

Atheists. Agnostics. Humanists.
Americans.

July 26, 2018

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Secular Groups Oppose Brett Kavanaugh Supreme Court Nomination

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned organizations representing the secular community, including atheists, agnostics, humanists, and the religiously unaffiliated, as well as all Americans who value true religious freedom and equality, write to urge you to reject the nomination of Judge Brett Kavanaugh to fill the Supreme Court vacancy created by the retirement of Associate Justice Anthony Kennedy.

The responsibility of the Senate to confirm a nominee for a seat on the Supreme Court is one of the most impactful powers enumerated in the Constitution. The Supreme Court, as the final interpreter of federal law, is charged with the most absolute decision-making authority. Nine Justices alone hold the responsibility of protecting civil rights for all Americans by striking down those laws that they deem unconstitutional, enforcing limitations on power for both Legislative and Executive branches, and administering justice through impartial and meticulous analysis of the US Constitution.

The importance of the Senatorial role in this confirmation process laid out under the Constitution cannot be overstated. The Senate, as the most deliberative legislative body, must keep the Judiciary independent and away from the vagaries of partisanship, to protect the People of the United States from ill-considered or biased decisions on the part of the president, which may have repercussions on our Nation for decades. The Senate's duty of advice and consent of the president's nominee for the Supreme Court was intended by the Founders to be perhaps the most important check on both presidential and judicial power. As organizations dedicated to our constitutional order and to the

proper functioning of our Republic, it is therefore our hope and expectation that the nomination of Judge Brett Kavanaugh be given due process and thorough consideration.

A single seat on the Supreme Court, especially in these politically divided times, can determine outcomes so monumental in the scheme of individual rights and constitutional interpretation that it can reshape what it means to be an American citizen. Landmark 5-4 decisions have accomplished everything from establishing due process rights during arrest,¹ to clarifying how educational institutions should consider equality of opportunity and race,² to defining the bounds of our rights under the Second Amendment,³ to determining how money and free speech interact with elections.⁴ One of the most fundamental liberties regularly brought before the Supreme Court is the separation of religion and government, which is the very bedrock of our religious liberty.

Our historical understanding of religious liberty is built on the idea that government entanglement with religion can be a great threat to individual rights, often leading to religious oppression and tyranny.⁵ Grounded in the understanding that freedom of belief is an essential component of religious liberty, the principle of separation between religion and government has deep roots in both theology and political philosophy, and it prospered in colonial America due to a shared history of religious persecution.

Roger Williams, the Baptist theologian and founder of Rhode Island, preached that in order for religious belief to be genuine, people must come to realize it on their own free will. Coerced belief was antithetical to religion, and religious practices themselves were sinful and ingenuine unless performed “with faith and true persuasion that they are the true institutions of God.”⁶ This historical understanding of every individual’s right to religious liberty was built into our Republic through the Establishment and Free Exercise clauses in the First Amendment.

The Founders, who understood that they were creating a government for people of diverse origins and faiths, knew that the separation of religion and government was essential to the newborn nation’s survival. Thomas Jefferson explained that “the clergy, by getting themselves established by law & ingrafted into the machine of government, have been a very formidable engine against the civil & religious rights of man.”⁷ James Madison concluded that the establishment of state religions

¹ *Miranda v. Arizona*, 384 US 436 (1966).

² *Regents of the University of California v. Bakke*, 438 US 265 (1978).

³ *District of Columbia v. Heller*, 554 US 570 (2008).

⁴ *Citizens United v. Federal Election Commission*, 558 US ___ (2010).

⁵ “What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries. A just Government instituted to secure & perpetuate it needs them not.” James Madison, Memorial and Remonstrance Against Religious Assessments § 8 (1785).

⁶ Roger Williams, *The Bloudy Tenent, of Persecution for Cause of Conscience* (1644), reprinted in 3 Complete Writings of Roger Williams 12 (Samuel L. Caldwell ed., 1963).

⁷ Letter from Thomas Jefferson to Jeremiah Moore (August 14, 1800), <http://bit.ly/2y9nvNn>.

historically led to “ignorance and servility in the laity; in both, superstition, bigotry, and persecution.”⁸

Religious freedom means the right to choose a religion, or none at all, without interference by the government, and simultaneously prevents religious authorities from interfering with our system of government and law. Religious practices, if used to excuse oneself from the law, would “make the professed doctrines of religious belief the law of the land, and in effect to permit every citizen to become a law unto himself.”⁹ Historically, the Supreme Court, like the Founders before them, has believed such a system to be unworkable, and so the Court has acted as the ultimate protector of the separation of religion and government and thereby of religious liberty within our system of governance.

We are disappointed to say that the nomination by President Donald Trump of Judge Brett Kavanaugh is a threat to this constitutional order and to the religious liberty of all Americans. We dearly wish we could say otherwise -- as believers in the constitutional order, we firmly believe in the president’s power to nominate qualified candidates for the Supreme Court -- but in this instance, we are forced to ask the Senate to exercise its power and to deny this nomination. Judge Kavanaugh’s record and writings demonstrate support for the entanglement of religion and government, and he has continuously argued in favor of religious coercion above the constitutional guarantees of religious freedom and individual liberty.

In 2010, when non-theists challenged prayers said before the Presidential inauguration, Judge Kavanaugh declared the prayers constitutional, going so far as to say that “inaugural prayers are traditionally inclusive and largely non-sectarian,” despite references to “Lord,” “God,” and “Jesus.”¹⁰ His concurrence demonstrated a clear preference for Christian sects and beliefs at the expense of minority religions and nonbelievers.

Judge Kavanaugh repeated the same discriminatory ideology in a brief submitted to the US Supreme Court in a case challenging prayer before a high school football game. He argued that the Constitution requires schools to permit students to deliver prayers, as they are a fundamental part of national tradition, completely ignoring the impact that those prayers have on the adherents of minority religions and the non-religious. He stated his belief that long-standing constitutional precedent prohibiting the diversion of taxpayer dollars to pay for religious activities “is of questionable validity and is inconsistent with the thrust of the Court’s modern jurisprudence.”¹¹ He even went so far as to describe a world in which official prayer proscribed in public schools as “Orwellian” in nature.¹² The Supreme Court did not agree with his arguments, ruling that public schools could not circumvent constitutional restrictions on school-sponsored prayer through students.

⁸ James Madison, Memorial and Remonstrance Against Religious Assessments § 7 (1785).

⁹ *Reynolds v. United States*, 98 U.S. 145, 166-167 (1878).

¹⁰ *Newdow v. Roberts*, 603 F.3d 1002, 1021 (D.C. Cir. 2010).

¹¹ Brief of Amici Curiae Congressman Steve Largent and Congressman J.C. Watts in Support of Petitioner, at *18, *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000), No. 99-62, 1999 WL 1272963.

¹² *Id.* at *22.

In a speech delivered just last year, Judge Kavanaugh advocated that religious schools and institutions should be able to “receiv[e] funding or benefits from the state so long as the funding [i]s pursuant to a neutral program that, among other things, include[s] religious and nonreligious institutions alike.”¹³ However, he did not acknowledge the possibility, supported by many clear examples, that religious belief is sometimes used as an excuse to discriminate. His robust advocacy for the use of taxpayer dollars to support majoritarian religious sects and religious activities shows that he is not able to treat parties of differing beliefs neutrally and without bias, an essential component of our constitutional order.

Moreover, Judge Kavanaugh has demonstrated that he would likely allow religious freedom laws to be used to harm others. In 2015, he authored a dissent arguing that a requirement for religious organizations to fill out a form merely to inform the government that they would not be providing their employees, many holding differing religious beliefs, coverage for contraception was a substantial burden on the organization’s Free Exercise. This is a fringe opinion, at odds with the opinions of eight of the nine federal appeals courts that heard challenges to the accommodation and upheld it.¹⁴

In the same case, Judge Kavanaugh asserted that the Religious Freedom Restoration Act prohibits the government from requiring religious employers to notify their insurer of the objection, or even merely reveal to the government the identity of the insurer. In his view, women employed by the objecting organizations are entitled to contraceptive coverage only if the government can divine, without indication, who the insurance provider is. His dissent shows a clear preference for certain religious beliefs and for the religious liberty of organizations over that of individuals, who the First Amendment is meant to protect. Moreover, he shows a disdain for the equal rights and health care of women, demonstrating that he prioritizes religious coercion at the expense of civil rights.

Judge Kavanaugh’s speeches and writings reveal a level of biased, ideological fervor that is incompatible with service on the Supreme Court. His clear preference for particular religious sects, promotion of prayer and religious coercion in public settings, and relentless pursuit of ideology over established judicial precedents should disqualify this nomination from further consideration. His appointment would cause grave harm to the wall of separation between religion and government and true realization of religious liberty within our society.

For these reasons, we urge you to reject the President’s nomination of Judge Brett Kavanaugh for Associate Justice of the Supreme Court.

¹³ Brett Kavanaugh, Address at The American Enterprise Institute (Sept. 18, 2017).

¹⁴ R. Robin McDonald, *Eleventh Circuit Ruling Squares with Seven Other Circuits*, Daily Report, (February 22, 2016 at 12:00 AM), <https://www.law.com/dailyreportonline/almID/1202750202109/Eleventh-Circuit-Contraceptive-Ruling-Squares-With-Seven-Other-Circuits/>.

If you should have any questions about this issue or our position, please contact Alison Gill,
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Sincerely,



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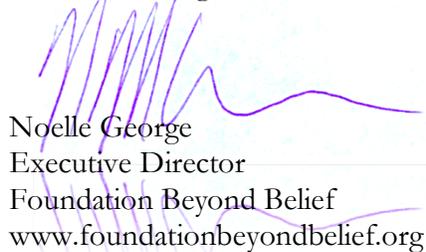
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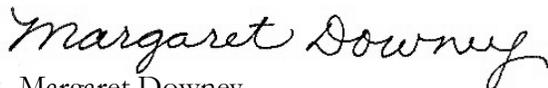
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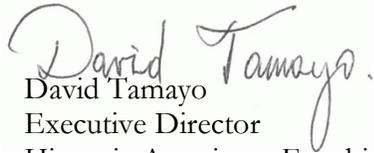
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