain, namely by reducing the Latino count to reapportion states and affecting the number of representatives certain states (primarily those in the south and west) are afforded. One of the cases receiving the most attention is [New York Immigration Coalition v. United States Department of Commerce](#). Although in the early stages, one or more of these cases will likely end up before the Supreme Court. The Court ruled in [Evenwel v. Abbott](#) that states are allowed to use total population when drawing districts (and not just total counts of citizens), but has not ruled that they must apportion according to total population. Those opposed of the citizenship question argue that the Trump administration is hoping this will lead to a court ruling that Congressional (and possibly state legislative) apportionment must be determined only by the number of citizens, not by the total number of residents.

Question for Judge Kavanaugh:
▶ Should apportionment be determined by total population or citizenry only?

