

**STATEMENT OF THE AMERICAN ASSOCIATION FOR ACCESS, EQUITY AND DIVERSITY**

**ON THE NOMINATION OF JUDGE BRETT M. KAVANAUGH TO THE**

**UNITED STATES SUPREME COURT**

July 12, 2018

The Honorable Charles Grassley The Honorable Dianne Feinstein

Chairman Ranking Member

Senate Committee on the Judiciary Senate Committee on the Judiciary

224 Dirksen Senate Office Building 152 Dirksen Senate Office BuildingWashington, DC 20510 Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On July 9, 2018, The President of the United States announced his intent to nominate Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit to fill the Supreme Court vacancy created by Justice Anthony Kennedy’s retirement. In view of the implications of this nomination for the future of our democracy and the rights of racial and ethnic minorities, women, individuals with disabilities, members of the LGBTQ+ community and others who have historically suffered discrimination and inequality in this nation, the American Association for Access, Equity and Diversity (AAAED), must respectfully urge the Senate to give its most critical and searching review of this nomination.

Founded in 1974 as the American Association for Affirmative Action (AAAA), AAAED is a national not-for-profit association of professionals working in the areas of equal opportunity, compliance and diversity. The longest-serving organization of individuals in the equal opportunity and diversity professions, AAAED has 44 years of leadership providing quality professional development services to practitioners and promoting understanding and advocacy of affirmative action and other equal opportunity laws.

AAAED is reviewing the judicial record of Judge Kavanaugh and will not express its support or opposition at this time. However, given its purposes and in light of the seriousness of our concerns regarding the future of equal opportunity programs at a time when the nation is becoming increasingly diverse, we offer herewith some questions that we respectfully ask you to pose to the nominee as you consider his fitness to serve on the Court.

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1. Does Judge Kavanaugh believe the following cases related to equal opportunity and diversity in education were correctly decided. If not, why not?
   1. *Brown v. Board of Education of Topeka, 1347 US 483 (1954).* In *Brown v. Board of Education*, the Court held that “separate but equal” educational facilities for racial minorities is inherently unequal, violating the Equal Protection Clause of the Fourteenth Amendment.
   2. *Regents of the University of California v. Bakke, 1438 US 265 (1978).* In *Bakke,* four of the justices contended that any racial quota system supported by the government violated the Civil Rights Act of 1964. Justice Lewis F. Powell, Jr., agreed, casting the deciding vote ordering the medical school to admit Bakke. However, in his opinion, Powell argued that the rigid use of racial quotas as employed at the school violated the Equal Protection Clause of the Fourteenth Amendment. The remaining four justices held that the use of race in admissions decisions in higher education was constitutionally permissible. Powell joined that opinion as well, contending that the use of race was permissible as one of several admissions criteria.
   3. *Grutter v. Bollinger, 539 U.S. 306 (2003).* In *Grutter,* a 5-4 opinion delivered by Justice Sandra Day O'Connor, the Court held that the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body*.*
   4. *Fisher v. University of Texas at Austin, 539 U.S.\_\_ (2016).* In *Fisher,* the University of Texas’ use of race as a consideration in the admissions process did not violate the Equal Protection Clause of the Fourteenth Amendment. Justice Anthony M. Kennedy delivered the opinion for the 4-3 majority. The Court held that the University of Texas’ use of race as a factor in the holistic review used to fill the spots remaining after the Texas Top Ten Percent Plan was applied was narrowly tailored to serve a compelling state interest.
   5. *Parents Involved in Community Schools v. Seattle School District No. 1 et al, l551 US 701 (2007).* By a 5-4 vote, the Court applied "strict scrutiny" and ruled that the District's racial tiebreaker plan was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. In a separate opinion concurring in the judgment, Justice Kennedy agreed that the District's use of race was unconstitutional but stressed that public schools may sometimes consider race to ensure equal educational opportunity.
2. Does Judge Kavanaugh believe the following equal employment opportunity and marriage equality cases were correctly decided? If not, why not?
   1. *Griggs v. Duke Power Company, 401 US 424 (1971)*. In *Griggs v. Duke Power Co*., the Supreme Court decided that where an employer uses a neutral policy or rule, or utilizes a neutral test, and this policy or test disproportionately affects minorities or women in an adverse manner, the employer must justify the rule or test by proving it is justified by business necessity.
   2. *Johnson v. Transportation Agency, Santa Clara County, 480 US 616 (1987)*. In *Johnson,* the Court affirmed the promotion procedures of the Agency. Justice Brennan argued that it was not unreasonable to consider sex as one factor among many in making promotion decisions, and that the Agency's actions did not create an absolute barrier to the advancement of men.
   3. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 US 193 (1979). The United Steelworkers of America and the Kaiser Aluminum and Chemical Corporation implemented an affirmative action-based training program to increase the number of the company's black skilled craft workers. Half of the eligible positions in the training program were reserved for blacks. Weber, who was white, was passed over for the program. Weber claimed that he was the victim of reverse discrimination. The Court held that the training program was legitimate because the 1964 Act "did not intend to prohibit the private sector from taking effective steps" to implement the goals of Title VII”. Since the program sought to eliminate archaic patterns of racial segregation and hierarchy while not prohibiting white employees from advancing in the company, it was consistent with the intent of the law.
   4. *Obergefell v. Hodges, 576 US \_ (2015)*. In this case the Court held that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry one of the fundamental liberties it protects, and that analysis applies to same-sex couples in the same manner as it does to opposite-sex couples.
3. In the interest of this Committee and the public at large, please ask Judge Kavanaugh to elaborate on the basis for his dissent in the following two cases:
   1. *Agri Processor Co. v. N.L.R.B*., 514 F.3d 1 (D.C. Cir. 2008). In this case, Judge Kavanaugh dissented from the ruling of the majority that ordered a company to bargain with a union, reasoning that the employees were ineligible to vote as undocumented immigrants. The majority opinion harshly criticized Kavanaugh’s “misreading” of both the plain-language of the National Labor Relations Act (NLRA) and Supreme Court precedent in *Sure-Tan, Inc. v. N.L.R.B*., 467 U.S. 883 (1984) (holding that undocumented immigrants are covered by the NLRA).
   2. *Miller v. Clinton*, 687 F.3d 1332 (D.C. Cir. 2012). In Miller, the majority of the court held that the Department of State could not terminate an employee simply on the basis of his age (65). The majority of the D.C. Circuit noted: “the necessary consequence of the Department’s position is that it is also free from any statutory bar against terminating an employee like Miller solely on account of his disability or race or religion or sex . . .” Judge Kavanaugh dissented.
4. AAAED would also like to ascertain if Judge Kavanaugh agreed with the recent Department of Education and Justice rescission of the previous administration’s guidance on voluntary affirmative action in higher education admissions.[[1]](#footnote-1) Are there any circumstances in which race may be taken into account in deciding who is admitted to a competitive college or university?
5. It was reported that after serving as counsel of record in a 1999 case brought by the Center for Equal Opportunity (CEO), a group that openly opposes affirmative action[[2]](#footnote-2), Judge Kavanaugh was asked about his brief and the implications for affirmative action. He reportedly responded, “The Supreme Court has decided many cases on affirmative action programs and, if confirmed, I would faithfully follow those precedents.”[[3]](#footnote-3) Does Judge Kavanaugh continue to maintain this position?

The American Association for Access, Equity and Diversity (AAAED) thanks you for your kind consideration of our request. On the 150th Anniversary of the ratification of the Fourteenth Amendment, which codified the principles of equal protection and due process of law into our Constitution, the stakes could not be higher -- for our members and for the people of this great nation. We would be pleased to answer any questions you may have concerning our request.

Respectfully,

Richard Anthony Baker,

Richard Anthony Baker, M.P.A., J.D., Ph.D.

President, AAAED

Shirley J. Wilcher

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Executive Director, AAAED

1. Attorney General Jeff Sessions Rescinds 24 Guidance Documents, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>, July 3, 2018. [↑](#footnote-ref-1)
2. The Center for Equal Opportunity has, for example, an “Affirmative Action Watch” and urges the public to report on cases that CEO would deem discriminatory. *See, e.g.,* http://www.ceousa.org/affirmative-action/affirmative-action-news/affirmative-action-watch [↑](#footnote-ref-2)
3. Mel Leonor, *Politico*, “A dig through Kavanaugh’s record on education finds plenty of material,” July 10, 2018, https://www.politico.com/newsletters/morning-education/2018/07/10/a-dig-through-kavanaughs-record-on-education-finds-plenty-of-material-274850 [↑](#footnote-ref-3)