The Leadership Conference
on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

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The Leadership Conference

OPPOSE THE CONFIRMATION OF STEPHEN SCHWARTZ TO THE U.S. COURT OF FEDERAL CLAIMS

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I am writing in strong opposition to the confirmation of Stephen Schwartz to the U.S. Court of Federal Claims (CFC). The Leadership Conference urges the Senate to reject this nomination.

Mr. Schwartz, 36, is a far-right extremist who has repeatedly sought opportunities to restrict civil and human rights for marginalized communities. He has fought against voting rights, LGBTQ equality, reproductive freedom, immigrant rights, and environmental protection. Mr. Schwartz's nomination reflects President Trump's disturbing pattern of seeking agenda-driven ideologues who would undermine civil rights laws. Although not an Article III court, the CFC is an important federal court that has jurisdiction over cases with civil rights implications, such as federal contracting programs for socially and economically disadvantaged businesses, military pay discrimination claims, labor cases, Indian Country cases, and environmental cases. Senators must oppose Mr. Schwartz's nomination.

Worked to Restrict Voting Rights: Mr. Schwartz represented the state of North Carolina and defended its infamous voter suppression law passed in the wake of the Supreme Court's 2013 *Shelby County v. Holder* decision. The North Carolina law – which imposed a rigid photo identification requirement; eliminated same-day registration, out-of-precinct voting, and preregistration; and reduced the number of days permitted for early voting – was struck down by the U.S. Court of Appeals for the Fourth Circuit. In its decision in *North Carolina State Conference of the NAACP v. McCrory*, the Fourth Circuit ruled that the law was passed with discriminatory intent, noting that "the new provisions target African Americans with almost surgical precision" and calling the law "the most restrictive voting law North Carolina has seen since the era of Jim Crow."[1]

Mr. Schwartz's brief to the Supreme Court seeking review of the case – which was co-written with controversial Trump judicial nominees Thomas Farr (failed nominee to the Eastern District of North Carolina) and Stuart Duncan (confirmed to the U.S. Court of Appeals for the Fifth Circuit) – scolded the Fourth Circuit, asserting that "the notion that *these* election laws are reminiscent of 'the era of Jim Crow' is ludicrous," "in the eyes of the panel, where North Carolina is concerned, it is *always* 1965," and "the decision insults the people of North Carolina and their elected representatives by convicting them of abject racism."[2] The Supreme Court denied Mr. Schwartz's appeal and left the Fourth Circuit ruling in place.

[1] *N.C. St. Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214, 229 (4th Cir. 2016).
[2] https://www.scotusblog.com/wp-content/uploads/2017/01/16-833-cert-petition.pdf.

The Leadership Conference

Sought to Undermine LGBTQ Equality: Mr. Schwartz defended the Gloucester County, Virginia School Board's divisive policy that required students to use bathrooms that correlated with their biological gender, not their gender identity. He argued in a Supreme Court brief filed in *Gloucester County School Board v. G.G.* that deferring to the U.S. Department of Education's Title IX interpretation which allowed transgender students to use the bathroom of their choice "would upend the ingrained practices of nearly every school in the Nation on a matter of basic privacy and dignity."[3] Mr. Schwartz's untenable position in this case was that non-transgender students are entitled to privacy and dignity, but transgender students are not. The Fourth Circuit rejected Mr. Schwartz's argument and held that the Education Department's interpretation of Title IX was entitled to deference.

In another high-profile gender identity case, *United States v. North Carolina*, Mr. Schwartz represented North Carolina state legislators Phil Berger and Tim Moore, who intervened in order to vigorously defend the notorious state law, HB2, which required students to use the bathroom of their biological gender. As explained in a letter of opposition to Mr. Schwartz from a coalition of leading LGBTQ rights organizations: "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."[4] The North Carolina law was subsequently repealed by the state legislature.

Worked to Limit Reproductive Freedom: In *June Medical Services LLC v. Gee*, which is currently pending before the Supreme Court, Mr. Schwartz represents the state of Louisiana and is defending the state's anti-abortion law that would require physicians who perform abortions at clinics to have medically unnecessary hospital admitting privileges. Anti-abortion politicians have pushed such laws because admitting privileges are often difficult to obtain. One such law, in Texas, was struck down by the Supreme Court in 2016 in *Whole Women's Health v. Hellerstedt*, where the Court held that the law – nearly identical to the Louisiana law – created a substantial obstacle and undue burden for those seeking abortion services. In *June Medical Services*, Mr. Schwartz is making the extreme argument that *Hellerstedt* should be overturned. He wrote: "Louisiana opposes certiorari, but if this Court believes the case deserves review, it should clarify or overrule *Hellerstedt*."[5] The oral argument in this case is set for March 4, 2020.

In 2014, Mr. Schwartz filed an amicus brief on behalf of religious book publishers in *Burwell v. Hobby Lobby*, involving the question of whether religious for-profit corporations could deny their employees access to contraception coverage under the Affordable Care Act. Mr. Schwartz argued they could, asserting: "The American colonies were founded by joint stock companies expressly dedicated to pursuing *both* profit and religion. And the pursuit of profit and religion has gone hand in hand ever since. This is the nature of the human enterprise: we need to support ourselves materially, but at the same time to obey the moral and religious precepts that we recognize as authoritative."[6] The four-member dissent in this case condemned this rationale, noting it would allow for-profit corporations to "opt out of any law"

[3] http://www.scotusblog.com/wp-content/uploads/2017/01/16-273-pet-merits-brief.pdf.
[4] https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/letter_from_lgbt_groups_opposing_stephen_schwartz.pdf.
[5] https://www.supremecourt.gov/DocketPDF/18/18-1323/108674/20190719131435281_18-1323%20BIO--PDFA.pdf.
[6] https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_cba-etal.authcheckdam.pdf.

The Leadership Conference

and recalling the admonition in *Planned Parenthood v. Casey* that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[7] To Mr. Schwartz, women's equality should take a back seat to the interests of religious for-profit corporations when the two are in conflict.

Anti-Immigration Efforts: Mr. Schwartz challenged the legality of President Obama's signature immigration program: Deferred Action for Childhood Arrivals (DACA), which defers the removal of non-citizens who entered the United States as children and who meet certain conditions. In an amicus brief filed in 2017 asking the Supreme Court to grant a writ of certiorari in the case *Brewer v. Arizona Dream Act Coalition*, Mr. Schwartz wrote that DACA is "offensive to the constitutional order" and "the Constitution did not permit President Obama to override Arizona law by executive order. A program like DACA, which purports to change legal rights and (according to the Ninth Circuit) preempt State law has to be passed by Congress. Otherwise, it is not law."[8] The Supreme Court denied Mr. Schwartz's request and left DACA in place. Mr. Schwartz listed this case as the most significant litigated matter he has handled during his career,[9] which demonstrates either his anti-immigration zeal, his lack of legal experience (his involvement in the case consisted of writing a single brief), or both.

Worked to Diminish Environmental Protections: In 2014, Mr. Schwartz filed a brief asking the Supreme Court to reverse a Ninth Circuit decision that upheld California's Low Carbon Fuel Standard. This standard was designed to reduce greenhouse gas emissions, which pose a threat to human health and the environment. Mr. Schwartz sought to strike down California's environmental policy, arguing: "The State of California, in the name of combatting global warming, has violated the basic norms of interstate federalism."[10] The Supreme Court denied his cert petition.

In addition, Mr. Schwartz represented oil and gas company BP in litigation in the aftermath of the massive Deepwater Horizon oil spill, which caused millions of gallons of oil to spill into the Gulf of Mexico in 2010. Mr. Schwartz argued that BP should bear no civil liability under the Clean Water Act for its role in the oil spill and that such liability should extend only to the owners of the drilling rig. The Fifth Circuit rejected his argument, ruling that "the Clean Water Act leaves no room for civil-penalty defendants to shift liability via allegations of third-party fault."[11]

Ideological Comments and Affiliations: The far-right positions Mr. Schwartz has advanced during his legal career directly reflect his own deeply-held ideological views. Below are some of the most incendiary comments from articles he has authored:

- In a 2005 op-ed entitled "Yale experience needs stronger conservative voice," Mr. Schwartz declared: "I've argued that abortion is wrong, that racial preferences in college admissions are dangerous, that gay marriage should stay illegal, that immigration should be curtailed, that school vouchers are an excellent idea, that communism is a bad idea, that Lawrence Summers makes a

[7] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 739-741 (2014) (Ginsburg, J., dissenting).
[8] https://www.scotusblog.com/wp-content/uploads/2017/05/16-1180-cert-amicus-Jeb-bush.pdf.
[9] https://www.judiciary.senate.gov/imo/media/doc/SJQ_Stephen%20Schwartz.pdf.
[10] http://sblog.s3.amazonaws.com/wp-content/uploads/2014/04/2014-03-20a-Rocky-Mountain-Farmers-v-Corey_Petition-for-Certiorari.pdf.
[11] *In re Deepwater Horizon*, 753 F.3d 570, 575 (5th Cir. 2014).

good point, that drug use is immoral, that religion is indispensable to a moral system, and many, many other things that I believe."[12]

- In another 2005 op-ed, entitled "Bush's 2006 budget: a disgrace to all conservatives," Mr. Schwartz argued that several federal agencies were legally illegitimate. He asserted: "As conservatives often observe, much of what the federal government does now is without constitutional basis in the first place. One can find constitutional provision for departments of defense, justice, state, commerce, and the treasury without difficulty. But transportation? Education? Agriculture? Such departments, under the Tenth Amendment, oversee matters that often ought to receive government attention but are reserved for state authority."[13]

- And in a 2005 op-ed, "Social Security is better left to the private sphere," Mr. Schwartz advanced extreme arguments in opposition to vital federal benefit programs. He asserted: "All human beings are morally equal in certain respects, but inequality of means and resources is a natural aspect of the human condition."[14] He also contended: "[T]here is a powerful case to be made that all government spending on Social Security, welfare, medical insurance, and the like is harmful not only to society as a whole but also to the ostensible beneficiaries of such programs. Social spending makes individuals dependent on the government rather than their own work."[15] And he wrote: "Related to this point is the ancient insight, confirmed by all our experience, that reminds us that people who come to depend on an outside agent (be it a patron, government, or parent) for their livelihoods are inevitably somewhat less than fully mature adults…. Social spending programs – including but not limited to Social Security and federal medical benefits – are not the solution, but part of the problem."[16]

Mr. Schwartz's statements, made as a college senior, demonstrate his early commitment to these positions, and he has since pursued a legal career that mirrors his ultraconservative mindset. He joined the far-right Federalist Society in law school and served as the vice president of the school's Federalist Society chapter.[17] He served as a law clerk for archconservative Fifth Circuit Judge Jerry Smith. And he has worked for ideologically driven law firms and an anti-government advocacy organization funded by the Koch brothers called the Cause of Action Institute.[18] Mr. Schwartz would bring a strong bias to the bench and would be incapable of serving or being perceived as serving as a neutral arbiter.

Lack of Experience: Mr. Schwartz does not possess the qualifications necessary to serve as a federal judge on the Court of Federal Claims. First nominated to this position in 2017 at age 34, he is among the youngest people ever nominated for a federal judgeship. Even now, in 2020, he has been out of law school for only 11 years, which is below the minimum threshold of years of law practice that the American Bar Association ("ABA") believes is necessary to serve as a federal judge (though the ABA does not evaluate CFC nominees).[19] In addition, Mr. Schwartz has never litigated before the CFC and is

[12] http://civilrightsdocs.info/pdf/judicial-nominations/documents/Schwartz-College-Writings-1.pdf.
[13] http://civilrightsdocs.info/pdf/judicial-nominations/documents/Schwartz-College-Writings-3.pdf.
[14] http://civilrightsdocs.info/pdf/judicial-nominations/documents/Schwartz-College-Writings-4.pdf.
[15] *Id.*
[16] *Id.*
[17] https://www.judiciary.senate.gov/imo/media/doc/Schwartz%20Responses%20to%20QFRs.pdf.
[18] http://www.latimes.com/nation/la-na-cause-action-20150207-story.html.
[19] https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.authcheckdam.pdf.

The Leadership Conference

not admitted to practice in the CFC.[20] Based on his extreme views and lack of experience, Mr. Schwartz is plainly unqualified to serve as a federal judge.

Lack of Diversity: Mr. Schwartz, like most of President Trump's nominees, is a white male. President Trump's lack of commitment to diversifying the federal judiciary is deeply disturbing; he has appointed the least diverse group of nominees in decades.[21] Of his 55 appellate nominations, none are African American. Only one is Latinx. And only 11 are women. His district court and CFC nominees are similarly nondiverse. Our nation's great diversity should be reflected in its government institutions, especially the federal judiciary, which serves as the ultimate guardian of our rights and liberties. At a time when the legal profession has more women and attorneys of color than ever before, President Trump's record on judicial diversity is truly appalling.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Stephen Schwartz to the U.S. Court of Federal Claims. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel, or Lena Zwarensteyn, Fair Courts Campaign Director, at (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO

[20] https://www.judiciary.senate.gov/imo/media/doc/Schwartz%20Responses%20to%20QFRs.pdf.
[21] https://www.usatoday.com/story/news/politics/2018/02/13/trumps-87-picks-federal-judges-92-white-just-one-black-and-one-hispanic-nominee/333088002/.