Congress of the United States
Washington, DC 20515

September 6, 2018

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

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

Dear Chairman Grassley and Ranking Member Feinstein:

We write to express our strong opposition to the confirmation of Judge Brett Kavanaugh to a lifetime appointment on the U.S. Supreme Court. Although there are many reasons to oppose this nominee—his extreme views place him well outside the mainstream,[1] he may have misled the Senate in his previous confirmation hearing,[2] and he will not be an independent check on a president who desperately needs such a check[3] —we want to highlight Kavanaugh's alarming record on issues of state-church separation and religious liberty, core American principles.

He will undermine the "wall of separation."

Kavanaugh praised jurisprudence that "persuasively criticized" Thomas Jefferson's metaphor of "a strict wall of separation between church and state."[4] The Supreme Court first adopted this useful metaphor in the 1878 case, *U.S. v. Reynolds*, and courts and scholars have continually used it to explain the divided relationship between government and religion.[5]

Kavanaugh believes that Jefferson's metaphor is "based on bad history," is "useless as a guide to judging," and, most alarmingly, that "the wall metaphor was wrong as a matter of law and history."[6] Jefferson was one of the foremost legal scholars of his time, penning the Declaration of Independence, rewriting all of Virginia's colonial laws after independence, and famously authoring the Virginia Statute for Religious Freedom, which provided the basis for the religion clauses of the First Amendment.

The wall of separation is critical because genuine religious freedom requires a secular government. That was Jefferson's point when he used this metaphor and the intent of the First Amendment. That was the Supreme Court's point when it adopted the metaphor in 1878, and again in 1947, 1948, 1952, 1961 (three times), 1962, 1963, and on and on.[7]

He is hyper-sensitive to burdens on religion; deaf to burdens on women.

In 2017, Kavanaugh wrote a bitter dissent in which he argued unsuccessfully that forcing a 17-year-old girl detained as an illegal immigrant to continue her unwanted pregnancy was not an "undue burden" on her constitutionally protected reproductive rights and right to choose.[8] This decision would essentially have forced her to carry the pregnancy to term and still he thought it was not an "undue burden." Yet in 2015, Kavanaugh wrote a dissent arguing that it *is* a "substantial burden" on religion to ask a religious organization opting out of the ACA contraceptive mandate to fill out five blanks on a form — name, corporation name, date, address

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and signature.[9] For Kavanaugh, filling out a form burdens religion, but forcing a child to give birth is not a burden.

He will threaten 70 years of Establishment Clause jurisprudence.
Kavanaugh wrote that the Establishment Clause of the First Amendment does not necessarily require "an overarching test" and that such tests can be harmful.[10] He all but said the court should overturn the test that defines state-church separation, the *Lemon* test, which says that all government actions must have a secular purpose, must not have a primary effect of advancing or inhibiting religion, and must not lead to excessive religious entanglement.

The *Lemon* test, formulated by the Court in 1971, embodies the principles in all the Supreme Court's cases involving religion and government dating back to at least 1947. It is the culmination of more than 70 years of jurisprudence.

Kavanaugh has made it clear that he would not faithfully apply the *Lemon* test to strike down violations of the Establishment Clause. Instead, he would strike down the test, even though it is two years older than *Roe v. Wade*.

He is a danger to our secular public schools.
Before his time as a government attorney, Kavanaugh defended then-Governor Jeb Bush's private religious school voucher program that would have sent public money into the coffers of church schools.[11] The Florida Supreme Court struck down the unconstitutional program.[12] Kavanaugh has not deviated from his decades-old desire to send taxpayer money into churches and church-run schools. In a 2017 speech, Kavanaugh argued that "religious schools and religious institutions" ought to "receive[] funding or benefits from the state," as long as the funding goes to private institutions that are both "religious and nonreligious."[13]

However, the vast majority of private schools are religious, so even if funding is available to religious and nonreligious private schools, nearly all of the private school funding ends up supporting religious schools. For instance, in the Wisconsin Parental Choice Program, **100 percent** of the schools registered to participate in the 2017–18 school year are religious schools.[14]

He's shown hostility toward secular Americans and state-church plaintiffs.
Kavanaugh submitted a disturbing amicus brief to the Supreme Court in the landmark case *Santa Fe Independent School District v. Doe.*[15] In that 2000 case, the Supreme Court held 6-3, with Justice Kennedy voting in the majority, that school-organized prayers delivered over the loudspeakers at school events were unconstitutional.

His brief showed hostility and contempt for the families that brought the case and their lawyers. He wrote that citizens seeking to uphold the Constitution, specifically the First Amendment's Establishment Clause, want an "Orwellian world," are "absolutist," and seek "the full extermination of private religious speech from the public schools" and "to cleanse public schools throughout the country of private religious speech."[16]

One family of plaintiffs in this case shared Kavanaugh's Catholic faith and the other was Mormon, and yet Kavanaugh accused them of being "hostile to religion in any form."[17]

With unmitigated hyperbole, Kavanaugh cautioned the Supreme Court against deciding the case precisely on the grounds the Court eventually chose because doing so would "relegat[e] religious organizations and religious speakers to bottom-of-the-barrel status in our society — below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes...."[18]

This rhetoric and the consistent portrayal of state-church separation as hostile to religion is unfair to those brave families and their children and, more importantly, it shows that no plaintiff in a case involving state-church separation would get a fair hearing under Judge Kavanaugh.

He does not understand the true nature of religious freedom.

Kavanaugh would use his position on the high court to weaponize religious freedom. A vocal, conservative religious minority is working to redefine this critical individual right with the help of judges like Kavanaugh. Instead of a shield offering them protection from government overreach, they seek either the ability to use the government to impose their religious views on others, or to be exempt from civil rights protections, particularly for vulnerable minorities—the license to discriminate.

This was most obvious in his decision in the *Priests for Life* case. Kavanaugh would allow religious employers to deny women contraception in spite of the Affordable Care Act's contraception mandate, because a two-page form burdens their religion. The female employee's freedom is threatened, but Kavanaugh defended the "religious freedom" of the employer instead.

Religious liberty is a critical issue that Kavanaugh fundamentally misunderstands.
When it comes to the government funding religious schools, the religious liberty lies with the taxpayers, not the school. The coercive taxing power of the government cannot be used on citizens to give financial benefits to a religion to which they do not adhere. As the Supreme Court explained, "religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general."[19]

When it comes to the "wall of separation," Kavanaugh fails to understand that this is the greatest protection for religious liberty ever devised by political science, and that it is a uniquely American contribution to history. It is the reason Americans enjoy the religious liberty they so cherish.

This letter focuses on but one of the serious defects in Judge Kavanaugh's ability to serve on the U.S. Supreme Court, his infidelity to the First Amendment. The thriving and diverse religious marketplace in America is a result of a robust separation between state and church. As America becomes both less religious and more religiously diverse, the importance of keeping state and church separate is more vital than ever.[20] Judge Kavanaugh has indicated a clear desire to betray this American ideal.

For these reasons, we strongly oppose his confirmation to the Supreme Court. We hope that you will keep our opposition in mind as you deliberate.

Sincerely,

Jared Huffman
Member of Congress

Jamie Raskin
Member of Congress

Judy Chu
Member of Congress

David N. Cicilline
Member of Congress

Mark DeSaulnier
Member of Congress

Pramila Jayapal
Member of Congress

Henry C. "Hank" Johnson, Jr.
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Barbara Lee
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Zoe Lofgren
Member of Congress

Carolyn B. Maloney
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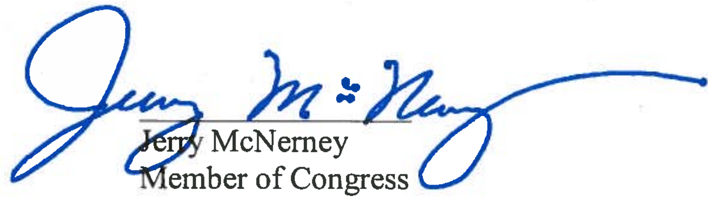

Jerry McNerney
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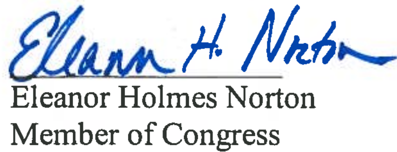

Eleanor Holmes Norton
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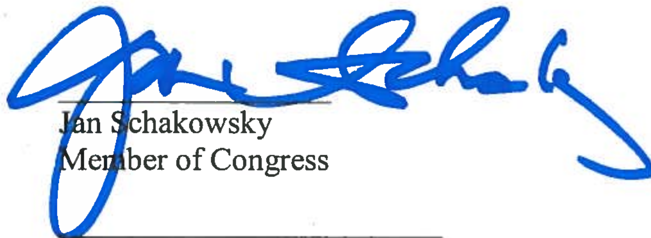

Jan Schakowsky
Member of Congress

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[1] *See* Washington Post, *The path ahead for Supreme Court nominee Brett Kavanaugh* (July 9, 2018). Kavanaugh writes separately 20% of the time, more so than any other candidate on Trump's short list, or any current Supreme Court justice, by a long shot. Jeremy Kidd & Ryan D. Walters, *Searching for Scalia in 2018: Measuring the "Scalia-ness" of President Trump's Supreme Court Shortlist* (Jan. 13, 2018). Kavanaugh is measured as more ideologically extreme than every member of the Court other than Justice Thomas, according to Judicial Common Space score developed by Lee Epstein, et al., *The Judicial Common Space*, The Journal of Law, Economics, & Organization 23, 303–25 (2007).

[2] Michael Kranish, *Kavanaugh's role in Bush-era detainee debate now an issue in his Supreme Court nomination*, THE WASHINGTON POST, (July 18, 2018) (during his 2006 confirmation hearing, Kavanaugh stated that he was "not involved" in "questions about the rules governing detention of combatants.").

[3] Adam Liptak, *Showdown on a Trump Subpoena Could Overshadow Brett Kavanaugh's Confirmation*, THE NEW YORK TIMES (July 10, 2018) (Kavanaugh "has expressed strong support for executive power [and] hostility to administrative agencies . . . .").

[4] Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, 2017 Walter Berns Constitution Day Lecture (Sept. 18, 2017), *available at* www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.

[5] 98 U.S. 145.

[6] Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist.*

[7] *See Reynolds v. U.S.*, 98 U.S. 145 (1879); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

[8] *Garza v. Hargan*, 874 F.3d 735, 752 (2017) (Kavanaugh, J., dissenting).

[9] *Priests for Life v. DHS*, 808 F.3d 1, 15 (2015) (Kavanaugh, J., dissenting from denial for rehearing en banc).

[10] *Id.* at 27.

[11] Monique O. Madan, *New Supreme Court nominee Kavanaugh has ties to big Florida moments*, MIAMI HERALD (July 9, 2018). *See Bush v. Holmes*, 767 So.2d 668 (Fla. Dist. Ct. App. 2000).

[12] *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006).

[13] Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, 2017 Walter Berns Constitution Day Lecture (Sept. 18, 2017), *available at* http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.

[14] Wis. Dept. of Pub. Instruction, *News Release* (Jan. 31, 2017) , *available at* dpi.wi.gov/sites/default/files/news-release/dpinr2017_15.pdf (listing all 163 private religious schools).

[15] Brief of Amici Curiae Congressman Steve Largent and Congressman J.C. Watts in Support of Petitioner, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), *available at* bit.ly/KavBrief.

[16] *Id.* at 4, 9, 22, 29.

[17] *Id.* at 28.

[18] *Id.* at 29.

[19] *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968).

[20] *See* Robert P. Jones & Daniel Cox, *America's Changing Religious Identity*, PUBLIC RELIGION RESEARCH INSTITUTE (Sept. 6, 2017), *available at* bit.ly/2uMdm9a (finding that 24% of Americans identify as nonreligious); Barna Group, *Atheism Doubles Among Generation Z* (Jan. 24, 2018), available at www.barna.com/research/atheism-doubles-among-generation-z/ (finding that 13% of Americans born between 1999 and 2015 are atheists); *Nones on the Rise: One-in-Five Adults Have No Religious Affiliation*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (October 9, 2012), *available at* www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx (showing that, for the first time in the country's history, the United States does not have a Protestant majority).