PACIFIC JUSTICE INSTITUTE

Brett Kavanaugh (age 53)

- Brett Kavanaugh graduated from Yale Law School in 1990. He first worked as a law clerk for Third and Ninth Circuit judges before his one-year fellowship with Solicitor General of the U.S. Ken Starr. Kavanaugh played a lead role in drafting the Starr report to impeach Bill Clinton.
- Kavanaugh clerked for Justice Kennedy. He later became a partner at the law firm of Kirkland & Ellis. Kavanaugh served for two years as Senior Associate Counsel and Associate Counsel to President George W. Bush in 2001. He served as Assistant to the President and Staff Secretary in 2003. President Bush nominated Kavanaugh to the D.C. Circuit in July 2003.

Judge Kavanaugh has had several occasions to rule on cases affecting free speech and religion. These decisions provide a preview of how he might rule in similar cases in the future.

Religious Objections to Contraceptive Mandate

- In *Priests for Life v. HHS*, 772 F.3d 229 (2015), Kavanaugh dissented from denial of rehearing en banc in a Religious Freedom Restoration Act challenge to the process for accommodating religious objections to the ACA's contraceptive mandate, which permitted religious nonprofits to self-certify their eligibility for an exemption from the birth-control benefit by notifying either their insurance company or the federal government of their faith-based objection to contraceptive coverage. The panel decision had upheld the accommodation, stating that a court is not required "simply to accept whatever beliefs a RFRA plaintiff avows—even erroneous beliefs about what a challenged regulation actually requires." Unlike other dissenters, who maintained that there is no compelling government interest in facilitating access to contraception, Kavanaugh disagreed.

Government-funded Abortion for Immigrant

- Kavanaugh dissented when the full D.C. Circuit Court of Appeals required the U.S. government to allow an abortion for a 17-year-old immigrant who was being held in a shelter because she is in the country illegally. *Garza v. Hargan*, 874 F.3d 735 (2017). Kavanaugh wrote, "The Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion," calling the majority's approach "a radical extension of the Supreme Court's abortion jurisprudence."

Pro-Life Protestors

- In *Mahoney v. Doe*, 642 F.3d 1112, (2011), in a concurrence to a ruling rejecting a First Amendment challenge to a law prohibiting defacement of public property enforced against a pro-life activist who wanted to chalk a message on the street outside the White House, Kavanaugh stated: "I add these few words simply because I do not want the fog of First Amendment doctrine to make this case seem harder than it is. No one has a First Amendment right to deface government property. No one has a First Amendment right, for example, to spray-paint the Washington Monument or smash the windows of a police car."

Inauguration Prayer

- In *Newdow v. Roberts*, 603 F.3d 1002 (2010), he concurred in a judgment against atheist plaintiffs who objected to prayer at the presidential inauguration. The other judges on the panel had held that the plaintiffs lacked standing to sue; Kavanaugh would have rejected their claims on the merits "because those longstanding practices do not violate the Establishment Clause as it has been interpreted by the Supreme Court."

Roe v. Wade Comments

- In a transcript of an interview with American Enterprise Institute from 2017, Kavanaugh contrasted the Supreme Court's rejection of a right to assisted suicide in *Washington v. Glucksberg* with its prior decision in *Roe v. Wade*.[1] "Even a first-year law student could tell you that the *Glucksberg*'s approach to unenumerated rights was not consistent with the approach of the abortion cases such as *Roe vs. Wade,*" Kavanaugh explained. While Rehnquist ultimately "was not successful in convincing a majority of the justices" to overrule *Roe* entirely, Kavanaugh said that Rehnquist "was successful in stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition" — by which Kavanaugh meant decisions such as *Roe*. "The *Glucksberg* case," Kavanaugh concluded, "stands to this day as an important precedent, limiting the Court's role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy." To Kavanaugh, in other words, *Roe*'s sin was that it inserted the Court into "the realm of social policy" and it exceeded the Court's role as a "court of law."
  Though *Roe* has not yet been overruled — largely due to Justice Anthony Kennedy's hesitancy to explicitly overrule a landmark precedent—Kavanaugh praised *Glucksberg* for ensuring that there would be no more *Roe*-like decisions in the future.

Prayer at Football Games

- In *Santa Fe Independent School District v. Doe*, Kavanaugh wrote an amicus brief in favor of a Texas high school's policy allowing student-led and student-initiated prayers at

[1] American Enterprise Institute, "FROM THE BENCH: JUDGE BRETT KAVANAUGH ON THE CONSTITUTIONAL STATESMANSHIP OF CHIEF JUSTICE WILLIAM REHNQUIST," September 18, 2017, https://www.aei.org/wp-content/uploads/2017/08/from-the-bench.pdf.

school football games. The amicus brief, on behalf of Congressmen Steve Largent and J.C. Watts, argued that the policy passed constitutional muster — an argument the Supreme Court ultimately rejected. In a 6-3 ruling, the court declared the school policy allowing prayer unconstitutional under the First Amendment's Establishment Clause.

Second Amendment

- In *Heller v. District of Columbia*, 670 F.3d 1244 (2011), a challenge to a city law, enacted after an earlier law regulating handguns was invalidated by the Supreme Court, that banned possession of semi-automatic rifles and required registration of all guns, Kavanaugh dissented from the panel opinion that applied intermediate scrutiny to largely uphold the statute. In Kavanaugh's words, the Supreme Court left "little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." He wrote, "Semi-automatic rifles, like semi-automatic handguns, have not traditionally been banned and are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses." Citing his upbringing and working life in the area, Kavanaugh said he was "acutely aware" of the area's gun, drug and gang violence. "But our task is to apply the Constitution and the precedents of the Supreme Court, regardless of whether the result is one we agree with as a matter of first principles or policy," he wrote.

Public Funding of Religious Schools

- Kavanaugh has suggested he may be open to widening the flow of public funding to religious schools. In a 2017 essay for the American Enterprise Institute, he cheered the late Chief Justice William Rehnquist's efforts to reverse prior Supreme Court attempts at "erecting a strict wall of separation between church and state" — especially when it comes to schools.[2]

Religious Exemption for Prisoners

- Kavanaugh joined a majority opinion in *Kaemmerling v. Lappin*, 553 F.3d 669 (2008), ruling against a prisoner who claimed that a federal law requiring him to provide a DNA sample violated his free exercise of religion. The reasoning in the decision was too broad and enabled too large an encroachment on religious liberty in the future.

Expressive Conduct in a National Park

- In *Boardley v. United States DOI*, 615 F.3d 508 (2010), Kavanaugh ruled on a three-judge panel in favor of Michael Boardley, who argued the licensing scheme (that it is unlawful to engage in expressive activities within any of this country's 391 national parks unless a park official first issues a permit authorizing the activity) is overbroad and therefore unconstitutional on its face. Kavanaugh agreed, saying the regulations in their current

[2] Brett Kavanaugh, "From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist," American Enterprise Institute, December 12, 2017, http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.

form are antithetical to the core First Amendment principle that restrictions on free speech in a public forum may be valid only if narrowly tailored. Because these regulations penalize a substantial amount of speech that does not impinge on the government's interests, the Third Circuit found them overbroad and reversed the district court decision. The regulations were content-neutral, as they applied regardless of a speaker's message. But the parks' designated free speech areas were public forums and were not areas where the government had a paramount interest in maintaining peace and tranquility. Requiring licenses for small groups and individuals did not substantially further the interest in preventing overcrowding, protecting facilities and visitors, and avoiding interference with park activities. It was not explained why they were more likely to be problematic. Even if it arguably eliminated some evils that allegedly threatened the government's interests, it significantly restricted a substantial quantity of speech that did not impede permissible goals. Requiring permits for individuals infringed on their ability to engage in anonymous speech. The regulations were overbroad and not narrowly tailored. Alternatives were available, such as prohibiting and punishing harassing conduct or conduct that created other hazards. There was no lawful alternative to a permit for expressive conduct in the parks. Severance had not been requested and no basis for doing so was found. The regulations failed in their entirety.

Christmas Ads

- *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth*. He called the D.C. Metro's ban on religious advertising, including Christmas ads, "pure discrimination" and "odious" to the First Amendment. The Washington Post called his questioning "unrelenting."