

September 6, 2017

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

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

RE: 28 LGBT Groups Oppose Confirmation of Stephen S. Schwartz

Dear Chairman Grassley and Ranking Member Feinstein:

We, the undersigned 28 national, state, and local advocacy organizations, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and everyone living with HIV, write to oppose the nomination of Stephen S. Schwartz to the U.S. Court of Federal Claims.

Although a court of limited jurisdiction, the Court of Federal Claims adjudicates important civil rights issues. For example, the Court of Federal Claims has jurisdiction over claims brought by federal employees under the Equal Pay Act, 29 U.S.C. 206(d)(1), *See, e.g., Jordan v. United States*, 122 Fed Cl. 230 (2015). Of particular importance to our groups, the Court of Federal Claims has considered issues of tremendous importance to the LGBT community over the years, including most notably issues affecting LGBT people in the military.¹ Indeed, the Senate cannot but consider this nomination in light of the Trump administration's unconstitutional ban on military service by transgender individuals.²

Furthermore, even though judges on the Court of Federal Claims are technically appointed for fifteen-year terms, rather than lifetime appointments, upon completion of their term, judges on this court may elect senior status, which allows them to continue hearing cases at the discretion of the court's chief judge.³ For all of these reasons, it is crucial that this Committee scrutinizes Mr. Schwartz's nomination to the Court of Federal Claims as carefully as it would a nominee for lifetime appointment to an Article III court.

¹ *See, e.g., Collins v. United States*, No. 10-778C (Ct. Fed Cl. 2010) (challenging Department of Defense policy offering reduced military separate pay to those involuntarily discharged under "Don't Ask, Don't Tell" (DADT) policy); *Loomis v. United States*, 68 Fed. Cl. 503 (2005) (raising constitutional and administrative challenges to separation under DADT).

² Similar to the role that it played while DADT was in effect, the Court of Federal Claims would have jurisdiction over claims brought by transgender services members for reinstatement or back pay in the event of separation from the service.

³ 28 U.S.C. 178.

The combination of Mr. Schwartz’s approach to important legal issues affecting the LGBT community, his history of seeking out opportunities to oppose the civil rights of LGBT and other marginalized people, and his relative inexperience in areas of the law within the jurisdiction of the Court of Federal Claims, render him unqualified for this position. As a threshold matter, at 34 years old and having graduated from law school only in 2008, Mr. Schwartz does not have the (at least) twelve years of experience practicing law that the American Bar Association (ABA) ordinarily expects of a prospective nominee to the federal bench.⁴ While the ABA does not review nominees for this court, we believe Mr. Schwartz’s lack of experience alone should cause this Committee significant concern.

With that said, Mr. Schwartz’s career is notable for his exceptional dedication to defending extreme positions that target members of the LGBT community, and especially transgender Americans. We wish to call to your attention to those aspects of his record that illustrate why he poses a grave threat to the communities that our organizations serve and is not an appropriate candidate for the bench.

We are particularly concerned by Mr. Schwartz’s work on behalf of law firms that specialize in litigating ultraconservative causes. For example, in 2015, Mr. Schwartz joined Cause of Action, a non-profit firm funded in part by the Koch Brothers, whose secretive tax-exempt organization, Freedom Partners, has donated money to support numerous anti-LGBT groups, including the Heritage Action Foundation.⁵ Mr. Schwartz left Cause of Action in 2016 to become a partner at Duncan Schaerr LLP, a boutique law firm enlisted by North Carolina legislators to fend off legal challenges to its HB 2 law restricting the ability of transgender people to use public restrooms and prohibiting municipalities from extending nondiscrimination protections to LGBT people. Through his affiliations with these entities, Mr. Schwartz has become a repeat player in some of the most high-profile civil rights cases in the courts in recent years, always on behalf of those seeking to limit the rights of women, transgender people, and people of color.

Mr. Schwartz appears to have developed a niche practice involving the defense of anti-transgender measures. Mr. Schwartz represented North Carolina legislators, Phil Berger and Tim Moore, who intervened in litigation against the governor (and then filed their own lawsuit against the Department of Justice) to ensure a vigorous defense of HB 2.⁶ This sweeping anti-transgender legislation gained national attention and prompted boycotts costing North Carolina millions of dollars in lost tourism revenue. Yet, even as the law’s odious intent and impact became obvious, Mr. Schwartz vigorously defended the legislature’s right to treat LGBT people as second-class citizens.⁷

⁴ American Bar Association, *Standing Committee on the Federal Judiciary: What it is and How it Works* (2009) (stipulating that “a prospective nominee to the federal bench ordinarily should have at least twelve years’ experience in the practice of law”), available at https://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal_judiciary09.authcheckdam.pdf.

⁵ Josh Israel, *New Filings Show Koch Brothers Give Millions to Anti-gay, Anti-choice Groups*, THINKPROGRESS (Nov. 18, 2015), available at <https://thinkprogress.org/new-filings-show-koch-brothers-give-millions-to-anti-gay-anti-choice-groups-4181b2cc96f9>.

⁶ Joint Status Report, *Carcaño v. Cooper, Formerly Carcaño v. McCrory*, No. 1:16-cv-00236 (M.D.N.C., Mar. 28, 2017), available at <http://files.eqcf.org/cases/116-cv-00236-201/>.

⁷ Jim Morrill and Colin Campbell, *NCAA Gives North Carolina a Deadline to Repeal HB2 or Lose Events Until 2022*, CHARLOTTE OBSERVER (Mar. 23, 2017), available at <http://www.charlotteobserver.com/news/politics-government/article140383638.html>.

That same year, Mr. Schwartz defended another discriminatory restroom policy that segregated transgender students from their peers by requiring them to use “alternative, private” facilities. As co-counsel for the Gloucester County School Board in the *G.G.* case, Mr. Schwartz filed a merits brief arguing that Title IX of the Education Amendments Act of 1972 does not protect transgender students and that Gavin Grimm, a transgender high school boy, should not be allowed to use the male restroom.⁸ Title IX is critical to ensuring that LGBT and gender non-conforming students are able to have equal educational opportunity. Several courts have held that Title IX’s prohibition on sex discrimination not only includes discrimination based on being a particular gender, but also includes sexual harassment and discrimination for failing to conform to gender stereotypes. Contrary to this body of law, Mr. Schwartz urged the court to adopt a constricted view of Title IX that would deny transgender students like Gavin the ability to go to school without fear of discrimination. In particular, Mr. Schwartz’s brief deployed offensive “gender fraud” arguments, suggesting that schools were entitled to refuse to respect a student’s gender identity in order to “prevent[] athletes who were born male from opting onto female teams, obtaining competitive advantages and displacing girls and women.”⁹

Mr. Schwartz now invokes his ongoing advocacy on behalf of anti-transgender measures and clients as a reason not to answer Senators’ questions about his views on equal protection. In response to direct questions about whether the Fourteenth Amendment requires states to treat same-sex couples the same as different-sex couples, Mr. Schwartz does not so much as acknowledge *Obergefell* as the relevant Supreme Court precedent—perhaps a first for a recent federal judicial nominee.¹⁰

In addition to his portfolio of anti-transgender advocacy, other aspects of Mr. Schwartz’s record call into question his ability to administer fair and impartial justice to historically marginalized groups who often must rely on the courts for vindication of their rights. While at Duncan Schaerr, Mr. Schwartz assisted the firm with its defense of a voter identification law so blatantly discriminatory that that the Fourth Circuit described it as “target[ing] African Americans with almost surgical precision.”¹¹ Mr. Schwartz is also part of the litigation team defending various Louisiana laws restricting abortion access by, among other means, requiring every doctor who provides abortions to have admitting privileges.¹²

Even before his tenure at these conservative boutique law firms, Mr. Schwartz sought out opportunities to advocate for right-wing causes. While working at the law firm Kirkland & Ellis, Mr. Schwartz filed an amicus brief in the Supreme Court case *Burwell v. Hobby Lobby* on behalf of four publishing companies, including the Christian Booksellers Association, which were seeking to invalidate the requirement in the Affordable Care Act that employers provide insurance coverage for

⁸ Brief of Petitioner at 1, *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 65477.

⁹ *Id.* at 41.

¹⁰ Senate Committee on the Judiciary, *Nomination of Stephen Schwartz to the U.S. Court of Federal Claims, Questions for the Record, Submitted August 1, 2017*, available at <https://www.judiciary.senate.gov/imo/media/doc/Schwartz%20Responses%20to%20QFRs.pdf>.

¹¹ *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

¹² *June Medical Services v. Caldwell*, No. 3:14-CV-00525-JWD (M.D. LA), appeal docketed, No.17-30397 (5th Cir. May 15, 2017).

contraception.¹³ In justifying his position that businesses should be able to opt-out of laws that, in their view, burden their exercise of religion, Mr. Schwartz sweepingly explained that “[t]he government’s view that the conduct of business cannot be governed by religious principle is contrary not only to legal precedent but to the common experience of many Americans.”¹⁴ Mr. Schwartz’s dogged pursuit of litigation targeting the rights of vulnerable groups and promoting discrimination justified by religion is particularly disconcerting for a nominee to the federal judiciary because, if confirmed, he would be expected to administer justice equally to litigants of various racial backgrounds, and all genders and sexual orientations.

Just like his fellow nominee to the Court of Federal Claims, Damien Schiff, Mr. Schwartz’s record demonstrates that his appointment to the bench would cause grave harm to the LGBT community, as well as many other communities that rely on the federal judiciary to administer fair and impartial justice.¹⁵ The Court of Federal Claims cannot afford one, let alone two, judges with records replete with aggressively anti-LGBT views. We urge you to reject Mr. Schwartz’s nomination.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sharon McGowan, Director of Strategy for Lambda Legal, at smcgowan@lambdalegal.org.

Very truly yours,

Lambda Legal
Advocates for Youth
Bend the Arc Jewish Action
BiNet USA
CenterLink: The Community of LGBT Centers
COLAGE
Equality California
Equality Federation
Family Equality Council
FORGE, Inc.
Freedom for All Americans
Human Rights Campaign
Mazzoni Center
National Center for Lesbian Rights
National Center for Transgender Equality

¹³ Brief for the Christian Booksellers Association et al. as Amicus Curiae supporting Hobby Lobby and Conestoga, *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (Nos. 13- 354,13-356), 2014 WL 343200, available at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_cba-et-al.authcheckdam.pdf.

¹⁴ *Id.* at 28.

¹⁵ See Lambda Legal, *27 National Groups Urge Senate to Oppose Confirmation of Hateful Judicial Nominees* (July 17, 2017), available at https://www.lambdalegal.org/blog/20170717_lambda-legal-brings-together-lgbt-groups-against-bush-schiff.



National Coalition for LGBT Health
National Council of Jewish Women
National LGBTQ Task Force Action Fund
National Latina Institute for Reproductive Health
OutServe-SLDN
People for the American Way
Pride at Work
Secular Coalition for America
Transgender Law Center
Transcend Legal
Transgender Legal Defense and Education Fund
URGE: Unite for Reproductive & Gender Equity
Whitman-Walker Health

cc: United States Senate Judiciary Committee Members