September 4, 2018

The Honorable Chuck Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
226 Dirksen Senate Office Building  
Washington, DC 20510  

The Honorable Diane Feinstein  
Ranking Member  
Committee on the Judiciary  
United States Senate  
425 Hart Senate Office Building  
Washington, DC 20510  

Re: Opposition to the Confirmation of Judge Brett Kavanaugh to the Supreme Court of the United States

Dear Chairman Grassley and Ranking Member Feinstein:

The American Association for Justice (AAJ), the world’s largest trial bar, writes to express its opposition to the confirmation of Brett Kavanaugh to the Supreme Court of the United States. AAJ attorneys represent consumers, workers, and patients seeking justice and accountability under the law. Because Judge Kavanagh has dedicated the majority of his professional life to restricting access to the courts for individuals and has instead sided with corporate defendants time and time again, AAJ cannot support his nomination to the highest court in the land. The Senate should reject his nomination.

The Supreme Court is the ultimate interpreter of all laws in the United States and as a result, it is of the utmost importance that any Supreme Court Justice be fair and even handed in the application of those laws. Judge Kavanagh’s rulings reveal a concerning trend of favoring the priorities of corporations over the rights of individuals. Moreover, his decisions indicate a willingness to give greater weight to arguments put forward by corporate interests and the executive branch, while giving far less deference to arguments put forward by consumers and workers. Especially at a time when the rights of individuals to access the courts are under excessive attack, AAJ believes that all nominees to the Supreme Court should hold equal the rights of individuals to those of corporations.
Indeed, the courts were always envisioned by the framers to be a place accessible by all, even when seeking to enforce rights against those with vastly more resources and power. The Seventh Amendment of the United States Constitution states: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” But if Judge Kavanaugh’s perspective and interpretations of the law become the basis for future Supreme Court rulings, it is likely that only corporations’ unfettered access to the courts will be preserved.

It is not only Judge Kavanaugh’s deference to corporations that is well documented, but so too is his long history of favoring expansive federal preemption of state law, including state tort law. The doctrine of federal preemption has long been used by powerful corporate interests to avoid complying with state and local laws that are often more protective of workers, consumers, and patients. Rather than protecting the rights of states to create and utilize their own common law, corporations often seek to immunize themselves from accountability through expanding the application of federal preemption. However, when state law is preempted, individuals are left without any way to access justice. While working for the Bush Administration, Judge Kavanaugh was heavily involved in a long-running strategy to wipe out state consumer protection laws via federal preemption.

Further, Judge Kavanaugh supported cutting off the ability of victims to hold corporate defendants fully accountable by limiting victims’ rights to seek non-economic and punitive damages. Non-economic damages provide recovery for individuals who suffer a severe loss beyond lost wages and direct medical expenses. Punitive damages are meant to punish a corporation for the worst types of conduct and to discourage the same behavior from occurring in the future. Judge Kavanaugh indicated his disregard for the importance of these types of damages and the important role judges and juries play in determining the appropriate amount of recovery.¹

Judge Kavanaugh also proposed limiting attorneys’ fees in cases so that individuals would be financially disincentivized from pursuing claims against powerful actors. After 9/11, Judge Kavanaugh proposed prohibiting punitive damages, limiting attorneys’ fees, and heightening the liability standard. He stated: “One could rely, for example, on the private insurance system with government backup coverage and essentially preclude lawsuits for injuries arising out of terrorism incidents. Another somewhat less drastic approach is to manage the liability process in such a way that it does not spiral out of control; that can be done by consolidating cases, eliminating punitive and perhaps non-economic damage limiting attorneys' fees, establishing a federal cause of action with a heightened liability standard.”²

¹ See Brett Kavanaugh email to Philip Perry, No Subject, August 5, 2002, where Kavanaugh suggested the phrase “reasonable federal limits on non-economic and punitive damages” to Anne Campbell, White House speechwriter. Also see Brett Kavanaugh email to Courtney Elwood, Subject: “edits/comments welcome!” March 13, 2002, which attached a speech Kavanaugh drafted for then White House Counsel Alberto Gonzales that was to be given before the American Tort Reform Association (“ATRA”). An extract of the speech stated: “The existing tort regime is often characterized by excessive payouts, lottery-style awards, and an inequitable division of the spoils among claimants and counsel... Escalating lawsuit abuse imposes enormous and varied costs on our economy.”

² Brett Kavanaugh email to Kristen Silverberg, Subject: “terrorism insurance,” October 2, 2001.
Judge Kavanagh’s history exemplifies a disturbing disregard for the interests and arguments of individuals and a clear preference for the positions of powerful, corporate entities. Workers, consumers, and patients already face a steep, uphill battle to enforce their rights under the law; the American public deserves a Supreme Court nominee who will respect the rights of individuals as much as the rights of corporations. Since so much of Judge Kavanaugh’s public record is being withheld from the American people, these examples here represent just a fraction of the totality of his anti-consumer and anti-worker activism. We strongly urge opposition to Judge Kavanaugh’s nomination to the Supreme Court of the United States.

Sincerely,

Elise Sanguinetti
President
American Association for Justice