



1201 16th St., N.W. | Washington, DC 20036 | Phone: (202) 833-4000

Lily Eskelsen García  
*President*

Rebecca S. Pringle  
*Vice President*

Princess R. Moss  
*Secretary-Treasurer*

John C. Stocks  
*Executive Director*

September 12, 2018

United States Senate  
Committee on the Judiciary  
Washington, DC 20510

Dear Senator:

On behalf of the three million members of the National Education Association and the 50 million students they serve, we strongly urge you to oppose Brett Kavanaugh's nomination to the United States Supreme Court. Votes associated with this issue may be included in NEA's Report Card for the 115th Congress.

We oppose Judge Kavanaugh's nomination for many reasons. He cannot be trusted to protect Americans with pre-existing health conditions while the Trump administration argues in federal court that such protections are unconstitutional.<sup>1</sup> He believes nearly all sensible gun regulations are unconstitutional.<sup>2</sup> He has made it clear he believes affirmative action is unconstitutional, calling it a "naked racial spoils system."<sup>3</sup> Educators are particularly concerned that he has been an outspoken voucher activist for nearly two decades — as a private citizen, lawyer, political staffer, and judge. Vetted and chosen by groups who want to privatize public education and eradicate educator labor unions, he would advance the voucher agenda of Secretary of Education Betsy DeVos and her allies — a profound threat to our students and communities that the Senate has a duty to stop. Details on Judge Kavanaugh's record are provided below and in NEA's report, [Kavanaugh Could Unleash School Voucher Programs throughout the Nation](#).

Nothing in Judge Kavanaugh's testimony before this Committee allayed any of our concerns.

### **Kavanaugh supports replacing public education with vouchers**

Pro-voucher groups funded and supported by Betsy DeVos and her allies are engaged in a legal campaign to unleash vouchers nationwide.<sup>4</sup> Judge Kavanaugh is expected to help further this goal if

---

<sup>1</sup> See, e.g., *Sissel v. U.S. Dep't of Health and Human Servs.*, 799 F.3d 1035 (D.C. Cir. 2015); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

<sup>2</sup> *Heller v. D.C.*, 670 F.3d 1244, 1266 (D.C. Cir. 2011).

<sup>3</sup> See Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL ST. J., Sept. 27, 1999, [https://turtletalk.files.wordpress.com/2018/07/are\\_hawaiians\\_indians\\_the\\_jus.pdf](https://turtletalk.files.wordpress.com/2018/07/are_hawaiians_indians_the_jus.pdf).

<sup>4</sup> Erica L. Green, *Kavanaugh Could Unlock Funding for Religious Education, School Voucher Advocates Say*, N.Y. TIMES, Aug. 14, 2018, <https://www.nytimes.com/2018/08/14/us/politics/kavanaugh-vouchers-religious-education.html>.

his nomination to the Supreme Court is confirmed.<sup>5</sup> And for good reason: throughout his career, he has been a voucher activist.

Judge Kavanaugh co-chaired the Federalist Society's subcommittee on school choice.<sup>6</sup> A piece published by the Federalist Society during his tenure argued for "replacing the government's education monopoly with a universal government-funded voucher system."<sup>7</sup> He defended then-Florida Governor Jeb Bush in a constitutional challenge to Florida's voucher system ultimately struck down by the Florida Supreme Court.<sup>8</sup> He appeared on CNN<sup>9</sup> and gave public speeches — even as a judge — to argue pro-voucher positions.<sup>10</sup> He had a hand in crafting President George W. Bush's education policies, including the first federal voucher program in American history<sup>11</sup> that even Betsy DeVos' Education Department recognizes as a failure.<sup>12</sup> As a judge, he issued a decision that makes it harder for taxpayers to challenge voucher programs as a violation of the United States Constitution.<sup>13</sup> He serves on the board of a voucher-supported school in Washington, D.C.<sup>14</sup>

On top of all that, the Federalist Society and the Heritage Foundation vetted and approved Judge Kavanaugh's nomination to the Supreme Court. These corporate-funded organizations, major

---

<sup>5</sup> *Id.*

<sup>6</sup> Brett Kavanaugh Questionnaire for Nominee to the Supreme Court, U.S. Senate Committee on the Judiciary, [https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJQ%20\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJQ%20(PUBLIC).pdf).

<sup>7</sup> Rick Garnett, *The Justice of School Choice*, Federalist Soc'y Religious Liberties Practice Grp. Newsletter, Vol. 3, Issue 2 (captured by the WayBack Machine on June 17, 2001), [https://web.archive.org/web/20010717152126fw\\_/http://www.fed-soc.org:80/justice-relv3i2.htm](https://web.archive.org/web/20010717152126fw_/http://www.fed-soc.org:80/justice-relv3i2.htm).

<sup>8</sup> *Bush v. Holmes*, 919 So. 2d 391, 409 (Fla. 2006).

<sup>9</sup> Burden of Proof, *Supreme Court Rules on Gay Rights, Abortion, Separation of Church and State*, CNN.com Transcripts (June 29, 2000), <http://www.cnn.com/TRANSCRIPTS/0006/29/bp.00.html>.

<sup>10</sup> Brett Kavanaugh, Am. Enter. Inst., 2017 Walter Berns Constitution Day Lecture, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist* 12–13 (Sept. 18, 2017), <http://lc.org/PDFs/Attachments2PRsLAs/2018/071018KavanaughSpeech2017.pdf>.

<sup>11</sup> Valerie Strauss & Bill Turque, *Fate of D.C. Voucher Program Darkens*, WASH. POST, June 9, 2008, <https://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040120-7.html>.

<sup>12</sup> U.S. Dep't of Educ. et al., Evaluation of the DC Opportunity Scholarship Program: Impacts Two Years After Students Applied 19–30 (May 2018); see also Matt Barnum, *D.C.'s Private School Voucher Program Hurt Low-Income Students' Math Test Scores, According to Federal Study*, CHALKBEAT, May 29, 2018, <https://chalkbeat.org/posts/us/2018/05/29/dcs-private-school-voucher-program-hurt-low-income-students-math-test-scores-according-to-federal-study/>.

<sup>13</sup> The opinion gives taxpayers only a narrow right to sue over public funding of religion. *In re Navy Chaplaincy*, 534 F.3d 756, 762 (D.C. Cir. 2008). Given that over 75 percent of voucher schools are religious, this decision impacts taxpayers' ability to challenge voucher programs as a violation of the U.S. Constitution. Rebecca Klein, *Voucher Schools Championed By Betsy DeVos Can Teach Whatever They Want. Turns Out They Teach Lies*, HUFFINGTON POST, Dec. 20, 2017, [https://www.huffingtonpost.com/entry/school-voucher-evangelical-education-betsy-devos\\_us\\_5a021962e4b04e96f0c6093c](https://www.huffingtonpost.com/entry/school-voucher-evangelical-education-betsy-devos_us_5a021962e4b04e96f0c6093c).

<sup>14</sup> Brett Kavanaugh Questionnaire for Nominee to the Supreme Court, U.S. Senate Committee on the Judiciary, [https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJQ%20\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJQ%20(PUBLIC).pdf)

supporters of Betsy DeVos' voucher agenda, favor replacing our public education system<sup>15</sup> with vouchers nationwide.

### **Kavanaugh sides with corporations and employers over workers and unions**

Pro-voucher organizations and their allies are engaged in a concerted legal campaign to bankrupt and silence educator labor unions.<sup>16</sup> Here, too, Judge Kavanaugh would be an ally.

On the D.C. Circuit, Judge Kavanaugh consistently sided with corporations and employers over workers and unions. Based on our review, Judge Kavanaugh ruled against the union in the overwhelming majority of labor law cases in which he wrote a majority or dissenting opinion. He has disregarded the deferential standard of review for National Labor Relations Board decisions when they uphold workers' rights, but hides behind the standard when decisions are unfavorable to workers.<sup>17</sup> He has repeatedly rejected the National Labor Relations Board's findings of facts and law to deprive workers of their rights to protest or picket,<sup>18</sup> and consistently ignored evidence of employers' anti-union animus to let companies evade their obligations under the National Labor Relations Act.<sup>19</sup> He ruled that a law authorizing the Secretary of Defense to develop a new personnel system permitted the complete suspension of collective bargaining for hundreds of thousands of civilian Department of Defense employees<sup>20</sup> although the statute and the Secretary himself said otherwise.<sup>21</sup> He sided with the Trump Plaza Hotel and Casino when it tried to prevent its workers from unionizing, nearly 70 percent of whom had voted to unionize.<sup>22</sup> Again as a lone dissenting judge, he argued that intentional discrimination by the State Department was legal.<sup>23</sup> He even sided with Verizon when it limited union employees' right to display pro-union signs on their own cars, parked in the employee parking lot.<sup>24</sup>

### **Kavanaugh opposes key provisions of the Affordable Care Act**

Judge Kavanaugh has signaled that he will find Affordable Care Act's protections for people with pre-existing conditions unconstitutional — a theory being litigated by Republican state attorneys general that the Trump Administration's Department of Justice is supporting in federal courts. A

---

<sup>15</sup> Louise Radnofsky, *Trump Adds Five to List of Candidates for Supreme Court Vacancies*, WALL ST. JOURNAL, Nov. 17, 2017, <https://www.wsj.com/articles/trump-adds-five-to-list-of-candidates-for-supreme-court-vacancies-1510960518>.

<sup>16</sup> See Noam Schieber, *Trump Nominee Is Mastermind of Anti-Union Legal Campaign*, N.Y. TIMES, July 18, 2018, <https://www.nytimes.com/2018/07/18/business/economy/union-fees-lawyer.html>.

<sup>17</sup> See, e.g., *Trump Plaza Assocs. v. N.L.R.B.*, 679 F.3d 822, 831 (D.C. Cir. 2012) (not deferring to NLRB when union prevailed with NLRB) and *Verizon New England Inc. v. N.L.R.B.*, 826 F.3d 480, 488 (D.C. Cir. 2016) (same).

<sup>18</sup> See, e.g., *Verizon New England Inc.*, 826 F.3d at 488; *Venetian Casino Resort, LLC v. N.L.R.B.*, 793 F.3d 85 (D.C. Cir. 2015); *S. New England Tel. Co. v. N.L.R.B.*, 793 F.3d 93 (D.C. Cir. 2015).

<sup>19</sup> See, e.g., *Island Architectural Woodwork, Inc. v. N.L.R.B.*, 892 F.3d 362 (D.C. Cir. 2018) (Kavanaugh, J., dissenting); *N.L.R.B. v. CNN Am., Inc.*, 865 F.3d 740 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); *United Food & Commercial Workers, AFL-CIO v. N.L.R.B.*, 519 F.3d 490 (D.C. Cir. 2008).

<sup>20</sup> *Am. Fed'n of Gov't Employees, AFL-CIO v. Gates*, 486 F.3d 1316, 1319 (D.C. Cir. 2007).

<sup>21</sup> *Id.* at 1331 (Tatel, J., dissenting).

<sup>22</sup> *Trump Plaza Assocs.*, 679 F.3d at 831

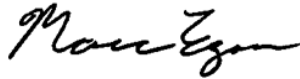
<sup>23</sup> *Miller v. Clinton*, 687 F.3d 1332, 1335 (D.C. Cir. 2012).

<sup>24</sup> *Verizon New England Inc.*, 826 F.3d at 488.

president need not enforce the individual mandate, Kavanaugh says, because “[u]nder the Constitution, the president may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”<sup>25</sup> He also argues that requiring religious non-profits to “opt out” of contraceptive coverage for employees substantially burdens their religious rights.<sup>26</sup>

In short, Judge Kavanaugh would be an ally of those who want to privatize our education system, weaken educator labor unions, silence educators who stand in the way of these efforts, and threaten essential healthcare protections for students, educators, and families all across America. For all of these reasons, we strongly urge you to oppose Judge Kavanaugh’s nomination to the United States Supreme Court.

Sincerely,

A handwritten signature in black ink that reads "Marc Egan". The signature is written in a cursive, flowing style.

Marc Egan  
Director of Government Relations  
National Education Association

---

<sup>25</sup> *Seven-Sky*, 661 F.3d at 50 n.43.

<sup>26</sup> *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 808 F.3d 1, 15 (D.C. Cir. 2015).