



## Why Judge Kavanaugh Should Be Confirmed to the Supreme Court

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### SUMMARY:

For the past fifty years, the Supreme Court has increasingly stepped outside of its limited role in our constitutional order, issuing growing numbers of activist and policy-driven rulings which have no constitutional warrant but which have allowed the Court to amass great power for itself at the expense of the people. By now, in many areas (including many of concern to Family Research Council), the Court has almost become an unchallengeable, unreviewable super-legislature. For this reason, it is all the more important to appoint Supreme Court justices holding an originalist philosophy, who can return our judiciary to a proper understanding of the Constitution's powers. Justice Neil Gorsuch holds such a philosophy, and President Trump's latest nominee, Judge Brett Kavanaugh, holds one too. If power is returned to the people through Supreme Court rulings based on the Constitution's plain meaning in accord with its limited role for the judiciary – to which Judge Kavanaugh adheres – we will not only return to a proper, originalist application of our Constitution, but we may even succeed in reducing the contentious nature of the nominations process itself over the long-term.

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### Introduction

During his presidential campaign, President Trump produced a list of 21 potential nominees for Justice Scalia's vacant seat on the Supreme Court, and promised to pick a nominee from that list. After being elected, he nominated Judge Neil Gorsuch, who was subsequently confirmed to the Supreme Court. In his short time on the Court, Justice Gorsuch has quickly developed an excellent record in ruling as an originalist and has articulated strong legal defenses of religious liberty.

Since replacing Justice Scalia, President Trump added five more candidates to his list, and worked from this new group of 25 potential nominees for the next opening on the Court. When Justice Anthony Kennedy announced that he would retire at the end of July 2018, President Trump nominated another candidate off that list – Judge Brett Kavanaugh, someone who has called the late Justice Scalia a "hero and a role model."<sup>1</sup>

Upon confirmation, Judge Kavanaugh will be faced with a host of pressing legal issues, and it is important to understand how he will rule and why. This analysis generally discusses the type of justices who we want to sit on our highest court, and then explains why Kavanaugh is ultimately qualified for that role and should be confirmed.

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## I. General Principles: What to look for in a Supreme Court Justice

Since the founding of this Republic over 240 years ago, it has been understood that first and foremost governments are put in place to secure the inalienable rights bestowed upon us by God, our Creator. These rights cannot be taken away from any American by any level of government. Our Constitution was adopted to preserve these rights and to institute a just government that will also provide those benefits enumerated in the Preamble to the Constitution.

The primacy of law-making by our elected representatives and the adherence to the rule of law by the executive branch form the keystone of our governmental framework. Over the past two hundred years, the power of the judiciary has grown to the point that it now threatens the separation of powers between the branches. The power of the legislative branch to make our laws has been challenged most directly by the courts. We must now confront a crisis of governance created by our judiciary and, more specifically, by the Supreme Court, which has grasped powers it was never intended to possess. In the period since the New Deal era, the Supreme Court has become an almost unchallengeable, unreviewable super-legislature. The Founding Fathers did not risk their lives, their fortunes, and their sacred honor so that someday we would be ruled over by an oligarchic, self-aggrandizing body of lawyers.

In no area is this more prominent than in the Court's self-invented "right to abortion," which has been dictated as "law" for all 50 states by the Court for the past 45 years.<sup>2</sup> In perhaps no other area do we see a greater price paid for judges giving in to the temptation to cease judging and start making policy. Tens of millions of unborn babies have been killed in that time.

Similarly, and more recently, a slim 5-4 majority mandated same-sex marriage in all 50 states, even though over 30 states had explicitly rejected this concept since the late 1990s.<sup>3</sup> In this way, the federal courts were hijacked to impose same-sex marriage on America.

Assaults on religious freedom have followed both decisions, especially in the past ten years as federal and state governments attempted to compel the provision of abortifacient contraceptives and tacit recognition of same-sex marriage by small business owners and nonprofit organizations.

In his final years on the Court, Justice Kennedy joined majorities that protected the right of religious conscience in regard to abortion<sup>4</sup> and same-sex marriage.<sup>5</sup> Yet those decisions hang by a thread.<sup>6</sup> We must have a justice who will protect religious freedom, and who will firmly and resolutely respect the Constitution's original plain mean and limited role of the judiciary. The stakes are too high for anything else.

The late Justice Antonin Scalia was one who was ever cognizant of the danger of such an activist Court. When the Court imposed same-sex marriage on the nation in *Obergefell v. Hodges*, Justice Scalia wrote in dissent:

"I write separately to call attention to this Court's threat to American democracy ... Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court ... This

practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”<sup>7</sup>

Justice Scalia himself would agree that outstanding judicial nominees should recognize limits to the judicial power created by Article III of the Constitution. Such nominees for all federal judicial positions, including the U.S. Supreme Court, should only include those who respect the judiciary’s proper place within the Constitution’s governmental framework – one that recognizes the irreducible role of the States (federalism) and the irreducible role of the Congress and the President (separation of powers).

When interpreting the Constitution, members of the judiciary must look first to the text of the Constitution, and their decisions must conform to the Constitution’s original meaning as understood at the time the constitutional provision’s language was adopted. Similarly, judges interpreting statutes and regulations must look to the text of those provisions and assess them in light of their meaning at the time they were enacted or adopted.

The legitimacy of our government lies in the fact that it expresses the will of the American people through their elected representatives. Judicial activism undermines the sovereignty of the American people, the rule of law, and a proper understanding of the Constitution. This is true whether it occurs through an inappropriate reliance on foreign law, the Court’s projections of “popular opinion,” or some other means by which the Court imposes its policy preferences in its rulings.

Since the late nineteenth century, Congress has ceded ever-growing quantities of legislative authority to executive branch administrative agencies. Such governmental entities were never envisaged by the Framers, and it is only with their continued existence that our vast administrative state would even be possible. These agencies now produce unfathomable quantities of costly rules that typically have the force of law on par with statutes enacted by Congress. Regulations can only be known by the regulated in some hypothetical sense, and enforcement actions are often arbitrary and excessive. In short, the constitutional rights of Americans have been gutted by the regulatory state as the courts have enunciated elaborate doctrines of “deference” that place bureaucratic judgments and actions beyond the reach of judicial review and any reasonable definition of justice.

With respect to the administrative agencies, the best judicial candidates will be those who seek to reduce the excessive levels of deference that federal courts have granted federal agencies in interpreting the statutes that pertain to them, especially provisions related to the jurisdiction or scope of the agency’s power. Having no judicial check on bureaucratic self-assessments of their own legislative and regulatory jurisdiction provides a dangerous invitation for ever-expanding and unconstitutional governmental expansion. What bureaucracy will limit its own power? To ask the question is to answer it.

Having briefly laid out a set of principles to guide an originalist assessment of judicial candidates, we will now examine the cases and issues of concern to Family Research Council

(FRC) that will arise or are likely to arise at the Supreme Court in the near future – the outcome of which will clearly be affected by Judge Kavanaugh’s judicial philosophy.

## II. Issues of Concern to FRC and How Judge Kavanaugh Will View Them

### Abortion

Abortion-related issues have come before the Court a number of times in recent years, and will continue to do so. Several years ago, the Court in *Whole Woman’s Health v. Hellerstedt* ruled 5-3 that a Texas law which improved abortion safety standards at abortion clinics and required abortion doctors to have hospital admitting privileges was somehow an unconstitutional violation of the “right” to abortion.<sup>8</sup>

Two cases currently pending at the certiorari stage – *Gee v. Planned Parenthood of Gulf Coast, Inc.*<sup>9</sup> and *Andersen v. Planned Parenthood of Kansas & Mid-Missouri*<sup>10</sup> – deal with whether states have the legal authority to exclude Planned Parenthood as a “qualified provider” under Medicaid. If these cases come before the Supreme Court, it will be important to have a justice like Brett Kavanaugh who is principled and understands the way the Constitution has divided power between the federal government and states, and who is not willing to let Planned Parenthood manipulate the courts to gain special treatment.

Judge Kavanaugh will less likely read old abortion cases inaccurately as the *Hellerstedt* Court did when it relied on *Planned Parenthood v. Casey* to claim that Texas state law imposed an undue burden on women seeking abortions.<sup>11</sup> He will likely allow states much more leeway to regulate abortion given his originalist understanding of the Constitution and principles of federalism.

Judge Kavanaugh’s originalist views will likely preclude him from even treating abortion as a constitutional right at all. In *Garza v. Hargan*, he argued against the arbitrary creation of new abortion rights in dissenting from the en banc majority of the D.C. Circuit, which held that an illegal alien in government custody had a right to an abortion.<sup>12</sup> In this case, which featured an unlawful immigrant minor seeking an abortion with the help of the ACLU, Kavanaugh argued that it was wrong for the court to create a right of abortion for illegal aliens in government custody as this departed from decades of Supreme Court precedent and stretched the relevant jurisprudence too far.<sup>13</sup> He also emphasized the importance of the government’s established interest in protecting the life of an unborn child and not facilitating abortion.<sup>14</sup> Kavanaugh therefore correctly decided this case.

As some have pointed out, Kavanaugh did not join Judge Henderson’s hard-hitting dissent, which drew more of a “line in the sand” on abortion in this case. However, his refusal to join this dissent does not necessarily mean he is not pro-life or that he believes abortion is a constitutional right, for Judge Henderson was arguing a broader issue than that of abortion – that illegal aliens cannot automatically claim to possess the constitutional rights of American citizens.<sup>15</sup> Judge Henderson was focused on the broader question of which constitutional rights unlawful immigrants might hold at all – a question which was not raised by the parties and arguably not necessary to decide at this procedural point in the case. While her dissent clearly explained the limits of constitutional rights in a case like this, it was not deciding an abortion

issue on its face, and judges have different procedural considerations for what should be decided at the different stages of a case like this. Judge Kavanaugh may have theoretically even agreed with what Judge Henderson wrote; he just may have believed it was not the appropriate point in the case to opine on that issue. It is thus unwarranted for pro-life advocates to criticize Judge Kavanaugh's decision to refrain from joining Henderson's dissent on a pro-life basis.

Though it didn't draw as much attention, Judge Kavanaugh's dissent in *Garza* was quite strong itself, reflecting on "the Supreme Court's many precedents holding that the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion." At the same time, he criticized the en banc majority for adopting a "novel" and "wrong" new "right" for "unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand." He also observed the "permissible government purposes" served by "abortion regulations" such as "parental consent laws, parental notice laws, informed consent laws, and waiting periods, among other regulations." Additionally, Judge Kavanaugh critiqued the D.C. Circuit for even accepting the case en banc, arguing it didn't meet the standard for review.<sup>16</sup> Set against his procedural considerations mentioned above, this posture of judicial restraint exhibited by Kavanaugh bodes well for those of us who wish to see the judiciary reign itself in from an activist role which has produced many unconstitutional "rights" like that of abortion in the first place.

Others may look with concern upon Judge Kavanaugh's testimony during this 2006 confirmation hearing for the D.C. Circuit Court of Appeals, in which he pledged to follow *Roe v. Wade* as precedent.<sup>17</sup> This response does not tell us much about how Judge Kavanaugh would rule on the Supreme Court, however, as a circuit court judge has a different role and is required to follow Supreme Court cases in a different manner than a Supreme Court justice. While a member of the Supreme Court is still bound to follow the Constitution, the Court may at times decide that certain cases need to be overruled (lower court judges do not have this power and are bound to follow Supreme Court rulings).

Additionally, if a judge is a faithful originalist, they will interpret the Constitution to not contain a "right" to abortion—regardless of their own personal views. While FRC advocates for pro-life policies, when it comes to constitutional interpretation, we simply want originalists (who will end up issuing pro-life rulings under our Constitution anyway), for it would lack integrity for anyone to ignore the legal requirements of the Constitution in order to advance their preferred policies. The Constitution's legal requirements are contained in the plain meaning of that document's text, and they must be followed wherever they lead. Though they do produce pro-life ends, our focus when examining a nominee must remain on the method of interpretation—originalism. Judge Kavanaugh is an originalist. Despite the lack of clarity in portions of his judicial record, we can take heart in his interpretive method—just like we did for Justice Gorsuch before him.

### Free Speech - Pro-Life Issues

Less than two months ago, in a 5-4 vote, the Court held in *NIFLA v. Becerra* that California's attempt to force pro-life pregnancy care centers to speak pro-abortion messages against their convictions violated the First Amendment's protection against compelled speech.<sup>18</sup> While this was a major victory for pro-life advocates and free speech supporters alike, it should alarm all

freedom-loving Americans that it was a 5-4 vote. The wrong justice could tip this balance against liberty in similar future decisions, and we need an originalist like Judge Kavanaugh on the Court to ensure this does not happen.

*NIFLA* was a major victory for pro-life groups and First Amendment rights, and it has already positively impacted three other similar cases regarding pro-life activism and free speech. A few days after deciding *NIFLA*, the Court instructed lower courts to reconsider their anti-free speech rulings in *Livingwell Medical Clinic, Inc. v. Becerra*,<sup>19</sup> *Mountain Right to Life, Inc. v. Becerra*,<sup>20</sup> and *A Woman's Friend Pregnancy Resource Clinic v. Becerra*<sup>21</sup> in light of the recent opinion in *NIFLA*.

This immediate and positive impact of the pro-free speech ruling in *NIFLA* shows how crucial it is to have Supreme Court justices who respect the text of the Constitution. Yet the fact that they did so in a 5-4 vote does not allow us to rest too easy, and reminds us of the importance of having an originalist like Judge Kavanaugh on the Court.

Other cases, like *Newman v. National Abortion Federation*, a case the Court declined to take up this time around, will likely continue to arise and possibly be heard by the Court. Here, pro-life activists recorded undercover videos at the National Abortion Federation's (NAF) annual meetings.<sup>22</sup> NAF received an injunction barring the activists from publishing the videos on the grounds that the people filming had violated nondisclosure agreements that were enforceable as contracts.<sup>23</sup> The Supreme Court declined to hear the case and overturn this ruling.<sup>24</sup> Cases like this are important for both free speech and pro-life activism, and a jurist like Judge Kavanaugh would help guarantee that future cases in this vein are decided in accordance with constitutional rights.

### Religious Freedom – HHS Mandate

Several years ago, in *Zubik v. Burwell*, the Court faced claims by religious nonprofits that the Religious Freedom Restoration Act (RFRA) entitled them to an exemption from being forced to violate their consciences by participating in the Obama administration's HHS contraceptive mandate. The Court punted the issue and told the government and parties to arrive at a solution themselves, and there has been no permanent resolution to this case.<sup>25</sup>

Although President Trump's HHS issued new regulations governing this matter, they are tied up in Court and not fully controlling these cases yet, and the disputes continue to be sorted out by courts. They concern dozens of organizations involved in multiple lawsuits involving RFRA and First Amendment claims,<sup>26</sup> to say nothing of the for-profit entities affected by the Court's 5-4 ruling in *Burwell v. Hobby Lobby*.<sup>27</sup> Between these sets of cases, there are at least 100 entities involved in the litigation alone,<sup>28</sup> aside from the incalculable number of others affected by the Court's rulings. It is thus important to have justices with a proper understanding of religious freedom statutes and constitutional protections as these issues continue to arise.

On this issue, Judge Kavanaugh has affirmed that RFRA protects the religious claimants. In *Priests for Life v. HHS*, he dissented from the D.C. Circuit's denial of rehearing en banc, arguing that the HHS mandate substantially burdened the organization's exercise of religion, pursuant to *Burwell v. Hobby Lobby*. This is a very important conclusion on an important issue, and shows Judge Kavanaugh to have a right understanding of the religious freedom burdens that RFRA

guards against in this context. While his assertion later in the same case that *Hobby Lobby* “strongly suggests” that the government has a compelling interest in ensuring broad access to contraceptives seems unnecessary, he did conclude that RFRA protected the claimants because the HHS mandate was not the least restrictive means of achieving any such interest.<sup>29</sup>

If Judge Kavanaugh was just trying to faithfully apply *Hobby Lobby* as a lower court judge on the question of “compelling interest” (the most logical explanation), then it seems he simply erred. *Hobby Lobby* never held there was a compelling interest, and Judge Kavanaugh did not have to draw this conclusion to rule as he did in *Priests for Life*. Ultimately, however, this issue does not affect the positive religious freedom outcome that we are most concerned about (and which Kavanaugh reached), and we must remember that “[t]he religious-liberty argument against the HHS contraceptive mandate is *not* an argument against government-sponsored contraception; it is an argument against dragooning objecting religious believers to be agents of the state in that project.”<sup>30</sup>

Additionally, there is some confusion over whether Kavanaugh upheld the constitutionality of the Affordable Care Act (ACA), colloquially known as “Obamacare” – confusion which emanates from Judge Kavanaugh’s dissent in *Seven-Sky v. Holder*.<sup>31</sup> Yet Kavanaugh did not base his dissent on any claim that the ACA was constitutional; rather, he argued that the court did not have the authority to hear the case at all. He rooted his intricate argument in the Anti-Injunction Act, (AIA) which he argued prohibited the case from being brought until the plaintiffs had paid the “tax” in question. Yet Kavanaugh cautioned against disregarding the AIA for convenience’s sake as that would mean that the court had ignored Congress’s intent, writing that the court “cannot override the text of a statute that limits our jurisdiction.”<sup>32</sup> While some don’t like the “roadmap” to saving the ACA which they believe Judge Kavanaugh laid out, he still didn’t actually *uphold* the ACA in his opinion (he actually declined to rule on the issue). More importantly, this demonstrates that Kavanaugh will interpret the law based on its text and plain meaning, and decide cases accordingly, even when this is a difficult and complex task.

### Religious Freedom – LGBT Issues

Only several months ago, the Court ruled in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* in favor of Christian small business owner Jack Phillips, who didn’t want to be forced to create a custom same-sex wedding cake against his conscience. Though Phillips received relief after years of fighting for his religious freedom, the decision was largely limited to the specific facts of the case; the Court ruled for Phillips based on the Commission’s overt hostility to his religious beliefs – which it claimed violated the free exercise protections of the First Amendment.<sup>33</sup> Despite the positive result in this case, judges and commissioners who are more subtle with their biases will likely still find a way to rule against religious liberty, and the brewing conflicts between religious freedom and government-mandated same-sex marriage are by no means resolved. Indeed, the Colorado Civil Rights Commission has recently continued to harass Jack Phillips, and his case may yet again wind its way through the courts.<sup>34</sup>

Right now, there are multiple other small business owners who have been penalized by different states for refusing to use their talents to further same-sex weddings.<sup>35</sup> Just days after issuing the ruling in *Masterpiece*, the Court overturned a lower court decision against florist

Barronelle Stutzman in *Ingersoll v. Arlene's Flowers*, instructing the lower court to reconsider the case in light of *Masterpiece*.<sup>36</sup> Like Phillips, Stutzman had declined to create floral arrangements for a same-sex wedding, despite happily serving these customers anything else. The Washington Attorney General had sued her for discrimination, and the Washington Supreme Court ultimately decided that she must pay burdensome penalties.<sup>37</sup> Thankfully, the Supreme Court reversed this decision.

This is another step in the right direction for religious freedom, but the battle is far from over, and other cases like this could soon be before the Supreme Court. The case of *Klein v. Oregon Bureau of Labor and Industries*, featuring bakers Aaron and Melissa Klein – more Christian small business owners who were sued after they refused to use their culinary talents to create a cake for a same-sex wedding – is currently before the Oregon Supreme Court, and could reach the U.S. Supreme Court in the next year or two.<sup>38</sup>

Other cases deal with the religious freedom of small business owners on the issue of faith and sexuality more broadly. Earlier this year, in *EEOC v. R.G. & G.R. Harris Funeral Homes*, the Sixth Circuit Court of Appeals rejected the RFRA claim of a funeral home owner who wanted to run his business in accordance with his faith and not accede to the “gender identity” discrimination claim of an employee who desired to remain an employee while living out his transgendered lifestyle.<sup>39</sup> In *Fulton v. City of Philadelphia*, a district judge recently rejected a Christian adoption provider’s religious freedom claim, holding that it must abide by a city nondiscrimination policy even if that means violating its faith tenets and placing children in homes other than those with one mom and one dad.<sup>40</sup> These cases and others like them may come before the Supreme Court in the coming years.

The First Amendment’s free speech and free exercise protections, along with statutes like RFRA, should guarantee safety for these small business owners, but lower courts who are ignorant or hostile to religious freedom have often ruled against them. It is therefore imperative to appoint someone to the Supreme Court who understands statutory and constitutional protections for religious liberty when the issue arises again. A constitutional originalist and textualist like Kavanaugh will follow the plain meaning of the First Amendment and the text of statutes to ensure that religious freedom is protected in these increasingly anti-religious times.

### Religious Freedom – Religion in the Public Square

Last year, in *Trinity Lutheran Church v. Comer*, the Court ruled that government exclusion of an otherwise-qualified church from a public grant program solely because it was a religious organization violated First Amendment free exercise protections against discrimination against religious organizations in the public square.<sup>41</sup> This is an important ruling for religious freedom and is already benefiting other religious organizations in their cases against this type of arbitrary discrimination. Like *NIFLA*, this ruling demonstrates the immediate consequences of Supreme Court decisions on the role of religion in the public square.

These issues will continue to arise. The case of Coach Joe Kennedy, a high school football coach disciplined for praying by himself after games, is now pending before the Supreme Court.<sup>42</sup> In *Espinoza v. Montana Department of Revenue*, the Montana Department of Revenue refused to follow a state law allowing people to deduct certain donations to scholarship programs from

their taxes because some of the benefits of the program went to religious schools. The case is currently before the Montana Supreme Court.<sup>43</sup> An originalist like Judge Kavanaugh will help ensure that such cases are heard by the Supreme Court and properly decided.

The Court has also dealt with many cases over the years regarding religious monuments in the public square, and will likely continue to do so. The case of *American Legion v. American Humanist Association* is currently pending at the cert stage and the Court may take it up in the upcoming months. In this case, mothers of World War I veterans had a large cross built in memory of their sons, a cross which now sits on public land near a busy intersection in Bladensburg, Maryland. Yet the American Humanist Association is suing to have it either removed or heavily modified because it allegedly represents a government endorsement of Christianity.<sup>44</sup> Even though an original understanding of the Establishment Clause would clearly permit such monuments, the Supreme Court has not always clearly ruled that they are constitutional – because not all recent justices have been originalists. As the Court faces such cases, it becomes even more important to have a staunch originalist like Judge Kavanaugh on the bench.

Even after the Supreme Court upheld the constitutionality of public prayer before local government bodies in *Town of Greece v. Galloway*,<sup>45</sup> that issue has continued to percolate, with appeals courts splitting on the constitutionality of the practice in *Bormuth v. County of Jackson*<sup>46</sup> and *Rowan County v. Lund*<sup>47</sup> – one or both of which may reach the Supreme Court. Regardless, cases challenging public prayer are not going away, and it will be important to have a justice who understands how to properly interpret the Establishment Clause. (Hint: it doesn't prohibit such practices!)

Thankfully, Judge Kavanaugh has a positive record on issues of religion in the public square more broadly. In *Newdow v. Roberts*,<sup>48</sup> atheists had argued that “so help me God” in the presidential oath violated the Establishment Clause. The D.C. Circuit rejected their argument, and Judge Kavanaugh wrote a concurrence stating that such “longstanding practices do not violate the Establishment Clause as it has been interpreted by the Supreme Court.”<sup>49</sup> More recently, in *Archdiocese of Washington v. WMATA*, the Archdiocese of Washington attempted to purchase advertising space on the Washington Metro during the Christmas season, and the Washington Metropolitan Area Transit Authority refused to sell what it deemed a “religious” message for a religious organization.<sup>50</sup> During oral arguments on this case, Judge Kavanaugh told WMATA’s lawyer that this was “pure discrimination” and an “odious” First Amendment violation,<sup>51</sup> showing a keen awareness of potential violations of free speech and free expression with a religious basis.

During his time in private practice, Judge Kavanaugh chaired the Religious Liberty Practice Group at the Federalist Society, and worked *pro bono* to write amicus briefs in support of religious expression in schools.<sup>52</sup> He wrote briefs in *Good News Club v. Milford Central School*,<sup>53</sup> and *Santa Fe Independent School District v. Doe*,<sup>54</sup> in which he argued that a public school must allow religious student clubs to use its facilities in a similar manner as other clubs, and that student-led prayer at football events did not violate the establishment clause, respectively.<sup>55</sup> He helped set up a voucher program supporting religious schools in Florida,<sup>56</sup> and also represented the Adat Shalom Jewish group in their legal battle against a Maryland county that was trying to stop construction of a synagogue.<sup>57</sup> Given that Judge Kavanaugh has ruled and approached

these issues as he did, we can be confident he will properly apply the law to protect religious freedom in this area.

### Sexual Orientation – Statutory Interpretation

As activist groups have not been able to pass laws against “sexual orientation discrimination” in Congress and other legislatures, they have resorted to the courts to advance their agenda just as they did on the issue of same-sex marriage. Such cases have been percolating through the lower courts, and are now reaching the Supreme Court. In *Altitude Express v. Zarda*,<sup>58</sup> and *Bostock v. Clayton County*,<sup>59</sup> the issue is whether alleged discrimination against someone based on their “sexual orientation” qualifies as “sex discrimination” under Title VII of the Civil Rights Act of 1964. Deciding that this qualifies as “sex discrimination” would require the Court to change the meaning of the word “sex” as plainly reflected in the text and history of the Civil Rights Act. Through such legal machinations, perpetuated by activists and activist judges, courts give themselves wide latitude to interpret laws in unreasonable ways, altering the balance of power our Constitution was designed to sustain. A textualist like Judge Kavanaugh will adhere to the plain meaning of the text in such cases, and help prevent the misuse of laws and courts by activists.

### Transgender Issues – Executive Branch Authority to Regulate the Military

In *Doe 1 v. Trump*, a federal judge held that a transgender member of the military was likely to succeed on an equal protection claim against President Trump’s order that most transgender individuals leave the military.<sup>60</sup> On appeal of this case, the D.C. Circuit refused to allow an administrative stay on the lower court’s decision.<sup>61</sup> These cases demonstrate the power imbalance that results when judges take it upon themselves to issue politically-motivated rulings and make policy, especially in areas where they should be least able to do so (the Constitution leaves broad power to the executive branch on matters concerning the military), and when they again read new “rights” into the Constitution.

An originalist like Judge Kavanaugh will not allow this sort of judicial activism, or this distortion of the Constitution’s separation of powers. For these reasons, it will be important to have someone with his judicial philosophy on the bench if this case or others like it go before the Court.

### **III. The Many Supreme Court Cases Decided By One Vote Show the Importance of Having a Justice with an Originalist Philosophy**

The cases below confronted wide-ranging issues, some of which are beyond FRC’s core issues, but their close 5-4 votes (and the 4-4 decisions from the time period after Justice Scalia’s death) remind us of the importance of having someone on the Court who adheres to an originalist interpretation of the Constitution. Judge Kavanaugh holds such a philosophy, and will decide such cases according to that philosophy.

#### 4-4 Cases:

- *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016): A 4-4 decision left in place a lower court ruling holding that requiring non-union members to pay shop fees did not violate the First Amendment.
- *United States v. Texas*, 579 U.S. \_\_\_ (2016): A 4-4 decision left in place a lower court ruling which had put the Obama administration's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) immigration program on hold because the challengers to the program would likely succeed on their claims that it was unlawful.

#### 5-4 Cases:

- *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018): A 5-4 majority upheld free speech and free expression for pro-life pregnancy care centers to not be forced to proclaim messages against their beliefs.
- *Trump v. Hawaii*, 138 S. Ct. 2392 (2018): A 5-4 majority held that the president has the authority under the Immigration and Nationality Act to regulate immigration as it pertains to national security, and that this does not violate the Establishment Clause.
- *Janus v. AFSCME*, 138 S. Ct. 2448 (2018): A 5-4 majority held that public employees could not be forced to subsidize unions which they didn't want to join, as it was a First Amendment compelled speech violation to force them to support groups proclaiming messages and engaging in activities they objected to.
- *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016): A 4-3 majority upheld a public university admissions program which considered race as a factor in admissions as lawful under the Equal Protection Clause (Justice Scalia had passed away and Justice Kagan recused herself).
- *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015): A 5-4 majority imposed same-sex marriage on the nation over the objections of an overwhelming majority of states whose citizens had voted for man-woman marriage in state referenda.
- *NFIB v. Sebelius*, 132 S. Ct. 2566 (2014): A 5-4 majority upheld the Obamacare individual mandate forcing everyone to purchase a government-approved health insurance plan as a constitutional exercise of Congress's taxing power.
- *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014): A 5-4 majority protected the freedom of government bodies to choose to have a time of prayer before public meetings as long as it permitted expressions from all faiths equally.
- *United States v. Windsor*, 133 S. Ct. 2675 (2013): A 5-4 majority ruled that Congress could not define "marriage" in federal laws to mean man-woman marriage.
- *District of Columbia v. Heller*, 554 U.S. 570 (2010): A 5-4 majority ruled that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia.
- *Citizens United v. FEC*, 558 U.S. 310 (2010): A 5-4 majority restored the First Amendment protection of political speech, allowing non-profit corporations and others to come together with their donors and supporters to educate the American people.
- *Gonzales v. Carhart*, 550 U.S. 124 (2007): A 5-4 majority upheld a federal law restricting the use of the horrific partial-birth abortion technique.

- *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002): A 5-4 majority held that parents could use public funds (in the form of vouchers distributed to needy families) to choose to send their children to religiously affiliated schools.
- *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000): A 5-4 majority ruled that the First Amendment's freedom of association protects the Boy Scouts from being forced to admit scout leaders who identify as homosexual under state laws barring discrimination on the basis of sexual orientation.
- *Rosenberger v. UVA*, 515 U.S. 819 (1995): A 5-4 majority upheld the right of religious student groups to receive university funding on an equal basis with other student groups.
- *Lee v. Weisman*, 505 U.S. 577 (1992): A 5-4 majority ruled that schools cannot sponsor a member of the clergy to conduct even non-denominational prayers at a graduation.
- *Rust v. Sullivan*, 500 U.S. 173 (1991): A 5-4 majority upheld Reagan administration regulations providing that federal tax dollars could go to family planning but not to abortion counseling, referral, or advocacy.

#### IV. For the Above Reasons and More, Judge Kavanaugh Should Be Confirmed

As outlined above, the ideal candidate to replace Justice Kennedy is a committed originalist and textualist who interprets the Constitution and statutory law for what it says rather than what he or she may wish it said, and who understands the limited role of the judiciary. Judge Kavanaugh is such a candidate, and his record reveals someone who will faithfully interpret the Constitution and the law as it is written.

As shown above, Judge Kavanaugh has a solid history of applying and advocating originalist principles on issues important to social conservatives. His trail of opinions and dissents demonstrates his commitment to faithfully apply the Constitution and statutes as written, and to oppose judicial activism. Judge Kavanaugh is on record with his constitutional views; he has written law review articles advocating for judicial restraint and adherence to the Constitution as necessary for protecting liberty.<sup>62</sup> Similarly, Judge Kavanaugh has called Justice William Rehnquist a "hero," noting his support for the constitutionality of religious schools being able to participate in the public square, his criticism of the "wall of separation" metaphor as "based on bad history," and his adherence to a limited judiciary and support for leaving social policy to the states instead of injecting it into constitutional "rights."<sup>63</sup>

Even outside of issues important to social conservatives, Judge Kavanaugh will ensure our laws are followed to protect the people they are supposed to protect. In *Heller v. D.C.*, the D.C. Circuit upheld Washington, D.C.'s prohibition of most semi-automatic rifles and its requirement that all firearms must be registered. Judge Kavanaugh dissented from the majority and argued that this stringent ban was unconstitutional under the 2008 ruling in *District of Columbia v. Heller*. This further demonstrates his commitment to applying the Constitution as it is written and following precedent.<sup>64</sup>

Concerning the broader issues of how the Constitution allocates power, discussed in the opening section of this analysis, Judge Kavanaugh has an exceptionally solid record:

- He has curbed the excesses of regulatory bodies and held them to accountability. In his dissent in *Grocery Manufacturers Association v. EPA*,<sup>65</sup> Judge Kavanaugh articulated a strong defense of curbing bureaucratic lawlessness and run-away executive agency power.
- He is an exceptional critic of unconstitutional administrative power, and can be trusted to rein it in on the Supreme Court. In both a majority opinion<sup>66</sup> and subsequent dissent<sup>67</sup> in *PHH Corporation v. CFPB*, Judge Kavanaugh wrote about how the constitutional separation of powers is necessary to protect liberty, and warned against the potential dangers of administrative agencies that flout these safeguards. In both opinions, he wrote that “[t]he independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government... Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.”<sup>68</sup>
- At the same time, Judge Kavanaugh will faithfully and constitutionally protect the president’s power where the Constitution ascribes power to the executive branch. In *Free Enterprise Fund v. PCAOB*,<sup>69</sup> he strongly defended the power of the executive branch in the face of the Public Company Accounting Oversight Board created by the Sarbanes-Oxley Act of 2002.

Perhaps best summing up what this nomination battle is all about, one liberal author recently wrote: “‘Interpreting the Constitution as it’s written’ means that substantive due process, the doctrine underneath *Roe*, *Obergefell* – and even *Griswold v. Connecticut*, which forbids the government from banning contraception – is illegitimate. That means all those cases are on the chopping block.”<sup>70</sup> Representing a mind-set opposed to originalism, this liberal admission shows that judicial activists and their supporters don’t want to follow the law as it is written, but want to mold it to their own policy preferences. Meanwhile, originalists don’t want to mold the Constitution, but simply desire to follow it where it leads them (they will follow the constitutional amendment process if they want to change the Constitution). All who wish for our country to continue to follow the Constitution in this regard have reason to support Brett Kavanaugh’s nomination to be our next Supreme Court justice.

Indeed, much of why current judicial nomination battles are so contentious is that activist Supreme Court justices and other federal judges have taken issues out of the hands of the people by ruling on a myriad of constitutional “rights” over the years. Every time a state constitutional amendment is struck down because one more federal judge claims it violates some constitutional “right,” the voters become more powerless in their own country, and increasingly disenfranchised. If power is returned to the people through Supreme Court rulings based on the Constitution’s plain meaning in accord with its limited role for the judiciary – to which Judge Kavanaugh adheres – we will not only return to a proper, originalist application of our Constitution, but we may even succeed in reducing the contentious nature of the nominations process itself over the long-term. Judge Kavanaugh’s confirmation is one step in this direction.

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