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KAVANAUGH HAS AN UNSETTLING RECORD ON DEMOCRACY

Judge Kavanaugh's record raises serious concerns that he would expand the power of big money in politics, weaken voter protections, and insulate the president from the rule of law. Senators must press Kavanaugh and critically examine his track record on these issues.

PRESIDENTIAL POWER

Judge Kavanaugh takes an expansive view of presidential power as it relates to legal oversight over misconduct by the president or the president's associates.

In 2009, Judge Kavanaugh opined in a *Minnesota Law Review* article that presidents should be free from “time-consuming and distracting” lawsuits and investigations, and that the indictment and trial of a sitting president “ill serve[s] the public interest.”¹ He also urged Congress to consider a law exempting the president—while in office—from criminal prosecution and investigation, including questioning by criminal prosecutors or defense counsel.²

These views suggest Kavanaugh would approve congressional efforts to insulate President Trump from the Mueller probe into his 2016 presidential campaign, and block efforts to hold him accountable. A Justice who believes checks on criminal behavior should not apply to the president raises serious rule-of-law concerns.

MONEY IN POLITICS

Kavanaugh's long money-in-politics record shows he is skeptical of reforms to rein in big money, played a key role in the creation of super PACs, and is willing to go to great lengths to get the outcomes he wants.

Judge Kavanaugh has authored six opinions about money in politics³ and joined another five.⁴ There is reason to believe that if confirmed, Kavanaugh would be more aggressive in lifting restrictions on big money than Justice Kennedy, who was no friend



of reform, but at least strongly supportive of disclosure measures. Although Judge Kavanaugh has occasionally upheld campaign finance laws, he has often done so in such a way as to restrict their scope or invite further Supreme Court scrutiny.

Kavanaugh's record reflects some of the most radical deregulatory impulses of the Supreme Court under Chief Justice Roberts. According to Kavanaugh:

- Money is “absolutely” the equivalent of speech;⁵ thus, the contribution and expenditure of money requires the same constitutional protections as other political speech.⁶
- The *only* form of political corruption that justifies campaign finance measures is *quid pro quo* corruption and its appearance (or essentially, bribery).⁷
- SuperPAC and other “independent” spending limits cannot be justified by the interest in preventing corruption; thus, such spending is strictly protected and may not be regulated regardless of the influence it exerts over candidates and elected officials.⁸
- The interest in political equality *cannot* justify campaign finance restrictions, as “restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁹ (Kavanaugh believes this principle is “one of the most important sentences in First Amendment history.”¹⁰)

Kavanaugh has been hostile to reforms to rein in the power of big money in politics.

He paved the way for super PACs, before the Supreme Court signaled in *Citizens United* that “independent” spending received near-absolute constitutional protection.

- In *EMILY's List v. FEC*,¹¹ decided a year before the Supreme Court's decision in *Citizens United*, Kavanaugh struck down FEC rules developed to address an influx of spending by outside organizations in the 2004 elections. The rules regulated the extent to which organizations that engage in both state and federal electioneering must comply with federal contribution limits.¹²
 - Kavanaugh held that the rules violated the First Amendment because they did not serve to prevent corruption—“the sole basis for regulating campaign contributions and expenditures.”¹³
 - He stated that “independent” non-profits are “constitutionally entitled to raise and spend unlimited money in support of candidates for elected office,”¹⁴ because it is “implausible that contributions to independent expenditure political committees are corrupting.”¹⁵
 - He brushed off fears that even massive outside spending could corrupt the political process, opining that if a non-profit that is independent of a candidate's campaign spends its donations on election activities, “those expenditures are not considered corrupting, *even though they may generate gratitude from and influence with officeholders and candidates.*”¹⁶

- After *EMILY's List*, the Supreme Court held in *Citizens United* that limits on “independent” expenditures do not serve to prevent corruption or its appearance.¹⁷ Shortly thereafter, when faced with a challenge to contribution limits as applied to groups engaged only in “independent” spending, the D. C. Circuit believed it was compelled by *Citizens United* to strike them down.¹⁸ Kavanaugh joined the *en banc* D.C. Circuit in *SpeechNow.org v. FEC* to invalidate the limits,¹⁹ giving rise to the phenomenon of Super PACs.
- Nine years since EMILY's List, we have experienced an explosion of outside spending, with wink-and-nod coordination between candidates and outside spenders which on paper are “independent.”²⁰

Judge Kavanaugh's record raises concerns he would vote to strike down disclosure laws, putting him to the right of Justice Kennedy.

- In *Independence Institute v. FEC*,²¹ Judge Kavanaugh went to great lengths to keep a case alive that challenged the federal “electioneering communications” disclosure provisions in the McCain-Feingold Act, although they had already been twice upheld by the Supreme Court.²² The district court had rejected the challenge as “obviously without merit.”²³ Kavanaugh reversed based on a novel theory that would limit disclosure based on a spender's tax-status, a theory subsequently rejected by a three-judge court and the Supreme Court.²⁴ His approach raises serious questions whether he will support political disclosure measures vital to maintaining transparency and accountability in our democracy.

He has also signaled an openness to revisiting the “soft money” contribution restrictions.

- In a 2010 decision, he upheld the party soft money limits of the McCain-Feingold Act, but only because he felt bound as a lower court judge by earlier Supreme Court precedents approving these limits.²⁵ In a 2016 interview, he suggested, without prompting, that the Supreme Court might reconsider these “soft money” limits.²⁶

Kavanaugh's record on money in politics has been marked by judicial activism.

He is willing to overreach to get the outcomes he wants.

- Kavanaugh's sweeping decision in *EMILY's List* turned a case that could have been decided on administrative law grounds into a broad constitutional ruling with profound consequences for our ability to regulate the influence of big money in elections. The plaintiff had not sought such a broad First Amendment holding, but Judge Kavanaugh delivered one.²⁷ In the process, he disregarded controlling precedents, drawing a stinging separate opinion from another conservative judge, who observed the opinion was inconsistent with the time-honored doctrine that courts should rule on constitutional issues only

when they must.²⁸

- In *Independence Institute*, Kavanaugh claimed that although the Supreme Court had repeatedly upheld the disclosure provisions being challenged, it had never considered whether they were constitutional as applied to a section 501(c)(3) charity like the plaintiff. He justified his departure from precedent on grounds that “later cases often distinguish prior cases based on sometimes slight differences.”²⁹ His theory was ultimately repudiated by a three-judge court and later the Supreme Court.³⁰

Even when Judge Kavanaugh has occasionally upheld campaign finance laws, he read the law narrowly or invited the Supreme Court to reconsider it.

- His narrow reading of the Federal Elections Campaign Act in *Bluman v. FEC*—a case upholding the federal ban on campaign contributions and expenditures by “foreign nationals”³¹—would leave the door open for unlimited spending by foreign powers on what Kavanaugh called “issue advocacy.” His interpretation means that the law likely would have covered only a small fraction of the campaign activity attributed to Russian operatives in the 2016 elections.
 - The challenge was brought by individuals residing in the U.S. on temporary visas who wished to donate to certain candidates. One also wanted to distribute flyers expressly advocating for Obama’s re-election.
 - Kavanaugh held that banning contributions and expenditures by foreign nationals did not violate the First Amendment, citing precedent that the government may exclude foreign citizens from activities “intimately related to the process of democratic self-government.”³²
 - But he went out of his way to narrowly interpret the ban, asserting that it applied only as to a “certain form of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to *expressly advocate for or against* the election of a candidate.”³³ This construction leaves room for unlimited foreign spending on electoral advocacy posing as “issue advocacy” – including ads seeking to incite division amongst Americans on the bases of race and religion,³⁴ and that skirt the line of express advocacy with messages like “Hillary is Satan.”³⁵
 - His analysis casts doubt on whether he would approve of efforts, such as the Honest Ads Act,³⁶ to strengthen the foreign national ban and disclosure laws to prevent foreign interference in future elections. Kavanaugh must be pressed about his views on the permissible scope of laws seeking to shield our elections from the influence of foreign powers.
- Kavanaugh followed the Supreme Court’s controlling decision in *McConnell v. FEC* to uphold the party “soft money” limits of the McCain-Feingold Act in *Republican National Committee (RNC) v. FEC*. But he also signaled his reluctance to do so, suggesting the Supreme Court could “clarify or refine this

aspect of *McConnell* as the Court sees fit.”³⁷ The Supreme Court declined to revisit its precedents and reaffirmed the constitutionality of the limits.³⁸

- The RNC had argued that under *Citizens United*, it was entitled to raise and spend unlimited soft-money funds on activities that it claimed did not relate to federal elections, such as redistricting activities, grassroots lobbying efforts, and ads supporting state candidates.
- Kavanaugh said that the RNC’s arguments “carrie[d] considerable logic and force,” but found that as a lower court judge, he lacked the authority to “clarify or refine *McConnell*” or “otherwise get ahead of the Supreme Court.”³⁹ His adherence to precedent likely does not signal his support for the soft money limits on contributions to political parties – which he has elsewhere indicated could be challenged again – but rather, simply a lower court judge’s required deference to binding precedent. As he conceded, the Supreme Court already had “squarely addressed” this issue.⁴⁰

Trump’s nominee must be pressed on money in politics.

- Americans of all parties understand that our campaign finance system needs fundamental changes.⁴¹
 - The current system allows powerful donors to drive elections and public policy. The individuals in this donor class are disproportionately wealthy, white, and male compared to Americans as a whole.⁴²
- A clear majority would like to see a Supreme Court justice who would limit the influence of big money.
 - More than 64 percent of voters said they wanted Trump to pick a nominee who would “limit the amount of money corporations and unions can spend on political campaigns,”⁴³ including 70 percent of Democrats, 60 percent of Independents, and 67 percent of Republicans.
 - In another poll, 63 percent of voters—including 54 percent of Republicans and 60 percent of Conservatives—say it’s “very important”⁴⁴ that he pick someone who is “open to limiting the influence of big money in politics.”⁴⁵
- Trump promised to nominate individuals in the mold of Justice Scalia, an ardent opponent of limits on big money, and vetted⁴⁶ nominees through White House Counsel Don McGahn,⁴⁷ one of the Commissioners most hostile to campaign finance rules in the history of the Federal Election Commission (FEC).
- Trump’s first Supreme Court nominee, Justice Gorsuch, refused to answer questions about his money-in-politics record, but has already proven a vote in favor of big money.⁴⁸

VOTING RIGHTS

Judge Kavanaugh's record suggests that he may jeopardize the freedom to vote and that he is likely to refuse to fairly consider claims of disparate racial impact.

Unfortunately, ours is a long history of excluding people from the democratic process on the bases of race and ethnicity, which continues to play out today through restrictions on the right to vote that disproportionately hurt Black and Latino voters. Voting rights cases require sensitivity to this history, and to the disparate impact of voting laws on people of color. Here Judge Kavanaugh's record also raises concerns.

Judge Kavanaugh has disregarded evidence of discriminatory purpose.

In 2012, Judge Kavanaugh authored a three-judge court opinion approving South Carolina's voter ID law under Section 5 of the Voting Rights Act (the law which, before it was gutted by the Supreme Court, required certain state and local jurisdictions with a history of discriminatory voting practices to obtain approval from the federal government before enacting changes to voting laws).⁴⁹ In the opinion, Kavanaugh rejected the Department of Justice's claims that the law would have a discriminatory impact on voters of color.

- Kavanaugh also rejected that the law had a discriminatory purpose, even though there was strong evidence that it did.⁵⁰ In the record was an email exchange in which a state legislator responded approvingly ("Amen") to an email from a constituent stating that if African Americans were offered money to get Voter IDs, "it would be like a swarm of bees going after a watermelon."⁵¹ While the opinion acknowledges the *constituent's* disparaging remarks demonstrating "Racial insensitivity," it does not properly acknowledge the *lawmaker's* response to the constituent's remarks – and says, "views of one constituent—and one legislator's failure to immediately denounce those views in his responsive email, as he later testified he should have done—do not speak for the two Houses of the South Carolina Legislature, or the South Carolina Governor."⁵²
- Notably, the South Carolina law was only approved after the state made clear that it would broadly interpret a provision in the law (the "reasonable impediment" provision) allowing individuals without the required ID to sign a declaration and vote by provisional ballot. Any such provisional ballot must be counted as long as the declaration is not false, regardless of the reason the voter does not have a photo ID. Nonetheless, Judge Kavanaugh downplayed the individual and cumulative burden on voters forced to sign declarations and cast provisional ballots as a result of the law.⁵³ He also ignored the Department's evidence that this option could "be applied differently from county to county, and possibly from polling place to polling place, and thus risks exacerbating rather than mitigating the retrogressive effect of the new requirements on minority voters."⁵⁴

Judge Kavanaugh's record demonstrates hostility to racial disparate impact claims.

In *Greater New Orleans Fair Housing Action Center v. HUD*,⁵⁵ Kavanaugh joined an opinion dismissing a disparate-treatment claim, which challenged the manner in which grants were calculated for post-Hurricane Katrina property repair. Community housing groups alleged the relief calculation disadvantaged black homeowners by, among other things, tying the grant ceiling to the pre-Katrina home values and leaving black homeowners to shoulder a higher cost deficit.

- The opinion reveals a cavalier attitude about disparate racial impact, stating that “[i]n any state where African-American and white homeowners have significantly different economic profiles, it will presumably be the case that particular elements of a complex formula ... will have a disproportionate negative impact on African-Americans, an impact potentially offset by other elements of the formula.”⁵⁶ As an example, the court noted that African Americans recovered less money from insurance on average, “so that the formula’s deduction of insurance proceeds from the grant appears to favor African-Americans.”⁵⁷ The court even stated that “the \$150,000 cap on total grants would seem to disfavor wealthier (and therefore, according to the [plaintiffs] study, disproportionately white) grant recipients.”⁵⁸
- Beyond dismissing the plaintiffs’ claim, the opinion launched wide-ranging attacks on the ability to prove disparate impact in any case, by attacking various measurements of disparate impact without providing a clear benchmark for future cases. Judge Rogers’ concurrence in the case makes the concerning broad sweep of the opinion clear:

[T]he majority takes a strange turn in disposing of these appeals. . . . [T]he majority meanders into disparate impact theory—without citation to authority—and into benchmark suppositions not briefed by the parties much less argued in the district court, and set up only to be rejected without record evidence on either side of the new constructs while ignoring support for plaintiffs’ evidentiary proffer. . . . Along the way, the majority even speculates that white recipients might have disparate impact claims under a different, size-of-grant benchmark. *One might well wonder what purpose these meanderings have other than to posit hurdles for future disparate impact claims.*⁵⁹

Judge Kavanaugh should be questioned about carefully assessing cumulative burdens on the right to vote, as well as his views on accepting at face value state interests in preventing “voter fraud” without any evidence. He must also be pressed on analyzing discriminatory intent and disparate impact claims, and whether he believes federal civil rights statutes that outlaw practices that have an unjustified disparate impact based on race—including the Voting Rights Act, the Fair Housing Act, and Title VII concerning employment—are constitutional.

¹ Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1461 (2009).

² *Id.*

³ *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.C. Cir. 2011), *Republican Nat'l Committee v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) ("RNC v. FEC"), *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), *Indep. Inst. v. FEC*, 816 F.3d 113 (D.C. Cir. 2016), and *Citizens for Responsibility and Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013).

⁴ *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (en banc), *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), *Citizens for Responsibility and Ethics in Washington v. FEC*, Case No. 5049 (D.C. Cir. 2018), *Holmes v. FEC*, 875 F.3d 1153 (D.C. Cir. 2017) (en banc), and *Pursuing America's Greatness v. FEC*, 831 F.3d 500 (D.C. Cir. 2016).

⁵ American Enterprise Institute, *Judge Brett Kavanaugh—The Court: Power, policy, and self-government*, YouTube 47:26-48:03 (Mar. 31, 2016), <https://www.youtube.com/watch?v=GcTR0OyHiK8>.

⁶ See *Bluman*, 800 F. Supp. 2d at 287 ("Political contributions and expenditures are acts of political expression and association protected by the First Amendment."); see also *EMILY's List*, 581 F.3d at 5 ("Campaign expenditures and contributions constitute 'speech' within the protection of the First Amendment.").

⁷ See *RNC*, 698 F. Supp. 2d at 152 ("Congress may impose some limits on contributions to federal candidates and political parties because of the quid pro quo corruption or appearance of quid pro quo corruption that can be associated with such contributions."); see also *Emily's List*, 581 F.3d at 6 (holding that the only interest the Court has recognized as justifying campaign finance regulation is quid pro quo corruption and the appearance thereof).

⁸ See *RNC*, 698 F. Supp. 2d at 152 ("Congress may not limit non-connected entities—including individuals, unincorporated associations, nonprofit organizations, labor unions, and for-profit corporations—from spending or raising money to support the election or defeat of candidates."); see also *EMILY's List*, 581 F.3d 1, 11 (D.C. Cir. 2009).

⁹ *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

¹⁰ *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 432 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); *EMILY's List*, 581 F.3d at 5.

¹¹ *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

¹² *Id.*

¹³ *Id.* at 11.

¹⁴ *EMILY's List*, 581 F.3d at 6.

¹⁵ *Id.* at 7 (quoting *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008)).

¹⁶ *Id.* at 11 (emphasis added).

¹⁷ See *Citizens United v. FEC*, 558 U.S. 310, 356-57 (2010).

¹⁸ 599 F.3d 686 (D.C. Cir. 2010) (en banc).

¹⁹ See *id.* at 692-93 (citations omitted).

²⁰ See, e.g., Paul Blumenthal, *Your State And Local Elections Are Now A Super PAC Playground*, HUFF. POST (Oct. 31, 2015), https://www.huffingtonpost.com/entry/2015-elections-super-pac_us_5633d165e4b0c66bae5c7bbb; Derek Willis, *The Special Powers of Super PACs, and Not Just for Federal Elections*, N.Y. TIMES (Dec. 8, 2014), <https://www.nytimes.com/2014/12/09/upshot/the-special-powers-of-super-pacs-and-not-just-for-federal-elections.html>; Brent Ferguson, *Candidates & Super PACs: the New Model in 2016*, BRENNAN CENTER FOR JUSTICE (June 12, 2015), brennancenter.org/sites/default/files/analysis/Super_PACs_2016.pdf.

²¹ *Indep. Inst. v. FEC*, 816 F.3d 113 (D.C. Cir. 2016).

²² See, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003); *Citizens United v. FEC*, 558 U.S. 310 (2010).

²³ *Indep. Inst. v. FEC*, 70 F. Supp. 3d 502 (D.D.C. 2014), *reversed and vacated by* 816 F.3d 113 (D.C. Cir. 2016).

²⁴ *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 192 (D.D.C. 2016) (3-judge court holding against challenger), summarily affirmed by *Indep. Inst. v. FEC*, 137 S. Ct. 1204 (2017).

²⁵ *RNC v. FEC*, 698 F. Supp. 2d 150, 160 (D.D.C. 2010).

²⁶ American Enterprise Institute, *supra* note 5, at 45:29 to 47:17 ("I'll say one thing about the campaign finance jurisprudence. There is clearly a structure that has been set up as a result of the jurisprudence that the political parties and candidates can't raise large sums of money, and

outside groups can... Not a surprise, that outside groups therefore have a much more prominent role in our political system today than they did when parties could raise a lot of money . . . That is a reality, I think, and it is a reality directly attributable to the Supreme Court's jurisprudence which has maintained the limit on contributions to parties, but has not allowed limits on contributions to outside entities.").

²⁷ *EMILY's List*, 581 F.3d at 31 (Brown, J., concurring in part) (Explaining: "The court, however, is not content just answering a gratuitous constitutional question. Its holding is broader than even the plaintiff requests. Instead of arguing nonprofits have a constitutional right to pay for ads attacking federal candidates with soft money, EMILY's List more modestly challenges the regulations as the 'functional equivalent of spending limits, prohibiting EMILY's List from supporting state and local candidates in certain ways when its federal funds are exhausted' and claims they are not properly tailored because they 'restrict vast amounts of nonfederal activity.'").

²⁸ *Id.* at 30-31 (Brown, J., concurring in part) (explaining, "Because this case can be decided on statutory grounds, we need not reach the constitutional question, and so should not reach the constitutional question. Our precedent is not wishy-washy[.]")

²⁹ *Indep. Inst. v. FEC*, 816 F.3d 113, 117 (D.C. Cir. 2016).

³⁰ *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 192 (D.D.C. 2016) (3-judge court holding against challenger), *summarily affirmed by Indep. Inst. v. FEC*, 137 S. Ct. 1204 (2017).

³¹ "Foreign national" is a term defined by FECA, and includes foreign principals (which include, e.g., the government of a country outside the U.S. as well as business entities organized under the laws of a country outside the U.S.), as well as individuals residing in the U.S. who do not have Lawful Permanent Resident status. *See* 52 U.S.C. 30121(b).

³² *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.C. Cir. 2011) (citation omitted).

³³ *Id.* at 289-90 (emphasis added).

³⁴ Adam Entous, Craig Timberg, and Elizabeth Dwoskin, *Russian operatives used Facebook ads to exploit America's racial and religious divisions*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/business/technology/russian-operatives-used-facebook-ads-to-exploit-divisions-over-black-political-activism-and-muslims/2017/09/25/4a011242-a21b-11e7-ade1-76d061d56efa_story.html?noredirect=on&utm_term=.4ee2cfd8a32a.

³⁵ *See* Rick Hasen, *On Kavanaugh and Campaign Finance (and Allowing Foreign Interference in Our Elections): Methinks the Bopp Doth Protest Too Much*, Election Law Blog (July 3, 2018, 5:09pm), electionlawblog.org/?p=99897.

³⁶ Honest Ads Act, 115 H.R. 4077 (2017).

³⁷ *RNC v. FEC*, 698 F. Supp. 2d 150, 160 (D.D.C. 2010).

³⁸ *RNC v. FEC*, 698 F. Supp. 2d 150, 160 (D.D.C. 2010), *affirmed*, *RNC v. FEC*, 130 S.Ct. 3544 (2010) (Justices Scali, Kennedy, and Thomas would not probable jurisdiction and set the case for oral argument.).

³⁹ 698 F. Supp. 2d at 160.

⁴⁰ *Id.* at 161 (the Court squarely addressed the soft money limit in *McConnell*); *id.* at 157 ("Citizens United expressly left intact this portion of *McConnell*.")

⁴¹ Nicholas Confessore and Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES, June 2, 2015, <https://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html>

⁴² Adam Lioz, *Stacked Deck: How The Racial Bias In Our Big Money Political System Undermines Our Democracy And Our Economy*, DEMOS (July 23, 2015), <http://www.demos.org/publication/stacked-deck-how-racial-bias-our-big-money-political-system-undermines-our-democracy-a-0>.

⁴³ Sam Stein, *Poll: Voters Want Trump's Supreme Court Pick to Limit Corporate Money in Politics, Not Abortion*, DAILY BEAST (July 3, 2018), <https://www.thedailybeast.com/abortion-more-scotus-watchers-are-concerned-about-campaign-dollar-dollar-dollar-poll>.

⁴⁴ *Voters want President Trump to nominate a justice who will fight big money in politics (Hattaway Communications)*, RETHINK (Jan 12, 2017), <https://rethinkmedia.org/opinion/breaking-poll/voters-want-president-trump-nominate-justice-who-will-fight-big-money-politics?authkey=637f218d632554648ba05c3df80de366e493f09ab643597e4d0cb5ded593c06a>.

⁴⁵ *See The Supreme Court and Money in Politics: Survey Topline Findings*, HATTAWAY COMMUNICATIONS (January 2017). Preview available at

<https://rethinkmedia.org/opinion/breaking-poll/voters-want-president-trump-nominate-justice-who-will-fight-big-money-politics?authkey=637f218d632554648ba05c3df80de366e493f09ab643597e4d0cb5ded593c06a>.

⁴⁶ Joel Achenbach, *How Trump and two lawyers narrowed the field for his Supreme Court choice*, WASH. POST (JULY 8, 2018), https://www.washingtonpost.com/politics/how-trump-narrowed-the-field-for-his-supreme-court-pick/2018/07/08/b9d3b16a-808c-11e8-b660-4d0f9f0351f1_story.html?utm_term=.35ce71178057.

⁴⁷ Arn Pearson, *Don McGahn, Trump White House Counsel, Has Long Courted Controversy*, PRWATCH (Nov. 22, 2016), <https://www.prwatch.org/news/2016/11/13176/don-mcgahn-trump-transition-lawyer-has-long-courted-controversy>.

⁴⁸ Rick Hasen, *Breaking: #SCOTUS Declines Soft Money Case; Thomas and Gorsuch Would Vote to Hear*, ELECTION LAW BLOG (May 22, 2017), <https://electionlawblog.org/?p=92665>.

⁴⁹ *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012).

⁵⁰ *Id.*

⁵¹ See *id.* at 45 (describing the email exchange); see also, e.g., Ryan J. Reilly, *South Carolina Lawmaker Said 'Amen' To Email Comparing Blacks to 'Bees Going After A Watermelon'*, TALKING POINTS MEMO (Aug. 29, 2012), <https://talkingpointsmemo.com/muckraker/south-carolina-lawmaker-said-amen-to-email-comparing-blacks-to-bees-going-after-a-watermelon>.

⁵² *South Carolina v. United States*, 898 F. Supp. 2d at 45.

⁵³ *Id.* at 39-42.

⁵⁴ Letter from Thomas E. Perez, Ass't Attorney General, Civil Rights Division, Dep't of Justice, to C. Havird Jones, Jr., Ass't Deputy Attorney General, South Carolina Office of the Attorney General, No. 2011-2495 (Dec. 23, 2011), available at justice.gov/crt/voting-determination-letter-65.

⁵⁵ 639 F.3d 1078 (D.C. 2011).

⁵⁶ *Id.* at 1086.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1093.