



September 10, 2018

Senator Chuck Grassley  
Chairman  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Senator Dianne Feinstein  
Ranking Member  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

Americans United writes to express our opposition to the nomination of Judge Brett Kavanaugh to be the next Supreme Court justice. Judge Kavanaugh's record indicates that he is hostile to the principle of the separation of church and state and could upend decades of settled law in this area. The rejection of this fundamental American value would have a profound impact on our nation, undermining religious freedom for all and particularly harming those of minority faiths and the nonreligious, women, and LGBTQ people.

The wall of separation between church and state is the linchpin of religious freedom. Judge Kavanaugh, however, has made clear that he believes the "wall of separation" metaphor, long used to explain the protections guaranteed to us by the First Amendment to the U.S. Constitution, "was wrong as a matter of law and history."<sup>1</sup> This view, if adopted by the Court, could cause real harm to real people. Below are just three examples of what is at stake.

First, the separation of church and state is what ensures that students of all religions and beliefs can attend public schools without fear of being evangelized by teachers or forced to pray according to someone else's faith tradition. But Judge Kavanaugh's record indicates he may reject five decades of Supreme Court cases that uphold the constitutional bar on public school-sponsored prayer and religious activities. In an amicus brief he submitted to the Supreme Court, for example, he argued in support of school-sponsored prayers at football games.<sup>2</sup> His brief asserted that public schools can—and sometimes must—sponsor prayers, even though they make students and their families who follow a faith that is different from a majority of their community or are nonreligious feel like outsiders in their own school.

Second, the separation of church and state ensures the government cannot carve out religious exemptions if they cause harm to others. Judge Kavanaugh's record, however, shows he supports religious exemptions even if they undermine nondiscrimination laws or obstruct women's access to healthcare. When he was a White House counsel, he was point

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<sup>1</sup> Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist* (Sept. 18, 2017), at 12-13.

<sup>2</sup> Brief of Amici Curiae Congressman Steve Largent & Congressman J.C. Watts in Supp. Pet'r, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), No. 99-62, 1999 WL 1272963, at \*4-5.

person on President George W. Bush’s “faith-based initiative,”<sup>3</sup> which allowed faith-based organizations that accept government grants to discriminate in hiring with taxpayer dollars.<sup>4</sup> Under the Bush initiative, a homeless shelter could get a government grant and then deny someone a job because she’s the “wrong” religion. And in a dissenting opinion in *Priests for Life v. U.S. Department of Health and Human Services*, Judge Kavanaugh sided with a religious organization that argued that filling out a form to request a religious exemption burdened its religious exercise.<sup>5</sup> Thus, he allowed employers to cite religious beliefs to obstruct their employees’ access to contraception. Judge Kavanaugh’s nomination threatens to turn the balance of the court so that religion can be used to undermine people’s rights, especially for women, LGBTQ people, and religious minorities.

Third, the separation of church and state ensures that taxpayer dollars cannot be used to pay for religious activities, schools, and institutions. Yet, in amicus briefs he wrote in two different Supreme Court cases, Judge Kavanaugh made clear he believes that religious institutions should be equally entitled to taxpayer funds that are available to nonreligious institutions—even if the funding goes to religious activities.<sup>6</sup> And in a pro bono case, *Bush v. Holmes*, he argued that a Florida private school voucher program that funded religious schools did not violate the state constitution’s bar on funding religious institutions.<sup>7</sup> These arguments could jeopardize 38 state constitutional provision, ushering in private school voucher programs across the country. Each person should have the right to decide whether and how to donate money to our houses of worship, religious schools, faith-based social service providers, and other religious institutions, and the government cannot force anyone to pay for someone else’s religion. Judge Kavanaugh would turn his back on this vital constitutional protection for freedom of conscience.

The separation of church and state ensures religious freedom for all. Accordingly, we urge you to oppose Judge Kavanaugh’s nomination.

Sincerely,



Maggie Garrett  
Legislative Director

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<sup>3</sup> Email from Bradford A. Berenson to Jay P. Lefkowitz (July 11, 2001, 5:06:36 p.m.) (REV\_00017302-0017305); email from Brett M. Kavanaugh to Elizabeth N. Camp (July 12, 2001, 7:42:13 a.m.) (REV\_00128692).

<sup>4</sup> *E.g.*, White House Faith-Based and Community Initiatives, “Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations,” available at <https://bit.ly/2007n8q>.

<sup>5</sup> 808 F.3d 1, 14-26 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc).

<sup>6</sup> Brief of Amicus Curiae Sally Campbell in Supp. Pet’rs, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), No. 99-2036, 2000 WL 1784193, at \*6, \*20; Brief of Amici Curiae in *Santa Fe Indep. Sch. Dist. v. Doe*, at \*28 n.7.

<sup>7</sup> Reply Brief of Appellants, *Bush v. Holmes*, 767 So.2d 668 (Fla. Dist. Ct. App. 2000), No. 1D00-1121/1D00-1150, at 14 n.8 (*aff’d on other grounds*, 919 So.2d 392 (Fla. 2006) (holding private school vouchers violate another provision of state constitution)).