

ACCESS TO JUSTICE AND VOTING RIGHTS

REVIEW OF DISABILITY-RELATED CASES INVOLVING JUDGE BRETT KAVANAUGH

The Bazelon Center for Mental Health Law strongly opposes the nomination of Judge Brett Kavanaugh to serve on the U.S. Supreme Court. The appointment of Judge Kavanaugh would threaten hard-won rights and protections for people with disabilities. Judge Kavanaugh’s record demonstrates his great skepticism of the Affordable Care Act, his hostility to civil rights—including the rights of people with disabilities—and his narrow view of the authority of executive branch agencies to interpret and enforce the law. His confirmation could add a fifth vote for such regressive views. A summary of his record is provided below.

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Judge Kavanaugh’s record on other fundamental rights, including the right to pursue claims in court, also raises concerns about his willingness to ensure justice for all Americans. For example, he authored a strongly worded dissent in *Cohen v. U.S.*,¹ a challenge to a refund mechanism established by the Internal Revenue Service brought by a putative class of taxpayers. Judge Kavanaugh charged the plaintiffs with seeking a “class-wide jackpot” by filing a class-action lawsuit requesting “billions of dollars in additional refunds to millions of as-yet-unnamed individuals.”² He also contended that the court should have barred the plaintiffs from bringing their challenge as a class until after they had filed claims under the refund mechanism to which they objected.³ The class action is an indispensable tool that enables people with disabilities and others with limited means to pursue justice as a group, rather than being forced to litigate separately at great cost and effort. As the majority opinion in *Cohen* observed, “it would be cold comfort to direct Appellants to proceed in a series of individual suits, submitting themselves one by one to the very refund procedures that they claim to be unlawful.”⁴ Judge Kavanaugh’s alarm in this case at the basic functions of the class action reveals a troubling hostility to this important legal mechanism.⁵

¹ 650 F.3d 717 (D.C. Cir. 2011).

² *Id.* at 737 (Kavanaugh, J., dissenting).

³ *Id.* at 738.

⁴ 650 F.3d at 733.

⁵ It should be noted, however, that in one case, Judge Kavanaugh joined an opinion affirming the certification of a class of Medicaid recipients with disabilities who were segregated and isolated in violation of the ADA. *In re D.C.*, 792 F.3d 96 (D.C. Cir. 2015).

Judge Kavanaugh's dissent in a housing discrimination case, *Redman v. Graham*,⁶ again demonstrates the barriers he would impose for individuals seeking access to courts. In this case, a tenant alleged that the law firm that had represented her former landlord in eviction proceedings had engaged in disability discrimination and retaliation. The majority vacated the dismissal of this claim and allowed her the opportunity to clarify her legal theory and present evidence in support of her claim.⁷ Judge Kavanaugh would have prevented her from proceeding based on his strict and formalistic reading of the Fair Housing Act and the corresponding District of Columbia law, writing dismissively that neither law authorized a claim against an attorney.⁸

Judge Kavanaugh's record also reveals a permissive attitude toward state's efforts to restrict voting rights. In *South Carolina v. U.S.*,⁹ Judge Kavanaugh upheld a South Carolina voter identification law that the Department of Justice (DOJ) had previously blocked under the Voting Rights Act. DOJ observed that 8.9% of the state's registered voters, or 239,333 people, did not possess DMV-issued identification that would satisfy the South Carolina law, and that non-white registered voters were more likely to lack such identification.¹⁰ While DOJ did not discuss the impact of the law on voters with disabilities, these voters may also face particular financial or practical challenges in obtaining the required identification. A conservative majority on the Supreme Court has subsequently voted to roll back the protections of the Voting Rights Act, opening the door for states to impose even more burdensome voting restrictions that will disproportionately affect voters with disabilities. Judge Kavanaugh's decision in *South Carolina* indicates that he will not stand in their way.

⁶ 2006 U.S. App. LEXIS 28147 (D.C. Cir. 2006).

⁷ *Id.* at **6-7.

⁸ *Id.* at **8-9 (Kavanaugh, J., dissenting).

⁹ 898 F. Supp. 2d 30 (D.D.C. 2012).

¹⁰ Letter from Thomas E. Perez, Assistant Att. General, U.S. Department of Justice, Civil Rights Division, 2 (Dec. 23, 2011), <https://action.naacp.org/page/-/DOJ%20SC%20memo.pdf>.