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September 4, 2018

Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C. 20510

Honorable Charles Schumer
Minority Leader
United States Senate
Washington, D.C. 20510

Honorable Charles Grassley
Chairman
Judiciary Committee
United States Senate
Washington, D.C. 20510

Honorable Dianne Feinstein
Ranking Member
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Leader McConnell, Leader Schumer, Chairman Grassley, and Ranking Member Feinstein,

The members of the Congressional Black Caucus (CBC) express our strong opposition to the nomination of D.C. Circuit Judge Brett Kavanaugh to the United States Supreme Court. Based on a thorough review of his record, we have concluded that the confirmation of Judge Kavanaugh to the highest bench would endanger historically significant legal precedents of importance to African Americans and, more broadly, the balance of inclusive justice itself. As Members of the CBC, we cannot overstate what is at stake for African Americans and communities of color, who have spent more than a century fighting to achieve equal protection in our country and who continue this effort, particularly through the federal courts and the United States Supreme Court. Judge Kavanaugh's record as a federal judge gives every indication that he lacks respect for well-established precedents and would engage in aggressive judicial activism that could mean the reversal of important decisions that have afforded African Americans a measure of equal citizenship in a nation that has often stood in the way of its pursuit.

Repeatedly, Judge Kavanaugh has demonstrated a lack of respect for the judicial precedents that have ensured equal protection under the law for decades. Specifically, he has shown inadequate commitment to legal precedents that protect communities of color, women and, more recently, LGBTQ Americans. Instead, he has embraced jurisprudence so out of the mainstream of legal thought that even his conservative Republican-appointed judicial colleagues often have not agreed with him. Although serving on a court with a majority appointed by Republican presidents, Judge Kavanaugh averages a higher number of dissents annually than any other member of the D.C. Circuit Court. Case law precedents and the laws they represent are the contours of our legal system, ensuring that cherished rights are

protected. A judge who so frequently questions key legal precedents endangers the legal framework that has benefitted African Americans. Our substantive concerns, along with the ongoing investigations under Special Counsel Robert Mueller implicating the president, coupled with this nominee's ability to influence the outcome of an appeal, leave us no choice but to strongly urge rejection of Judge Kavanaugh's nomination.

We are particularly concerned about Judge Kavanaugh's likely impact on voting rights for communities that have historically been targeted for exclusion from the electorate. In *South Carolina v. United States*, Judge Kavanaugh condoned barriers to voter participation enacted by states. Under the then-enforced Voting Rights Act the Obama administration blocked enforcement of South Carolina's state-issued photo identification voting law in 2011, primarily because it affected up to eight percent of black South Carolinians, while impacting only up to four to five percent of whites. In his opinion ruling for the state, Judge Kavanaugh claimed the results of the South Carolina law "do[] not have the effects that some expected and some feared." This statement totally ignored the disparate impact of the photo ID law on African Americans and the real people who were hurt by the South Carolina law. For example, 92 year-old South Carolina native Larrie Butler, one of the many law-abiding, civically-engaged citizens involved, was stripped of his opportunity to vote because of difficulties imposed by the South Carolina voter ID law. Unable to obtain a birth certificate, Mr. Butler had to go through extraordinary steps to get the proper identification required for him to vote, but still failed to qualify. In light of the disproportionate numbers of African Americans who have been disenfranchised, it is unsettling that a nominee to the highest court expressed skepticism about the law's clear racial impact in a state with a long history of disenfranchisement of African Americans.

Judge Kavanaugh's record on matters related to criminal justice is of special concern to the CBC. He has spoken and written repeatedly for overturning precedent that protects civilians from overzealous law enforcement officers. Such a change would deeply reshape criminal law at a time when African Americans are already subject to disproportionate police surveillance and shootings. In a speech he delivered less than a year ago, Judge Kavanaugh suggested that it was appropriate to make "the probable cause standard more flexible." He also appeared to support decisions making it easier for police to conduct searches "without a warrant or individualized suspicion" and challenged the exclusionary rule that prohibits courts from accepting evidence obtained through an illegal search or seizure. Judge Kavanaugh has even supported narrowing the rights enumerated in *Miranda v. Arizona*—the landmark case, long accepted by law enforcement, which ensures that individuals are aware of their constitutionally protected rights before making incriminatory statements while in custody. Together, these opinions show a callous disregard for long-established rights for the accused who, under our system of justice, are innocent until proven guilty, a basic tenet of our criminal justice system. Judge Kavanaugh's advocacy for regressive changes to a criminal justice system that already falls short in many ways should trouble all Americans who support fair and equal treatment by law enforcement.

Judge Kavanaugh has also demonstrated hostility to a woman's fundamental right to make decisions regarding her own body, a right firmly established in our constitutional law over 45 years ago and since upheld several times by the Supreme Court. An adverse position would be particularly harmful to Black women who would be disproportionately affected because of systemic barriers to preventative care and affordable healthcare and the resultant use of abortion. In 2017, Judge Kavanaugh tried to block a lower court's ruling requiring the government to allow an undocumented woman entering the United States to have an abortion. According to a conservative Texas court, the woman had gone through all of the cumbersome legal steps required in Texas to obtain an abortion. Fortunately, the full D.C. Circuit overturned Judge Kavanaugh's decision—yet another example of a Republican-led court refusing to accept thinking outside of the conservative mainstream. Although Judge Kavanaugh proclaimed acceptance of the precedential value of *Roe v. Wade* during his 2006 confirmation hearing, his opinion in the 2017 case is another reason to doubt his purported commitment to binding precedent. The determination he showed to deter abortion in this case casts doubt on his willingness to uphold decades of established law protecting a woman's fundamental reproductive rights.

Judge Kavanaugh also has been hostile to affordable health care, a major concern for African Americans. In a uniquely troubling dissent in a case that ultimately upheld the Affordable Care Act, Judge Kavanaugh wrote, "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 unheard of view goes much further than an attempt to overturn existing precedent. It is dangerous to the rule of law itself. As numerous constitutional scholars have written, in our republic, the president cannot pick and choose which laws Congress passes to enforce, claiming constitutional breach, after a court has already deemed the law constitutional. Under our constitutional system, "[i]t is emphatically the province and duty of the judicial department to say what the law is," as Justice John Marshall famously said in *Marbury v. Madison*, and, under Article II of the Constitution, the president must "take care that the laws be faithfully executed." Judge Kavanaugh's view that the president may deem a law unconstitutional and refuse to enforce it, even after the Supreme Court has upheld it, represents an extreme view of the authority of the executive relative to the other branches. This notion of executive power is a departure from constitutional jurisprudence that must be repudiated in a republic governed by a written constitution. We would be particularly concerned if decisions of the Supreme Court could be ignored by the executive, considering that minorities in our country must disproportionately rely on the Court to ensure equal protection.

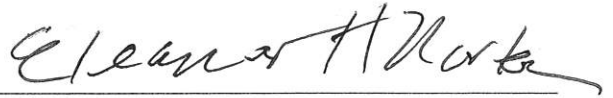
Finally, the ongoing Special Counsel investigation into the Trump administration's role in reported collusion with foreign governments makes the timing of Judge Kavanaugh's nomination unfortunate and adds to our objection to his nomination. Despite playing a pivotal role in the investigation of President Clinton in the 1990's, Judge Kavanaugh has since softened his stance on the legitimacy of such investigations of sitting presidents. His views favoring expansive executive power are deeply embedded. In a 2017 speech, Judge Kavanaugh said, "To be sure, I do not agree with all of [former Chief Justice William H. Rehnquist's] opinions... *Morrison v. Olson* in 1988 comes quickly to mind as the Rehnquist opinion I still have some trouble with..." *Morrison*, of course, is the case that upheld the constitutionality of the Independent Counsel. Furthermore, in reference to sitting presidents facing criminal prosecution while in office, in a 2009 *Minnesota Law Review* article Judge Kavanaugh wrote, "that the President should be excused from some of the burdens of ordinary citizenship while serving in office." This would mean, of course, that there would be no deterrent to a lawless president while in office, except the nuclear-sized, rarely used weapon of impeachment. There is little reason to believe that Judge Kavanaugh would uphold the constitutionality of Special Counsel Robert Muller's bipartisan work, given his related views. With the possibility that an appeal related to the investigation's outcome could be considered by the Supreme Court in the future, we are justifiably worried about this nomination.

For nearly eight decades, African Americans have arduously fought to secure many historic legal victories. Change often has been incremental, but Judge Kavanaugh's nomination threatens even these gains. As the first African American Supreme Court Justice Thurgood Marshall once said, "I wish I could say that racism and prejudice were only distant memories... We must dissent because America can do better, because America has no choice but to do better."

Sincerely,



Cedric L. Richmond
Chair, Congressional Black Caucus



Eleanor Holmes Norton
Chair, CBC Judicial Nominations Working Group