

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.

I. Access to Health Care

Access to health care is crucial to ensuring that people with disabilities are able to live, work, and succeed in their communities. Troublingly, in a series of public appearances, Judge Kavanaugh has repeatedly expressed skepticism of the Affordable Care Act (ACA), criticism of Chief Justice Roberts’ reasoning in upholding the ACA, and concerns about its “unprecedented” nature.¹ These comments indicate that Judge Kavanaugh would embrace the various challenges to the ACA that continue to make their way through the courts.

Judge Kavanaugh’s judicial opinions support this view. He has written dissenting opinions in three ACA cases, advocating positions that, if accepted, would undermine crucial elements of the ACA and hinder its implementation. First, in *Seven-Sky v. Holder*,² the panel majority upheld

¹ *The Joseph Story Distinguished Lecture*, The Heritage Foundation (Oct. 25, 2017), <https://www.heritage.org/josephstory2017>, at 34-37 min. (criticizing Chief Justice Roberts’ use of the constitutional avoidance canon in upholding the ACA in *NFIB v. Sebelius*); *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, American Enterprise Institute (Sept. 18, 2017), <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>, at 15 (lauding former Chief Justice Rehnquist for “putting the brakes on the Commerce Clause” and commenting positively on the fact that a five-judge majority on the Supreme Court ruled against the ACA under the Commerce Clause); *The Administrative State After the Health Care Cases*, The Federalist Society (Nov. 17, 2012), 55:30-57:25 and 1:01:20-1:02:55, <https://www.youtube.com/watch?v=zRImAlbJOt8>, at 55-59 min. (calling the ACA “unprecedented” and an “erosion of federalism” and speaking approvingly about Chief Justice Roberts’ ruling against the ACA on Commerce Clause grounds).

² 661 F.3d 1 (D.C. Cir. 2011), *abrogated by* Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

the constitutionality of the ACA's individual mandate. Judge Kavanaugh dissented, arguing that the court lacked jurisdiction to decide the issue.³ But Judge Kavanaugh also revealed his distaste for the ACA, describing it as “unprecedented on the federal level in American history” and writing that this fact “counsels the Judiciary to exercise great caution” in finding it constitutional.⁴ He also made the concerning statement that the president could decide not to enforce the ACA's individual mandate if the president concluded that it was unconstitutional, even if the courts had already ruled that it was constitutional.⁵

Second, Judge Kavanaugh dissented in another case challenging the constitutionality of the ACA, *Sissel v. U.S. Department of Health and Human Services*.⁶ The majority denied a petition for rehearing en banc, leaving in place a decision upholding the ACA. Judge Kavanaugh argued for a rehearing because the case raised the “serious constitutional question” of whether the ACA violated the Origination Clause of the Constitution, which requires that bills to raise revenue originate in the House of Representatives.⁷ Judge Kavanaugh agreed, on different grounds than the majority, that there was no Origination Clause violation, but his extremely broad view of this Clause as applicable to any legislation that “raises revenue for general governmental purposes”⁸ places important laws in jeopardy. Several judges joining the majority wrote separately to explain why Judge Kavanaugh's dissent was wrong, noting that it “forecloses the approach that the Supreme Court has used for more than a century and that we applied in this case.”⁹

Finally, in *Priests for Life v. U.S. Department of Health & Human Services*,¹⁰ Judge Kavanaugh argued to rehear en banc a decision against an employer's religious liberty challenge to the ACA's contraception coverage mandate. The majority held that the religious accommodation regulation, which exempted religious organizations from the mandate if they submitted a form to either their insurer or the Secretary of Health and Human Services, distinguished this case from the Supreme Court's holding in *Hobby Lobby*. Judge Kavanaugh disagreed, arguing that even submitting the form substantially burdened the employer's religious freedom.¹¹ His arguments also have implications for people with disabilities—particularly those served by religiously affiliated providers.

³ *Id.* at 22 (Kavanaugh, J., dissenting).

⁴ *Id.* at 51.

⁵ *Id.* at 50.

⁶ 799 F.3d 1035 (D.C. Cir. 2015).

⁷ *Id.* at 1049 (Kavanaugh, J., dissenting).

⁸ *Id.* at 1060.

⁹ *Id.* at 1042 (Rogers, Pillard, and Wilkins, J.J., concurring).

¹⁰ 808 F.3d 1 (D.C. Cir. 2015).

¹¹ *Id.* at 21 (Kavanaugh, J., dissenting). In 2016, the Supreme Court vacated the D.C. Circuit opinion and other decisions to allow the parties to resolve the matter and to “arrive at an approach going forward.” *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

Based on Judge Kavanaugh’s repeated and open willingness to undermine fundamental protections of the ACA, including the individual mandate, his confirmation to the Supreme Court likely endangers other important elements of the Act as well, such as requiring insurers to offer coverage to people with pre-existing conditions.

II. Self-Determination

Like all people, the decisions of people with disabilities, including their choices about the medical care they receive, should be respected to the maximum extent possible. Despite this basic principle, people with disabilities, and particularly people with intellectual and developmental disabilities, have experienced a long and shameful history of forced sterilization and other state-sanctioned intrusions into their physical autonomy.

Judge Kavanaugh demonstrated a disturbing lack of regard for the rights of individuals with disabilities in *Doe ex rel. Tarlow v. D.C.*,¹² a challenge brought by a class of people with intellectual disabilities who lived in District of Columbia facilities and were subjected to elective surgeries based on the consent of District officials. The plaintiffs alleged that the District provided consent for elective surgeries (including unwanted abortions) on class members without attempting to ascertain their wishes, in violation of the Constitution and the District’s own law; further, the plaintiffs alleged that District officials had signed off on *every* proposed elective surgery for class members for the past 30 years, indicating an unlawful rubber-stamp approach. The district court ruled in favor of the plaintiffs, noting that an individual who was legally incompetent to make medical decisions may nevertheless be capable of expressing a choice or preference regarding medical treatment and those wishes should be given weight under D.C. law, which requires that the District base medical decisions on the wishes of individuals who lack the capacity to make medical decisions unless those wishes cannot be ascertained.¹³ The district court permanently enjoined the District from consenting to elective surgeries before attempting to ascertain the known wishes of the patient.¹⁴

On appeal, Judge Kavanaugh vacated the injunction and directed judgment in favor of the District, writing that “accepting the wishes of patients who lack (and have always lacked) the mental capacity to make medical decisions does not make logical sense and would cause erroneous medical decisions—with harmful or even deadly consequences to intellectually disabled persons.”¹⁵ In addition, Judge Kavanaugh held that no substantive due process claims were implicated because “plaintiffs have not shown that consideration of the wishes of a never-competent patient is ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the

¹² 489 F.3d 376 (D.C. Cir. 2007).

¹³ *Does v. D.C.*, 374 F. Supp. 2d 107, 115 (D.D.C. 2005). Indeed, a District official had acknowledged in her testimony that at least one of the named plaintiffs was capable of making her wishes known. Brief of Appellees, 2006 WL 3532947, at *7.

¹⁴ *Does I through III v. D.C.*, 232 F.R.D. 18, 34 (D.D.C. 2005), *rev'd in part, vacated in part sub nom. Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376 (D.C. Cir. 2007).

¹⁵ *Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376, 382 (D.C. Cir. 2007).

concept of ordered liberty.”¹⁶ This language raises serious concerns about Judge Kavanaugh’s views on the rights and abilities of people with disabilities to determine the course of their own lives.¹⁷ It is also inconsistent with the approach required by numerous states and used in many court decisions, which requires some consideration of the individual’s wishes even if the individual is not legally competent to make the decision.

III. Employment Discrimination

In employment discrimination cases, Judge Kavanaugh has consistently demonstrated undue deference to employers and a particularly narrow understanding of antidiscrimination protections.

Judge Kavanaugh dissented from the majority opinion in *Miller v. Clinton*,¹⁸ which held that the Age Discrimination in Employment Act (ADEA) barred the State Department from imposing a mandatory retirement age for workers abroad and terminating an employee solely because he turned 65. Observing that the State Department’s reasoning would extend beyond the ADEA to other statutes, including the ADA, the majority wrote: “We simply do not believe [Congress] would have authorized the State Department to ignore statutory proscriptions against discrimination on the basis of age, disability, race, religion, or sex through the use of ambiguous language.”¹⁹ Indeed, the majority noted that “Congress has made clear that it regards those protections as extremely important,” and that a contrary holding would exempt a class of U.S. citizens “from the protections of the entire edifice of its antidiscrimination canon.”²⁰

In his dissent, Judge Kavanaugh dismissed these concerns, accusing the majority of “raising the specter of rampant race, sex, and religious discrimination by the U.S. State Department against U.S. citizens employed abroad.”²¹ Notably, although Judge Kavanaugh posited that the Constitution would still bar the State Department from discriminating against workers abroad

¹⁶ *Id.* at 383. Notably, the case proceeded following Judge Kavanaugh’s remand, and the District Court ultimately found that the District’s consent for the unwanted abortions on two of the women was unconstitutional and constituted batteries. *Doe v. D.C.*, 206 F. Supp. 3d 583 (D.D.C. 2016).

¹⁷ Judge Kavanaugh expressed similar views in *Garza v. Hargan*, in which he dissented from an en banc decision that allowed an undocumented minor in government custody to access abortion care. Even though the minor had already obtained a judicial bypass order confirming that she was capable of deciding to have an abortion, Judge Kavanaugh believed that she should wait to make this “major life decision” until she was placed with a sponsor and “in a better place when deciding whether to have an abortion.” *Garza v. Hargan*, 874 F.3d 735, 755 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *cert. granted, judgment vacated sub nom. Azar v. Garza*, 138 S. Ct. 1790 (2018). Like his opinion in *Doe*, Judge Kavanaugh’s dissent in *Garza* demonstrates a troubling disregard for an individual’s right to medical and physical autonomy.

¹⁸ 687 F.3d 1332 (D.C. Cir. 2012).

¹⁹ *Id.* at 1337.

²⁰ *Id.* at 1338.

²¹ *Id.* at 1357 (Kavanaugh, J., dissenting).

“on the basis of race, sex, or religion” even if antidiscrimination laws did not apply,²² he offered no such comfort to workers with disabilities (and the Supreme Court has applied less searching constitutional scrutiny of policies treating people with disabilities differently). Judge Kavanaugh’s eagerness to read this broad exemption into the nation’s antidiscrimination laws is deeply troubling.

In employment discrimination cases, Judge Kavanaugh has routinely disregarded the experiences of people with disabilities in order to side with employers. For example, in *Stewart v. St. Elizabeths Hospital*,²³ he ruled for the employer, a psychiatric hospital, because he found insufficient evidence that the employer had notice of the worker’s disability—despite her allegation that her supervisors knew she had been hired under a “patient hire” program at the hospital that provided jobs to hospital residents with disabilities.²⁴

Judge Kavanaugh again demonstrated great reluctance to scrutinize an employer’s actions in *Adeyemi v. District of Columbia*,²⁵ in which he ruled against the plaintiff, a Deaf job applicant who was turned down for an information technology position in the D.C. public school system. Judge Kavanaugh set out a high bar for job applicants alleging discrimination in the hiring process, writing that, in order to put his or her case to a jury, an applicant must provide evidence that he or she was “*significantly* better qualified for the job than those ultimately chosen.”²⁶ To allow judicial scrutiny in a case where the “comparative qualifications” between the applicants “are close,” he wrote, would turn the court into “a super-personnel department that reexamines an entity’s business decisions.”²⁷

Similarly, in *Baloch v. Kempthorne*,²⁸ Judge Kavanaugh rejected a worker’s disability discrimination and retaliation claims, unpersuaded by the worker’s allegations that, after he filed an administrative complaint, his supervisor imposed onerous sick leave restrictions requiring him to submit a physician certification each time he requested leave; gave him low performance reviews and a formal reprimand; and directed “profanity-laden yelling” at the worker on four separate occasions. Rather than considering these experiences as adverse actions that could support the worker’s retaliation claim, Judge Kavanaugh viewed them as examples of the employer’s ability to decide “[g]ood institutional administration.”²⁹

²² *Id.* at 1359.

²³ 589 F.3d 1305 (D.C. Cir. 2010).

²⁴ Appellant’s Brief, 2009 WL 3126602.

²⁵ 525 F.3d 1222 (D.C. Cir. 2008).

²⁶ *Id.* at 1227 (emphasis added).

²⁷ *Id.* (quoting *Jackson v. Gonzales*, 496 F.3d 703, 707 (D.C. Cir. 2007)).

²⁸ 550 F.3d 1191 (D.C. Cir. 2013).

²⁹ *Id.* at 1200.

Most recently, in *Johnson v. Interstate Management Company*,³⁰ Judge Kavanaugh again ruled for the employer, holding that the worker had not shown sufficient evidence that his employer terminated him as retaliation after he filed disability discrimination complaints. In reaching his conclusion, Judge Kavanaugh deferred to the employer's testimony alleging "repeated performance failings" by the worker;³¹ he discounted or ignored significant evidence presented by the worker, including the absence of a single complaint in the worker's nearly 15 years with the company until a new executive chef came on board, and fact questions around the performance complaints relied on by the employer.³² Indeed, another judge on the panel specifically noted in her concurring opinion that she disagreed with Judge Kavanaugh's analysis of the record on the retaliation issue.³³

IV. Equal Educational Opportunities

Judge Kavanaugh has long been a proponent of voucher programs, previously serving as co-chairman of the Federalist Society's "School Choice Practice Group."³⁴ As an attorney, he defended a Florida school voucher program called the Opportunity Scholarship Program, which provided state funding for some students to enroll in private schools. In 2006, the Florida Supreme Court declared that the Opportunity Scholarship Program violated the state constitution's guarantee of "a uniform, efficient, safe, secure, and high quality system of free public schools."³⁵ Students with disabilities who participate in school voucher programs are typically forced to waive their rights under the Individuals with Disabilities Education Act (IDEA), including the right to receive a free and appropriate education (FAPE). The Supreme Court's 2017 decision in *Endrew F. v. Douglas County School District*, in which the Court held that the IDEA requires schools to provide "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances,"³⁶ underscored the importance of these rights for students with disabilities. Judge Kavanaugh's advocacy on behalf of school voucher programs raises concerns about his understanding of the importance of the IDEA's protections for students with disabilities.

³⁰ 849 F.3d 1093 (D.C. Cir. 2017). Judge Kavanaugh also rejected the worker's claim that he was fired in retaliation for filing a workplace safety complaint with the Occupational Safety and Health Administration, holding that the Occupational Safety and Health Act did not provide workers a private cause of action. *Id.* at 1098.

³¹ *Id.* at 1099.

³² Opening Brief of Appointed Amicus Curiae in Support of the Appellant, 2016 WL 389495, at **5-6 and *12.

³³ 849 F.3d at 1101 (Millett, J., concurring).

³⁴ *Confirmation Hearing on the Nomination of Brett M. Kavanaugh to Be Circuit Judge for the District of Columbia Circuit Before the Committee on the Judiciary*, 108th Cong. 72-73 (2004).

³⁵ *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

³⁶ 137 S. Ct. 988, 1001 (2017).

Judge Kavanaugh's decision in *Hester v. D.C.*³⁷ further confirms that he lacks an appreciation for the IDEA's high standards for educating children with disabilities. In this case, he overturned a district court order requiring the District of Columbia to provide compensatory education to a student with a disability who had been incarcerated in a Maryland facility. The student and the District had entered into a settlement agreement in which the District agreed to provide the student with educational services during his incarceration. However, the Maryland facility denied access to the District's education provider. The facility indicated that it would itself provide the student with educational services, but testimony at the trial indicated that he received minimal educational benefit while at the facility: his testing scores declined; he did not receive transition services; there were significant reductions in the number of hours of both special and general education he received; and he spent a significant amount of time in segregation, during which he received no general education and only two hours per week of special education.³⁸ The district court held the District to its obligations under the settlement agreement and required the District to provide appropriate compensatory education.³⁹ Judge Kavanaugh reversed, writing that as a matter of contract law, the District was relieved from its obligations because the Maryland facility had made it impracticable for the District's provider to enter the facility.⁴⁰ Judge Kavanaugh's commitment to the high standards required under the IDEA is less than clear, given his approach to this case.

V. Access to Justice and Voting Rights

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.*,⁴¹ 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."⁴² 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.⁴³ 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."⁴⁴ Judge Kavanaugh's alarm

³⁷ 505 F.3d 1283 (D.C. Cir. 2007)

³⁸ *Hester v. D.C.*, 433 F. Supp. 2d 71, 80 (D.D.C. 2006), *rev'd and remanded*, 505 F.3d 1283 (D.C. Cir. 2007).

³⁹ *Id.* at 81.

⁴⁰ 505 F.3d at 1286.

⁴¹ 650 F.3d 717 (D.C. Cir. 2011).

⁴² *Id.* at 737 (Kavanaugh, J., dissenting).

⁴³ *Id.* at 738.

⁴⁴ 650 F.3d at 733.

in this case at the basic functions of the class action reveals a troubling hostility to this important legal mechanism.⁴⁵

Judge Kavanaugh's dissent in a housing discrimination case, *Redman v. Graham*,⁴⁶ 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.⁴⁷ 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.⁴⁸

Judge Kavanaugh's record also reveals a permissive attitude toward state's efforts to restrict voting rights. In *South Carolina v. U.S.*,⁴⁹ 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.⁵⁰ 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.

VI. Agency Authority

Administrative agencies, such as the Departments of Justice, Education, and Health and Human Services, play a large role in enforcing civil rights protections and managing federal healthcare and benefits programs that are crucial to many people with disabilities. Judge Kavanaugh's writings and opinions demonstrate that he shares Justice Gorsuch's antipathy for agencies' role in interpreting and implementing laws, including limiting their ability to make decisions regarding the laws they are expressly charged with implementing. For example, he has called for

⁴⁵ 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).

⁴⁶ 2006 U.S. App. LEXIS 28147 (D.C. Cir. 2006).

⁴⁷ *Id.* at **6-7.

⁴⁸ *Id.* at **8-9 (Kavanaugh, J., dissenting).

⁴⁹ 898 F. Supp. 2d 30 (D.D.C. 2012).

⁵⁰ 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>.

judges to limit the application of *Chevron* deference⁵¹—the long-accepted canon under which courts defer to an agency’s reasonable interpretation of the statutes they are responsible for implementing—calling it “an atextual invention by courts” and “a judicially orchestrated shift of power from Congress to the Executive Branch.”⁵² Judge Kavanaugh has also suggested that some agencies should be reduced or eliminated, citing “extraordinary duplication, overlap, and confusion among the missions of different agencies”⁵³ and writing that the existence of independent agencies is not “wise” and “has clear costs in terms of democratic accountability.”⁵⁴

Judge Kavanaugh has also imposed these beliefs in the cases before him as a judge. For example, in *EME Homer City Generation, L.P. v. E.P.A.*,⁵⁵ Judge Kavanaugh attempted to strike down an Environmental Protection Agency (EPA) rule intended to address air pollutants that cross state lines. Judge Kavanaugh vacated the rule in its entirety, writing that the EPA had exceeded its statutory authority. The Supreme Court voted 6-2 to overturn Judge Kavanaugh’s decision, holding that the plain text of the Clean Air Act supported the EPA’s rule.⁵⁶ The Court observed that Judge Kavanaugh’s decision wrote “an unwritten exception” into the text and violated the precept that the task of a reviewing court “is to apply the text [of the statute], not to improve upon it.”⁵⁷

In another troubling case, *PHH Corporation v. Consumer Finance Protection Bureau*,⁵⁸ Judge Kavanaugh found that the Consumer Financial Protection Bureau (CFPB) was unconstitutionally structured and struck down the relevant provision of the Dodd-Frank Act. Judge Kavanaugh evinced outright hostility to independent agencies—a group that includes not only the CFPB but also other agencies such as the National Labor Relations Board, the Equal Employment Opportunity Commission, and the Social Security Administration—writing that they “pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.”⁵⁹ The full Circuit Court reheard the case en banc and upheld the constitutionality of the agency, overturning Judge Kavanaugh’s decision.⁶⁰

⁵¹ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 128 Harvard L.J. 2118, 2154 (2016), <http://cdn.harvardlawreview.org/wp-content/uploads/2016/06/2118-2163-Online.pdf>.

⁵² *Id.* at 2150.

⁵³ Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L.R. 1454, 1469-70 (2009), http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf.

⁵⁴ *Id.* at 1472.

⁵⁵ 696 F.3d 7 (D.C. Cir. 2012), *rev'd and remanded*, 134 S. Ct. 1584 (2014).

⁵⁶ *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

⁵⁷ *Id.* at 1600.

⁵⁸ 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

⁵⁹ *Id.* at 5-6.

⁶⁰ 881 F.3d 75.