



Kavanaugh Could Unleash School Voucher Programs throughout the Nation

“If confirmed to the Supreme Court, Brett Kavanaugh will advance Betsy DeVos’s agenda of privatizing our public schools and weakening educators’ ability to stand up for their students and their communities to oppose that agenda.”

—Alice O’Brien, NEA General Counsel

School vouchers are an educational failure (and increasingly a political failure)

The privatization and voucher agenda of Education Secretary Betsy DeVos is well-known. For decades, she has been one of the leading voucher advocates in the nation. “It is hard to find anyone more passionate about the idea of steering public dollars away from traditional public schools than Betsy DeVos.”¹ As Education Secretary, she proposed cutting the Education Department’s overall budget by \$3.6 billion, including vital civil rights protections for students, at least in part to fund a \$1 billion voucher program.² Congress almost entirely rejected her budget and voucher proposal.³

Vouchers are neither successful⁴ nor popular.⁵ Time and again, when put on the ballot, Americans have rejected voucher plans.⁶ Voucher programs often allow fraud and abuse of taxpayer money.⁷ And numerous studies have proven that voucher plans do not increase student achievement.⁸

¹ Kate Zernike, *Betsy DeVos, Trump’s Education Pick, Has Steered Money From Public Schools*, N.Y. Times, Nov. 23, 2016, <https://www.nytimes.com/2016/11/23/us/politics/betsy-devos-trumps-education-pick-has-steered-money-from-public-schools.html>.

² Juana Summers, *Congress Blocks DeVos Agenda in Spending Bill*, CNN (Mar. 23, 2018), <https://www.cnn.com/2018/03/22/politics/congress-betsy-devos-spending-bill/index.html>.

³ *Id.*

⁴ Tim Walker, *School Vouchers’ Dismal Record of Failure Comes into Focus*, NEA Today, March 30, 2017, <http://neatoday.org/2017/03/30/how-school-vouchers-fail-students/>.

⁵ Tim Walker, *Survey: Public Wants Course Correction on Schools, Says No to Vouchers*, NEA Today, Aug. 29, 2017, <http://neatoday.org/2017/08/29/2017-pdk-poll-resuts/>.

⁶ *See, e.g., infra* notes 9–13 and accompanying text.

⁷ For a discussion of Milwaukee’s particularly fraudulent and abusive voucher system, see Erin Richards, *Milwaukee’s Voucher Verdict*, Am. Prospect (Jan. 12, 2017), <http://prospect.org/article/milwaukee%E2%80%99s-voucher-verdict>.

⁸ *See, e.g., Nat’l Coalition for Public Educ., Vouchers Do Not Improve Academic Achievement*, <https://www.ncpecoalition.org/academic-achievement> (collecting studies).

Voucher legislation has failed in particular in states with large rural populations, such as Alaska⁹, West Virginia,¹⁰ Michigan,¹¹ Texas,¹² and Utah,¹³ to name a few. These failures reflect the particular problems that vouchers pose for rural students. Senator Lisa Murkowski put it well during the Senate’s consideration of Secretary DeVos’s nomination:

When you talk about school choice in Alaska, if you are a small village, if you are a small remote community, there really is no choice there. . . . And I have serious concerns about a nominee to be Secretary of Education who’s been so involved in one side of the equation and so immersed in the push for vouchers that she may be unaware of what is broken in our public schools or how to fix them. Betsy DeVos, I think, must show all of us that she truly understands the children of all America, of rural, of urban, who are not able to access an alternative choice in education.¹⁴

Now that the voucher agenda is increasingly failing in Congress and in the states, voucher proponents are increasingly turning to the courts to enact their agenda. They have long recognized that “[w]hile in some states school choice will simply be a hotly contested policy debate,” many states will experience expansive voucher programs only if voucher

⁹ See Pat Forgey, *School Voucher Bill Pulled from Senate Floor, Avoiding Fatal Vote*, Anchorage Daily News (Sept. 28, 2016), <https://www.adn.com/politics/article/vote-looming-school-voucher-resolution-pulled-senate-floor/2014/03/12/>.

¹⁰ In 2011, voucher legislation, in the form of a tax-credit scholarship for low-income students, and another plan for special education students, failed to pass in West Virginia. *School Choice: West Virginia*, EdChoice (2018), <https://www.edchoice.org/school-choice/state/west-virginia/>.

¹¹ Arianna Prothero, *Trump’s Education Secretary Nominee’s School Choice Record in Michigan*, EdWeek (Dec. 8, 2016), http://blogs.edweek.org/edweek/charterschoice/2016/12/trump_education_secretary_betsy_devos_school_choice_record_michigan.html. DeVos personally poured nearly \$13 million into the failed Michigan voucher push.

¹² In 2017, the Texas legislature overwhelmingly rejected a school voucher proposal, by approving a budget amendment that would prohibit public money in school vouchers, education savings accounts, tax credit scholarships “or a similar program through which a child may use state money for nonpublic education. Ken Camp, *Texas House Soundly Rejects School Vouchers*, Baptist Standard (Apr. 6, 2017), <https://www.baptiststandard.com/news/texas/texas-house-soundly-rejects-school-vouchers/>.

¹³ In 2007, Utah voters overwhelmingly rejected the legislature’s voucher law that had narrowly passed earlier in the year. Michele McNeil, *Utah Vouchers Rejected in Overwhelming Vote*, EdWeek (Nov. 7, 2007), https://www.edweek.org/ew/articles/2007/11/07/12utah_web.h27.html.

¹⁴ Senator Lisa Murkowski *Betsy DeVos Nomination Committee Vote, Part 1*, C-SPAN (Time: 00:58:59) (Jan. 31, 2017), <https://www.c-span.org/video/?422523-1/democrats-protest-betsy-devos-nomination-advances-party-line-vote>.

proponents are successful in the federal courts.¹⁵ “The next battle” about vouchers will not be “in the laboratories of democracy, but in the courts.”¹⁶

Voucher Advocates Are Turning to the Courts to Enact Their Agenda, and the Next Supreme Court Justice Could Decide the Fate of that Initiative

DeVos allies are in the midst of a legal campaign to achieve many of the same things Secretary DeVos has thus far failed to achieve politically. And the Supreme Court could ultimately decide whether that campaign succeeds. Pro-voucher advocates believe that Judge Brett Kavanaugh—a decades-long voucher advocate himself—can help them achieve in the Supreme Court what Secretary DeVos has not achieved yet: voucherize and privatize our public schools and silence educators and their associations who fight that agenda.

Soon, the Supreme Court will likely address whether states and school districts can directly fund education at sectarian schools; whether “no-aid” clauses in state constitutions that have prevented states from adopting expansive voucher programs are constitutional; and perhaps even whether those who object to public schools have a constitutional right to a voucher from the government to attend private school. The Supreme Court is also poised to decide cases that are designed to weaken educators’ abilities to come together in strong education associations to fight for their students, their communities, and themselves, and to oppose the DeVos privatization and voucher agenda.

The first hurdle to vouchers was a settled precedent by the Supreme Court. In 1947, the Supreme Court made clear in *Everson v. Board of Education* that under the federal Constitution “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called.”¹⁷ In the 1970s, the Court struck down several state programs that subsidized private religious schools, including one that paid a portion of parochial school teachers’ salaries,¹⁸ and another that used public funds to repair parochial school facilities and provided parents with tuition reimbursements and tax benefits for sending their children to private schools.¹⁹ Given that the vast majority of voucher schools (well over 75 percent in most states with such programs) are religious,²⁰ the rule of *Everson* limited the adoption of widespread voucher programs.

¹⁵ Eric W. Treene, *The Grand Finale Is Just the Beginning: School Choice and the Coming Battle Over Blaine Amendments*, Federalist Soc’y (Mar. 29, 2002), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/h2TasenbtIN0QpEOz4IjPMSC3Gm1W8OsJdlwmfaN.pdf>.

¹⁶ *Id.*

¹⁷ 330 U.S. 1, 16 (1947).

¹⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 623–24 (1971).

¹⁹ *Comm. For Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973).

²⁰ See, e.g., Rebecca Klein, *Voucher Schools Championed By Betsy DeVos Can Teach Whatever They Want. Turns Out They Teach Lies*, Huffington Post, Dec. 20, 2017,

But in 2002, the Supreme Court, in a 5-4 decision in *Zelman v. Simmons-Harris*, upheld Cleveland’s voucher program—even though 96.4 percent of voucher recipients used their vouchers at religious schools and almost all of the schools approved to receive vouchers were religious schools.²¹

After *Zelman*, states *could* enact certain voucher programs even if the program primarily resulted in funding sectarian schools without running afoul of the federal Constitution. But many states have state constitutional provisions called “no-aid” amendments that ban states from sending public money to private or sectarian institutions, including sectarian schools. About thirty-eight states—including Alabama, Alaska, Indiana, Maine, Missouri, Montana, and South Dakota—have such provisions restricting funding to sectarian schools.²² These provisions have prevented many states from adopting expansive voucher programs.²³

Pro-voucher groups hoping to expand vouchers nationwide—groups funded, founded, or led by the DeVos family and personal fortune—are engaged in litigation to strike down the no-aid amendments.²⁴ They assert that it *violates* the federal Constitution to deny vouchers

https://www.huffingtonpost.com/entry/school-voucher-evangelical-education-betsy-devos_us_5a021962e4b04e96f0c6093c.

²¹ 536 U.S. 639, 662–63 (2002).

²² Ala. Const. art. XIV § 263 (1901); Alaska Const. art. VII § 1 (1956); Ariz. Const. art. IX, § 10, art. II, § 12 (1910); Cal. Const. art. IX, § 8, art. XVI, § 5 (1879); Colo. Const. art. V, § 34, art. IX § 7 (1876); Del. Const. art. X, § 3 (1897); Fla. Const. art. I, § 3 (1838); Ga. Const. art. I, § 1 ¶ XIII (1877); Haw. Const. art. I, § 4 (1959); Idaho Const. art. IX, § 5 (1890); Ill. Const. art. 10 § 3 (1870); Ind. Const. art. 1, § 6 (1816); Kan. Const. art. VI § 6 (C) (1859); Ky. Const. § 189 (1891); Mass. Const. art. XVIII (1919); Mich. Const. art. I, § 4 (1850); Minn. Const. art. I, § 16 (1857), art. XIII, § 2 (1857); Miss. Const. art. IV, § 66 (1890), art. 8, § 208 (1890); Mo. Const. art. I, § 7 (1875), art. IX, § 8 (1875); Mont. Const. art. X, § 6 (1889); Neb. Const. art. VII, § 11 (1875); Nev. Const. art. XI, § 10 (1880); N.H. Const. pt. 2, art. 83 (1877); N.M. Const. art. XII, § 3 (1911) (1911); N.Y. Const. art. XI, § 3 (1846); N.D. Const. art. VIII, § 5 (1889); Ohio Const. art. VI, § 2 (1851); Okla. Const. art. I, § 5, art. XI, § 5 (1907); Or. Const. art. I, § 5 (1857); Pa. Const. art. III, § 15 (1874), art. III, § 29 (1874); S.C. Const. art. XI, § 4 (1889); S.D. Const. art. VI, § 3, art. VIII, § 16; Tex. Const. art. I, § 7 (1876), art. VII, § 5 (C) (1876); Utah Const. art. I, § 4 (1895), art. X, § 9 (1895); Va. Const. art. IV, § 16 (1830); art. VIII, § 10 (1830); Wash. Const. art. I, § 11 (1889), art. IX, § 4 (1889); Wis. Const. art. I, § 18 (1848); Wyo. Const. art. I, § 19, art. III, § 36, art. VII, § 8 (1890); *see also* Me. Stat. tit. 20-A, § 2951(2).

²³ Adrianna Prothero, *Why Michigan Doesn’t Have School Vouchers and Probably Never Will*, Educ. Week, Jan. 4, 2017, http://blogs.edweek.org/edweek/charterschoice/2017/01/why_michigan_doesnt_have_school_vouchers_and_probably_never_will.html.

²⁴ One of the current lawsuits alleges that Maine unconstitutionally excludes funding from sectarian schools. *See* Complaint, Carson v. Hasson, No. 1:18-cv-00327, (D. Maine Aug. 21, 2018), <https://ij.org/wp-content/uploads/2018/08/ECF-1-Plaintiffs-Complaint-Maine-School-Choice-3.pdf>.

and other public funding to private sectarian schools.²⁵ They have pressed the Supreme Court to rule that no-aid constitutional amendments are entirely unconstitutional,²⁶ an argument on which they almost succeeded in 2017's *Trinity Lutheran* case,²⁷ and which, if accepted, would green light voucher programs nationwide.²⁸

Voucher proponents have not stopped there. Some argue not just that sectarian private schools have a constitutional right to access public school money, but that each parent has a constitutional right to receive a voucher in lieu of sending their child to public school. For example, in *Stevenson v. Blytheville School District, District #5*, voucher advocates argued that a constitutional liberty interest in directing the education of their children entitled them to a voucher as a constitutional right.²⁹ The Eighth Circuit rejected the argument,³⁰ but as we have repeatedly learned, yesterday's failed arguments become tomorrow's viable arguments when the composition of courts change.

Voucher proponents not only seek to use the courts to indirectly enact vouchers—they are also turning to the courts to silence the very educators who oppose their voucher schemes. As a Kavanaugh-linked pro-voucher newsletter once put it, vouchers have “failed to catch

In another lawsuit in Michigan (the birthplace of Betsy DeVos's failed voucher agenda), a Grand Rapids parochial school seeks to strike down the state's no-aid amendment. John Agar, *Catholic School, Others Seek \$2.5M from Michigan for State Mandates*, Mich. Live, Mar. 16, 2018, https://www.mlive.com/news/grand-rapids/index.ssf/2018/03/catholic_school_others_seek_25.html?_vz=rtw_top_pages%3D4500900015406.

In Montana, the United States Department of Justice—the same Justice Department vetting and shepherding Kavanaugh's nomination to the Supreme Court—recently filed an amicus brief in a cases challenging that state's no-aid clause, arguing that the State of Montana's refusal to give public funds to sectarian schools violates the U.S. Constitution. See Brief for the United States as Amicus Curiae, *Espinoza v. Montana Dep't of Revenue*, No. DA 17-0492 (Jan. 18, 2018), <https://www.justice.gov/crt/case-document/file/1027441/download>.

²⁵ See, e.g., *Moses v. Skandera*, 367 P.3d 838, 849 (N.M. 2015), *cert. granted, judgment vacated sub nom. New Mexico Ass'n of Non-public Sch. v. Moses*, 137 S. Ct. 2325 (2017); Robert Nott, *Lawyers Argue About Public Funding for Private School Books*, Santa Fe New Mexican, May 7, 2018, http://www.santafenewmexican.com/news/local_news/lawyers-argue-about-public-funding-for-private-school-books/article_140b5913-a6ff-5a34-bcda-270242ba187a.html.

²⁶ Mike McShane, Dir. Of Nat'l Research, EdChoice, *Does A Justice Kavanaugh Mean That Blaine Amendments Are History?*, Forbes, July 10, 2018, <https://www.forbes.com/sites/mikemcshane/2018/07/10/does-a-justice-kavanaugh-mean-that-blaine-amendments-are-history/#44202d176e74>.

²⁷ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 n.3 (2017).

²⁸ William S. Koski, *Trinity Lutheran Church v. Comer Decision: What Does It Mean for School Vouchers?*, Stanford Law School Blogs, July 4, 2017, <https://law.stanford.edu/2017/07/04/trinity-lutheran-church-v-comer-decision-what-does-it-mean-for-school-vouchers/>.

²⁹ 800 F.3d 955, 966 (8th Cir. 2015).

³⁰ *Id.* at 967.

hold in politics . . . in large part because of the vehement opposition of the teachers' unions and the increasing identification of school choice with religious conservatives.”³¹ In order to silence the educators who have led the fight against vouchers, pro-voucher groups and their allies have launched a legal assault on education labor unions—an assault designed to bankrupt education associations and silence educator voices in education policy.³²

The first line of attack culminated in the Supreme Court's recent decision in *Janus v. AFSCME*.³³ The *Janus* lawsuit was financially backed by billionaires and corporate lobbies,³⁴ including many of the same groups that support vouchers and that are funded by the DeVos fortune.³⁵ There, the Supreme Court, in a 5-4 decision, overturned a nearly forty-year old Supreme Court precedent that had permitted public employers to allow public-sector unions' to collect fees for the costs of representing employees that the unions are legally obligated to represent.³⁶ The five Justices in the majority were clearly motivated by their objections to how educators activate their unions to fight for education policies educators believe in.³⁷

These same groups are bringing new lawsuits. The new lawsuits seek to deprive education labor unions and their members of hundreds of millions of dollars of previously paid fees, even though the fees were authorized under state statutes and had been blessed by the Supreme Court for nearly forty years.³⁸ Some of these suits even challenge the constitutionality of having a union at all in a public-sector workplace by arguing that an employer cannot limit workplace representation rights to a single democratically elected

³¹ 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.

³² Arianna Prothero, *How the Janus Decision Could Fuel the Growth of Charter Schools and Vouchers*, Educ. Week, June 28, 2018, http://blogs.edweek.org/edweek/charterschoice/2018/06/how_the_janus_decision_could_fuel_the_growth_of_charter_schools.html.

³³ 138 S. Ct. 2448 (2018).

³⁴ See Celine McNicholas et al., Econ. Policy Inst., *Janus and Fair Share Fees: The Organizations Financing the Attack on Unions' Ability to Represent Workers* 7–11 (2018).

³⁵ Noam Schieber & Kenneth P. Vogel, *Behind a Key Labor Case, a Web of Conservative Donors*, N.Y. Times, Feb. 25, 2018, <https://www.nytimes.com/2018/02/25/business/economy/labor-court-conservatives.html> (noting Freedom Foundation's involvement in *Janus*); FreedomFoundationFacts.com, *Who Funds the Freedom Foundation?*, Jan. 24, 2016, <http://freedomfoundationfacts.com/index.php/2016/01/24/who-funds-the-freedom-foundation/> (noting that it is funded by a Freedom Foundation spin off that “works to promote school vouchers and privatization”).

³⁶ *Janus*, 138 S. Ct. at 2486.

³⁷ *Id.* at 2477.

³⁸ See, e.g., *Babb v. CTA*, No. 18-cv-00994-JLS-DFM (C.D. Cal.); *Hoekman v. Education Minnesota*, No. 0:18-cv-01686-SRN-SER (D. Minn.).

union—the exclusive representative—without violating individual worker’s freedom of association rights.³⁹ The Supreme Court will likely decide these issues in the coming years, and a decision favoring the interests of these wealthy backers will further suppress the voice of teachers, education support professionals, and all working people, and ultimately embolden and empower the forces wishing to privatize our public education system.

Kavanaugh’s Consistent Support for Vouchers

Brett Kavanaugh’s record as a private citizen, lawyer, political staffer, and judge demonstrates that if confirmed to the Supreme Court, he would use that perch to advance Betsy DeVos and her allies’ agenda to privatize public schools. For nearly two decades, Kavanaugh has been a vocal and active voucher activist. He has used his positions as an attorney—both in private practice and government—as a political staffer, and as a judge to help advance the privatization agenda.

From 1999 to 2001, while in private practice, Kavanaugh demonstrated an early commitment to vouchers by serving as co-chair of the Federalist Society’s subcommittee on School Choice.⁴⁰ A piece published by the Federalist Society during Kavanaugh’s tenure as co-chair argued for “replacing the government’s education monopoly with a universal government-funded voucher system.”⁴¹

In 2000, Kavanaugh defended then-Florida Governor Jeb Bush in a constitutional challenge against Florida’s voucher system;⁴² the defensive lawsuit was likely funded by groups linked to DeVos. That voucher program was eventually struck down by the Florida

³⁹ One lawsuit filed in federal court in Ohio against a local education association and board of education, argues that collective bargaining and exclusive representation violate the First Amendment of the U.S. Constitution. *See* Complaint, *Thompson v. Marietta Educ. Ass’n*, No. 2:18-cv-00628-GCS-CMV (S.D. Ohio). Another in California asserts the same. Complaint, *Martin v. CTA*, No. 2:18-cv-01951-MCE-AC (E.D. Cal.). Another in Minnesota makes nearly identical claims against a university faculty union. Complaint, *Uradnik v. Inter Faculty Organization*, No. 0:18-cv-01895 (D. Minn.), *available at* <https://www.buckeyeinstitute.org/library/docLib/2018-07-06-Kathy-Uradnik-complaint.pdf>. A complaint against NEA-Alaska goes so far as to claim that the union’s representation in collective bargaining, which fought for better wages and working conditions for educators, was “unconstitutional behavior.”

⁴⁰ Brett Kavanaugh Questionnaire for Nominee to the Supreme Court, U.S. Senate Committee on the Judiciary, at 6 ([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))

⁴¹ 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.

⁴² *See Bush v. Holmes*, 767 So. 2d 668, 670 (Fla. Dist. Ct. App. 2000) (noting Kavanaugh’s involvement in the case), *decision disapproved of*, 919 So. 2d 392 (Fla. 2006).

Supreme Court because, among other reasons, it unconstitutionally diverted public funds to private schools.⁴³

In 2000, Kavanaugh also appeared on CNN’s “Burden of Proof” and voiced his support for the theory that the Supreme Court will have to uphold vouchers to religious schools,⁴⁴ which a 5-4 Court ultimately did in *Zelman*.⁴⁵

In 2004, as assistant and staff secretary to President George W. Bush, Kavanaugh helped plan President Bush’s State of the Union address, in which Bush lauded “making sure [parents] have better options when schools are not performing”—a nod to vouchers.⁴⁶ Three days later on January 23, Bush signed into law the first ever federal school voucher legislation, the D.C. Opportunity Scholarship Program.⁴⁷ White House records that would demonstrate the extent of Kavanaugh’s involvement in passage of the voucher scheme are being blocked from release by Kavanaugh allies, but other records show that Kavanaugh was deeply involved in education policy.

The D.C. voucher program has not worked. Recent studies show that D.C. voucher recipients have performed worse than their public school counterparts.⁴⁸ Students in the D.C. voucher program, for example, were less likely to have access to key services such as English as a second language programs, learning supports, special education supports and services, and counselors than students who were not part of the program.⁴⁹

In 2008, Kavanaugh, then a judge on the D.C. Circuit, issued a decision that limits taxpayers’ ability to challenge voucher programs as a violation of the U.S. Constitution.⁵⁰

⁴³ *Bush v. Holmes*, 919 So. 2d at 409.

⁴⁴ 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>.

⁴⁵ 536 U.S. at 662–63.

⁴⁶ State of the Union Address by President George W. Bush (Jan. 20, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040120-7.html>.

⁴⁷ 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>.

⁴⁸ 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/>.

⁴⁹ U.S. Dep’t of Educ. et al., *Evaluation of the DC Opportunity Scholarship Program*, at xxvii (June 2010), <https://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf>.

⁵⁰ 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

In 2017, Kavanaugh, in public speeches, praised a line of Supreme Court rulings that have allowed public money to be funneled into voucher schools, stating that Chief Justice Rehnquist was successful in “ensuring that religious schools and religious institutions could . . . receiv[e] funding or benefits from the state.”⁵¹

Also in 2017, Kavanaugh became a member of the Board of Directors of the Washington Jesuit Academy, a school accepting vouchers from the D.C. voucher program. Kavanaugh has indicated that he “participate[s] in meetings where the Board deals with various issues, including educational decisions.”⁵²

In 2017, the Federalist Society and the Heritage Foundation—corporate-funded organizations that are major supporters of Betsy DeVos’s voucher agenda—approved Kavanaugh’s potential nomination to the Supreme Court.⁵³ The Heritage Foundation even has a center named after the DeVoses: the DeVos Center for Religion and Civil Society.⁵⁴ These organizations have been funded by Betsy DeVos’s family for decades,⁵⁵ and has fully supported school vouchers since Heritage first proposed the idea for President Reagan’s education agenda in 1981.⁵⁶

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.

⁵¹ 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>.

⁵² Brett Kavanaugh Questionnaire for Nominee to the Supreme Court, U.S. Senate Committee on the Judiciary, at 6 ([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)).

⁵³ Louise Radnofsky, *Trump Adds Five to List of Candidates for Supreme Court Vacancies*, Wall Street Journal, Nov. 17, 2017, <https://www.wsj.com/articles/trump-adds-five-to-list-of-candidates-for-supreme-court-vacancies-1510960518>.

⁵⁴ See, e.g., Berkley Ctr. for Religion, Peace & World Affairs, Resources on Faith, Ethics & Public Life: DeVos Center for Religion and Civil Society (<https://berkeleycenter.georgetown.edu/programs/devos-center-for-religion-and-civil-society> (last visited July 25, 2018)).

⁵⁵ See, e.g., Jeff Smith, Foundation Profile: The Richard & Helen DeVos Foundation, GRIID (Feb. 18, 2013), <https://griid.org/2013/02/18/foundation-profile-the-richard-helen-devos-foundation/>.

⁵⁶ Eileen White, *Heritage Provides Conservative Blueprint for Education Policy*, EdWeek (Sept. 28, 1981), <https://www.edweek.org/ew/articles/1981/09/28/01040051.h01.html>.

Finally, this year, the Heritage Foundation plans to spend over \$11 million to make sure Kavanaugh is confirmed to the Supreme Court.⁵⁷ The group expects a return on this investment, believing that Kavanaugh will advance Heritage’s agenda, including its voucher agenda.

Michael Q. McShane, the director of national research at EdChoice, a pro-voucher group, has argued in favor of Kavanaugh’s nomination to the Supreme Court, asserting “It seems that [Kavanaugh] would be a pretty solid vote” to promote vouchers on the Supreme Court.⁵⁸

Kavanaugh Would Try to Weaken Education Unions

Kavanaugh’s record also shows that he will be an ally to voucher proponents in their effort to silence educators’ voices and weaken their labor unions. He has consistently sided with corporations and employers over employees and their unions and has applied different legal rules depending on the outcome he seeks. He has disregarded the deferential standard of review for National Labor Relations Board decisions when the Board upholds workers’ rights, but hides behind the standard when the Board’s decisions are unfavorable to workers.⁵⁹ He repeatedly rejected the National Labor Relations Board’s findings of facts and law to deprive workers of their rights to protest or picket,⁶⁰ and consistently ignored evidence of employers’ anti-union animus to let companies evade their obligations under the NLRA.⁶¹ Here are some examples:

- 2007—Kavanaugh sides against the civilian union at the Department of Defense, holding that a statute authorizing the Secretary of Defense to create a new personnel system empowers him to suspend collective bargaining altogether—a

⁵⁷ Alayna Tree, *Heritage Action to Spend Bulk of \$11.5 Million Budget on Confirming Kavanaugh*, Axios, July 16, 2018, <https://www.axios.com/heritage-action-brett-kavanaugh-supreme-court-ec321cf1-9647-4322-a444-9ecbf9186361.html>.

⁵⁸ 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>.

⁵⁹ Compare for example *Verizon New England Inc. v. N.L.R.B.*, 826 F.3d 480, 488 (D.C. Cir. 2016) (deferring to NLRB when employer prevailed with NLRB) with *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).

⁶⁰ See, e.g., *Verizon New England Inc. v. N.L.R.B.*, 826 F.3d 480, 488 (D.C. Cir. 2016); *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).

⁶¹ *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).

position with which even the Secretary disagreed.⁶² Another judge dissented, pointing out that Kavanaugh’s interpretation disregarded a statutory provision that expressly required any new system to ensure that employees may organize in labor organizations of their choosing and bargain collectively.⁶³

- 2008—Kavanaugh is the lone dissenting judge to side with a meat producer accused of serious employment, labor, and health and safety law violations by contending that the producer’s undocumented employees had no legal protections under the National Labor Relations Act.⁶⁴
- 2012—Kavanaugh sides with Trump Plaza Hotel and Casino which tried to prevent its workers from unionizing even though the workers had voted for their union by a nearly 70 percent margin.⁶⁵
- 2012—Kavanaugh is the lone judge to disagree with a majority opinion that found illegal age discrimination against the State Department in a case in which the Department admitted to firing an employee because of the employee’s age.⁶⁶ Kavanaugh dissented from the majority ruling, arguing that the State Department could lawfully engage in such discrimination. The majority opinion noted that if Kavanaugh’s position had prevailed, the State Department would be free from “any statutory bar against terminating an employee . . . solely on account of his disability or race or religion or sex.”
- 2014—Kavanaugh, again the lone dissenting judge, sides with SeaWorld in a worker-safety case after a SeaWorld trainer died from an attack by a killer whale that had killed a trainer before.⁶⁷
- 2016—Kavanaugh sides with Verizon, limiting union members’ rights to display pro-union signs on their cars parked in the employee parking lot.⁶⁸

⁶² *Am. Fed’n of Gov’t Employees, AFL-CIO v. Gates*, 486 F.3d 1316, 1319 (D.C. Cir. 2007).

⁶³ *Id.* at 1331 (Tatel, J., dissenting).

⁶⁴ *Agri Processor Co. v. N.L.R.B.*, 514 F.3d 1, 14 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

⁶⁵ *Trump Plaza Assocs. v. N.L.R.B.*, 679 F.3d 822, 831 (D.C. Cir. 2012).

⁶⁶ *Miller v. Clinton*, 687 F.3d 1332, 1335 (D.C. Cir. 2012).

⁶⁷ *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2014) (Kavanaugh, J., dissenting).

⁶⁸ *Verizon New England Inc. v. N.L.R.B.*, 826 F.3d 480, 488 (D.C. Cir. 2016).

Conclusion

Brett Kavanaugh has been a vocal and active voucher activist for nearly two decades—as a private citizen, lawyer, political staffer, and judge. He was vetted and chosen by groups who want to privatize our entire public education system and extinguish educator labor unions. Should he be confirmed, he would present a profound threat to our students and our communities because, as voucher advocates expect, he would use his Supreme Court seat to advance Betsy DeVos and her allies’ agenda. The Senate has a duty to stop this from happening.