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August 31, 2018

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
U.S. Senate
226 Hart Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
U.S. Senate
226 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of Muslim Advocates, a national legal advocacy and educational organization that works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths, I write to oppose the nomination of Judge Brett Kavanaugh as an Associate Justice of the Supreme Court.

Muslim Advocates was founded in 2005 by a group of American Muslim lawyers who work to ensure our nation lives up to its promise of freedom, justice, and equality for all.

Our commitment to these very ideals is why we are deeply concerned about Judge Kavanaugh's nomination to serve on the highest court. Judge Kavanaugh's 12-year record on the U.S. Court of Appeals for the D.C. Circuit, as well as his public writings, speeches, and legal career, demonstrate that if he were confirmed to the Supreme Court, he would be the fifth and decisive vote to undermine many core rights and legal protections for all Americans. Judge Kavanaugh's confirmation would shift the Supreme Court toward what can only be described as extremely regressive views on any number of issues, views that are out of step with the values most Americans hold dear.

As you know, civil rights laws provide a number of protections to ensure that no one suffers discrimination because of their religious beliefs. We are concerned that Judge Kavanaugh would allow religious freedom laws to be used to harm women, LGBTQ people, and religious minorities, including Muslims. In a range of contexts, as both jurist and lawyer, Judge Kavanaugh has prioritized the interests of the majority over those of vulnerable minorities.

For instance, in *Priests for Life v. U.S. Department of Health and Human Services*¹, Judge Kavanaugh argued that employers can cite religious beliefs to obstruct their employees' access to contraceptive coverage. While in private practice, he authored a Supreme Court brief in *Santa Fe Independent School District v. Doe*² defending a public school policy that promoted prayer at school football games. Statements he rendered in that brief, and his writings elsewhere, suggest that Judge Kavanaugh is likely to dispute five decades of settled Supreme Court rulings that prohibit public schools from sponsoring prayer. Furthermore, in a brief submitted to the Supreme Court in *Good News Club v. Milford Central School*,³ Kavanaugh, again in private practice, argued against longstanding precedent prohibiting the use of public funds for religious activities. In fact, Judge Kavanaugh has also expressed hostility toward the very idea of a distinction between church and state. During a 2017 lecture at the American Enterprise Institute, Judge Kavanaugh praised former Chief Justice William Rehnquist for "persuasively criticiz[ing]" the metaphor of "a strict wall of separation between church and state."⁴ Judge Kavanaugh approvingly noted that Justice Rehnquist said the metaphor was "based on bad history" and "useless as a guide to judging." He expressed his belief that "the wall metaphor was wrong as a matter of law and history." Abandoning the separation of church and state, at the expense of religious minorities and other vulnerable groups, is a gross distortion of a fundamental liberty protected by the First Amendment.

Additionally, since Judge Kavanaugh played a role in crafting President George W. Bush's shameful detention and interrogation policies, we fear how he would approach national security cases from a perch on the Supreme Court. Top national security experts have noted that Judge Kavanaugh is likely to be deferential to the President's use of aggressive war powers and would be too willing to defer to the political branches of government.⁵ A clear example of this deference came in *Al-Bahlul v. U.S.*⁶ where Judge Kavanaugh wrote in support of expansion of the jurisdiction of military tribunals to include domestic offenses typically heard by civilian courts, deferring to Congress and the President rather than preserving judicial authority.

He has similarly taken troubling positions in other cases touching national security questions. Across the board, Judge Kavanaugh not only endorsed sweeping deference to the government but has gone out of his way to stifle the very possibility of judicial review of executive action. Four cases in particular are instructive. First, in *Al-Bihani v. Obama*⁷, Judge Kavanaugh concluded that, notwithstanding *Hamdi v. Rumsfeld*⁸, the courts should ignore international law — even the possibility that a detention might violate such law — in construing Congress's authorization of the executive branch to hold the Guantanamo detainees. He did so even in the face of the President's

¹ 808 F.3d 1 (D.C. Cir. 2015)

² 530 U.S. 290 (2000)

³ 533 U.S. 98 (2001)

⁴ Brett Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist* (Washington, DC: American Enterprise Institute, 2017) <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.

⁵ Peter Margulies, *Kavanaugh and the Military Commissions: Reading the Law "As Written" for an Unpopular Defendant* (Washington, DC: Lawfare, 2018) <https://www.lawfareblog.com/kavanaugh-and-military-commissions-reading-law-written-unpopular-defendant>.

⁶ 840 F.3d 757 (D.C. Cir. 2016)

⁷ 590 F.3d 866 (2010)

⁸ 542 U.S. 507 (2004)

own decision to rely on international law. Second, in *Omar v. McHugh*⁹, Judge Kavanaugh joined an opinion rejecting the habeas petition of a U.S. citizen held in U.S. military custody and facing transfer to potential torture in Iraqi custody. Third, in *Doe v. Exxon Mobil Corp.*¹⁰, he dissented from the majority opinion, holding that Exxon could be held liable under the Alien Tort Statute by Indonesian villagers who alleged they were subjected to torture and extra-judicial killings by Indonesian soldiers working for Exxon. Finally, in *Saleh v. Titan Corp.*¹¹, Judge Kavanaugh voted to bar state law tort claims against a private military contractor, even though no federal statute required such a result. Disregarding federalism interests, this decision treated the denial of remedies to torture victims as a sufficient federal interest to justify preemption in the absence of any congressional authorization. These decisions manifest Judge Kavanaugh's hostility to those harmed by government action—a hostility that trumps deference to the president, federalism interests, and even a due regard for the right against torture. Such decisions should be disqualifying for elevation to the Supreme Court.

It is disturbing that a jurist who goes out of his way to stymie the claims of vulnerable victims of serious constitutional claims has in other writings been so solicitous of the interests of the White House—especially in the context of criminal investigations of senior officials.¹² Such obsequious deference to authority, coupled with manifest disregard for the vulnerable, is a betrayal of all that makes the Court's history admirable.

If that were not enough, there are also grave questions as to whether Judge Kavanaugh purposely misled the Senate Judiciary Committee regarding his role in detention policy during his tenure in the Bush Administration. At the hearing, under oath, he said, "I was not involved and am not involved in the questions about the rules governing detention of combatants." A 2007 *Washington Post* report, however, appears to contradict Judge Kavanaugh's testimony, suggesting that as a White House staffer he indeed participated in discussions surrounding the issue.¹³ All of these issues paint a picture of a nominee with an expansive view of executive power who would use it unabashedly to protect actions taken by a President in violation of the Constitution.

Finally, within days of his nomination, Judge Kavanaugh was described by the *Breitbart* website as someone with an "America First" approach who would "share President Trump's views on immigration."¹⁴ In his opinions, Judge Kavanaugh has already demonstrated the President's hostility to immigrants and would serve as a rubber stamp on the Court for the President's anti-immigrant agenda. For instance, in *Agri Processor v. National Labor Relations Board*¹⁵, a company refused to engage in collective bargaining with workers who had voted to unionize, on the basis that many of the workers were undocumented immigrants. The D.C. Circuit rejected this claim.

⁹ 646 F.3d 13 (D.C. Cir. 2011)

¹⁰ 654 F.3d 11 (2011)

¹¹ 580 F.3d 1 (2009)

¹² See, e.g., Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454 (2009); Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Georgetown L. J. 2133 (1998).

¹³ Barton Gellman and Jo Becker, Pushing the Envelope on Presidential Power (Washington, DC: The Washington Post, 2007) http://voices.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/.

¹⁴ Joe Binder, 'America First' SCOTUS Choice Judge Brett Kavanaugh Applies Trump's Economic Patriotism to the Law (Washington, DC: Breitbart, 2018) <https://www.breitbart.com/big-government/2018/07/04/america-first-scotus-choice-judge-brett-kavanaugh-applies-trumps-economic-patriotism-to-the-law/>.

¹⁵ 514 F.3d 1 (D.C. Cir. 2008)

Judge Kavanaugh dissented, asserting that a federal immigration law had implicitly amended at least part of the National Labor Relations Act. The majority stated that Kavanaugh's views would have led to an "absurd result." Likewise, in *Fogo de Chao Inc. v. Department of Homeland Security*¹⁶, a company challenged DHS's refusal to grant temporary visas to foreign workers with specialized cultural knowledge. The majority sided with the restaurant and its workers. Kavanaugh dissented, leaving the majority to express "puzzlement" and to question whether Judge Kavanaugh embraced "woodenly excluding any and all knowledge or skills acquired by an employee solely because those skills and knowledge were learned from family or community rather than in-company trainers."

Our country was founded on the belief that no one should suffer discrimination or persecution because of their faith. Yet, from day one, the Trump administration has made a mockery of that bedrock American principle by using religion as a sword to deny basic rights and dignity to others. Given President Trump's well-documented hostility toward Muslims, immigrants, people of color, the LGBTQ community, and women, Americans need—and deserve—a Supreme Court justice who will guarantee freedom and justice for all Americans. Unfortunately, a confirmed Justice Kavanaugh will only further threaten to erode our nation's promise of freedom, justice and equality for all.

For these reasons, we urge the Senate to reject Judge Kavanaugh's nomination.

Sincerely,



Farhana Y. Khera
President and Executive Director

¹⁶ 769 F.3d 1127 (D.C. Cir. 2014)