



Americans United Opposes the Nomination of Brett Kavanaugh

The separation of church and state is the linchpin of religious freedom, but President Trump has shown little respect for this fundamental American value. We cannot afford to have a Supreme Court that does the same. Religious freedom for all Americans could hang in the balance.

Americans United opposes the nomination of Brett Kavanaugh to be the next justice on the U.S. Supreme Court because his record as an attorney and as a judge on the U.S. Court of Appeals for the D.C. Circuit indicates that he will not uphold the separation of church and state. Religious freedom for all Americans could hang in the balance.

Judge Kavanaugh has demonstrated he would likely be hostile to the constitutional protection ensuring separation of church and state by:

- Granting religious exemptions even when they cause harm to others;
- Permitting public school-sponsored prayer;
- Allowing taxpayer dollars to fund religious activities; and
- Failing to represent the interests of all Americans, including the nonreligious and those of minority religions.

Judge Kavanaugh has demonstrated that he would likely allow religious freedom laws to be used to harm others.

In [*Priests for Life v. U.S. Department of Health and Human Services*](#), a nonprofit organization challenged a religious accommodation created for religiously affiliated nonprofit organizations that allowed them to simply fill out a form to opt out of the Affordable Care Act's requirement that most health insurance plans cover contraception. Once the form was submitted, the nonprofit wouldn't have to pay for or provide the insurance coverage in any way; instead the government would work with the insurance company to make sure the employees received the coverage without any additional cost to them. Priests for Life argued that the mere act of submitting the one-page form to obtain the accommodation violated its religious freedom.

In his dissenting opinion, Judge Kavanaugh sided with the nonprofit and would have permitted it to use religion to obstruct women's access to birth control. His dissent is at odds with the opinions of [eight of the nine federal appeals courts](#) that heard challenges to the accommodation and upheld it as a valid way to exempt religiously affiliated organizations from the ACA's policy while still ensuring that women have access to vital healthcare.

This opinion indicates that Kavanaugh might grant religious exemptions to businesses and nonprofit organizations even where the exemption could cause real harm to other people. It's likely that in the next few years, the Supreme Court will be asked to decide a number of cases addressing this very issue. For example,

the Court could hear cases involving businesses that seek religious exemptions that would allow them to [fire a transgender employee](#) or refuse to sell goods to LGBTQ customers. Likewise, Kavanaugh could side with the Trump Administration in cases challenging religious exemptions that will put people's access to basic healthcare at risk and undermine access to government-funded social services for women, LGBTQ people, and religious minorities. He may let religious freedom be used as a sword to harm others.

Judge Kavanaugh has demonstrated that he could reject five decades of Supreme Court rulings that bar public schools from sponsoring prayer.

As an attorney, Kavanaugh wrote an [amicus brief](#) in *Santa Fe Independent School District v. Doe*, defending a public school that broadcasted student-delivered prayers at its football games. Not only did Kavanaugh argue that the school-sponsored prayers were constitutional, he contended that the Constitution *requires* public schools in some circumstances to allow students to deliver prayers to a captive audience of other students at public school events.

Notably, Justice Kennedy joined the 6-3 opinion in *Santa Fe* that rejected Kavanaugh's arguments. The Court explained that public schools may not sponsor prayer, even if delivered by students. But if Kavanaugh is confirmed as Justice Kennedy's replacement, the balance of the Court could shift, and it could usher in more public school-sponsored prayer and religious activities. As a result, public-school students who don't belong to the majority faith will feel excluded and relegated to be outsiders.

Judge Kavanaugh's record indicates he may not protect the interests of all Americans, including those of minority religions and the non-religious.

In his *Santa Fe* brief, Kavanaugh implied that practices "deeply rooted in our history and tradition" should be permitted even if they "favor or promote religion over non-religion." Religious freedom, however, requires that the government treat *all* religions equally, including belief systems that are non-theistic. Religious freedom is for all, not just some. It is critical that the Supreme Court represents everyone and treats everyone fairly, regardless of their faith or their being a nonbeliever.

Judge Kavanaugh has argued against long-standing precedent prohibiting the use of public funds for religious activities.

In amicus briefs in both *Santa Fe* and [Good News Club v. Milford Central School](#), Kavanaugh indicated that he opposes the constitutional bar on using taxpayer dollars to pay for religious activities in circumstances where the funds are available to religious and non-religious applicants. (In one brief, he went so far as to claim, wrongly, that this prohibition on spending public funds on religion had been overruled.) And in a September 2017 [speech](#), Kavanaugh continued to advocate for the notion that religious institutions should be equally entitled to public funds that are available to nonreligious institutions.

In the wake of the 2017 decision, *Trinity Lutheran Church of Columbia v. Comer*, the Supreme Court likely could be asked to decide a number of cases addressing this very issue. In *Trinity Lutheran*, the Supreme Court ruled that the state of Missouri could not exclude a church from a taxpayer-funded grant program that pays to resurface playgrounds. The decision was explicitly limited to the facts of the case and applies only to playground resurfacing, but some concurring justices would have broadly extended the decision.

Since the ruling, the case has been used to argue that the government should provide funding to rebuild houses of worship; that state constitutional provisions prohibiting private school vouchers should be nullified; and that the government must be required to give grants to foster-care providers that discriminate against Jewish, Catholic, and LGBTQ families. If the Court were to adopt Kavanaugh's views on public funding of religion, that would upend the bedrock constitutional principle that we each get to decide for ourselves whether and how our money goes to support religion.

Kavanaugh has generally expressed hostility toward the separation of church and state.

In a 2017 [lecture](#) given to the American Enterprise Institute, Kavanaugh praised former Chief Justice William Rehnquist for “persuasively criticiz[ing]” the use of the metaphor of “a strict wall of separation between church and state” to explain the meaning of the Establishment Clause. Kavanaugh approvingly noted that Rehnquist said the phrase was “based on bad history” and “useless as a guide to judging.” Kavanaugh believes that “the wall metaphor was wrong as a matter of law and history.”