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September 14, 2017

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

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

RE: *The Nomination of Stephen S. Schwartz to the United States Court of Federal Claims*

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), I write to oppose the confirmation of Stephen S. Schwartz to the U.S. Court of Federal Claims. During his short legal career, Mr. Schwartz has consistently pursued an anti-civil rights agenda across a variety of issues, including immigrants' rights, LGBTQ rights, reproductive rights, and voting rights. In addition, Mr. Schwartz lacks sufficient experience to serve as a federal judge, and has adopted extreme positions that are contrary to well-established law. Overall, Mr. Schwartz's nomination continues President Trump's disturbing trend of nominating judicial candidates who will undermine or effectively eliminate civil rights protections.

Headquartered in New York City, LDF is the nation's oldest civil rights law organization. Since Thurgood Marshall founded it in 1940, LDF has pursued racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. As part of its advocacy, LDF seeks to ensure that the federal judiciary reflects the nation's diversity and to protect the judiciary's role in enforcing civil rights laws and the Constitution's guarantee of equal protection.

If confirmed to the Court of Federal Claims, Mr. Schwartz, just 34 years old, would have a long-term negative impact on civil rights. The court has jurisdiction over a broad range of monetary claims against the federal government, including claims that federal laws or regulations constitute takings under the Fifth Amendment. These claims frequently challenge laws protecting the environment and public health, but extreme rulings in takings cases could threaten antidiscrimination protections, including the public accommodation clauses of the Civil Rights Act of

1964 and the Americans with Disabilities Act. The court also addresses discrimination claims in government contracts and civilian and military employment.

Mr. Schwartz graduated from law school less than ten years ago. After six years as an associate at Kirkland & Ellis LLP, he left to work for the Cause of Action Institute (“CoA Institute”). The CoA Institute, which purportedly advocates “for economic freedom and individual opportunity advanced by honest, accountable, and limited government,” is an ultraconservative Koch-funded group that challenges government action to advance corporate interests.<sup>1</sup> For example, it has sued the Department of Energy for implementing environmental regulations<sup>2</sup> and “investigated” an anti-tobacco and anti-obesity grant program by the Centers for Disease Control.<sup>3</sup> The group has also filed lawsuits for transparently partisan ends: In 2015, it sued then-Secretary of State John Kerry and the United States archivist to compel them to recover the emails of former Secretary of State Hillary Clinton.<sup>4</sup>

Mr. Schwartz’s work opposing civil rights protections is detailed below. This record, along with his association with the CoA Institute, show that Mr. Schwartz has not merely worked as a lawyer advocating for the legal interests of his clients. Rather, he has used his legal career to advance a far-right agenda that runs counter to the fundamental principles of equal justice enshrined in our civil rights laws. The biases that he would bring to the bench would erode public confidence in the courts—and in particular their ability to fairly adjudicate claims brought by victims of discrimination and other civil rights violations.

## **Voting Rights**

In 2016, after the Fourth Circuit struck down as unconstitutional North Carolina’s discriminatory package of voting restrictions,<sup>5</sup> Mr. Schwartz submitted a

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<sup>1</sup> See Evan Halper, *Koch-backed Group with Ties to Liberal Cause? Critics Call it a Charade*, L.A. TIMES (Feb. 7, 2015), <http://www.latimes.com/nation/la-na-cause-action-20150207-story.html>.

<sup>2</sup> See Press Release, CoA Institute, Cause of Action Challenges Department of Energy in Latest Filing on Behalf of HARDI (May 30, 2012), <https://causeofaction.org/coa-challenges-dept-of-energy-in-lawsuit-over-burdensome-rulemaking-decision/>.

<sup>3</sup> See CoA Institute, CPPW: Putting Politics to Work, <https://causeofaction.org/wp-content/uploads/2013/04/Final-CPPW-Report.pdf>.

<sup>4</sup> See Press Release, CoA Institute, Cause of Action Lawsuit Challenges Legality of Hillary Clinton’s Email Practices (July 8, 2015), <https://causeofaction.org/cause-of-action-lawsuit-challenges-legality-of-hillary-clintons-email-practices/>.

<sup>5</sup> *N.C. St. Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

petition for a writ of certiorari to the Supreme Court on behalf of the state.<sup>6</sup> The law reduced early voting, eliminated same-day registration, prohibited counting out-of-precinct votes, and required voters to comply with a strict photo identification requirement.<sup>7</sup> In striking down the law, the Fourth Circuit found that the law “target[s] African Americans with almost surgical precision.”<sup>8</sup> Nevertheless, Mr. Schwartz characterized the law as “lenient” and “sensible” and accused the court of “insult[ing] the people of North Carolina and their elected representatives.”<sup>9</sup>

Mr. Schwartz’s defense of a discriminatory voting law aligns with the Trump administration’s ongoing assaults on voting rights. President Trump has repeatedly perpetuated the myth of widespread voter fraud, often with racially-coded language that signals his accusations are directed at communities of color.<sup>10</sup> These claims led to the creation of a sham “election integrity” commission to investigate voter fraud that is now laying the groundwork for massive voter suppression and the disfranchisement of eligible voters, harms that will disproportionately fall upon Black and Latino voters.<sup>11</sup> Further, under Attorney General Jeff Sessions, the Justice Department has reversed course and supported Texas in its efforts to implement a strict voter ID law that a federal court found was enacted with discriminatory intent.<sup>12</sup> As a civil rights organization that has long fought for the full and equal participation of African Americans in our democracy, LDF cannot approve a nominee selected in part for his anti-voting rights record.

## **Immigrants’ Rights**

In 2017, Mr. Schwartz filed an amicus brief in support of Arizona’s attempt to sabotage the federal Deferred Action Childhood Arrivals (DACA) program. DACA allowed some undocumented youth brought to this country as children to apply for employment authorization and to remain in the United States without fear of

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<sup>6</sup> Petition for Writ of Certiorari, *N.C. v. N.C. St. Conf. of the NAACP*, 581 U.S. \_\_\_\_ (2017) (No. 16-833), 2016 WL 7634839.

<sup>7</sup> See *McCrary*, 831 F.3d at 219.

<sup>8</sup> *Id.* at 211.

<sup>9</sup> Petition for Writ of Certiorari, *supra* n.6, (No. 16-833) at \*2, \*21, \*22.

<sup>10</sup> See LDF, *LDF and Local Alabama Organization File Federal Lawsuit Challenging President’s “Election Integrity” Commission*, (July 18, 2017), <http://www.naacpldf.org/press-release/ldf-and-local-alabama-organization-file-federal-lawsuit-challenging-president%E2%80%99s-%E2%80%9CElect>.

<sup>11</sup> See *id.*

<sup>12</sup> See Sari Horwitz, *Justice Department Changes its Position in High-Profile Texas Voter-ID Case*, WASHINGTON POST (Feb. 27, 2017), [https://www.washingtonpost.com/world/national-security/justice-department-changes-its-position-in-high-profile-texas-voter-id-case/2017/02/27/cfaafac0-fd0c-11e6-99b4-9e613afeb09f\\_story.html?utm\\_term=.c9f94f843218](https://www.washingtonpost.com/world/national-security/justice-department-changes-its-position-in-high-profile-texas-voter-id-case/2017/02/27/cfaafac0-fd0c-11e6-99b4-9e613afeb09f_story.html?utm_term=.c9f94f843218).

removal.<sup>13</sup> Arizona responded by denying driver’s licenses to DACA youth, a policy that Governor Jan Brewer defended as necessary to ensure that there would be “no driver licenses for illegal people.”<sup>14</sup> The Ninth Circuit found that the policy likely violated the Equal Protection Clause of the Fourteenth Amendment.<sup>15</sup>

Mr. Schwartz’s brief, written on behalf of Florida Governor Jeb Bush, ignored the Equal Protection claim and focused instead on the argument that DACA does not have legal effect because it was created by an executive order, not by federal statute.<sup>16</sup> Even though Arizona’s anti-DACA driver’s license policy came via gubernatorial executive order after the DACA program was announced, Mr. Schwartz’s brief characterized DACA as an attempt to “override Arizona law.”<sup>17</sup> Mr. Schwartz’s disregard for the rights of undocumented youth is especially troubling given President Trump’s recent decision to end DACA<sup>18</sup> and the increase in Immigration and Custom Enforcement raids under this administration.<sup>19</sup>

## **LGBTQ Rights**

In *G.G. v. Gloucester County School Board*,<sup>20</sup> Mr. Schwartz drafted a brief on behalf of a school board trying to deny a transgender boy the right to use the boys’ restroom.<sup>21</sup> Mr. Schwartz defended the school district’s decision to ignore the Department of Education’s then-interpretation of Title IX and deny students the right to use a restroom consistent with their gender identity.<sup>22</sup> As LDF explained in an amicus brief, the anti-transgender discrimination at issue in *G.G.* is of a piece with the discrimination and segregation that people of color faced during the Jim Crow

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<sup>13</sup> See *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1058 (9th Cir. 2014).

<sup>14</sup> *Id.* at 1059.

<sup>15</sup> *Id.* at 1063–67.

<sup>16</sup> Brief of Governor Bush as Amicus Curiae Supporting Petitioners, *Brewer v. Ariz. Dream Act Coal.*, No. 16-1180 (U.S. May 1, 2017), 2017 WL 1756929 at \*5–\*6.

<sup>17</sup> *Id.* at \*5.

<sup>18</sup> See Julia Preston & Jennifer Medina, N.Y. TIMES (Nov. 19, 2016), *Immigrants Who Came to U.S. as Children Fear Deportation Under Trump*, <https://www.nytimes.com/2016/11/20/us/immigrants-donald-trump-daca.html>; Michael D. Shear & Julie Hirschfield Davis, *Trump moves to end DACA and calls on Congress to Act*, THE NEW YORK TIMES (Sept. 5, 2017), [https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html?\\_r=0](https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html?_r=0).

<sup>19</sup> See Caitlin Dickerson, N.Y. TIMES (May 17, 2017), *Immigration Arrests Rise Sharply as a Trump Mandate is Carried Out*, <https://www.nytimes.com/2017/05/17/us/immigration-enforcement-ice-arrests.html>.

<sup>20</sup> 822 F.3d 709 (4th Cir.), *petition for cert. granted*, No. 16-273, 137 S. Ct. 369 (2016).

<sup>21</sup> Brief of Petitioner, *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 65477.

<sup>22</sup> *Id.* at \*1.

era, particularly with respect to restrooms and other places of public accommodation.<sup>23</sup>

Again, Mr. Schwartz's views align with the administration's discriminatory policies. The Justice Department has since withdrawn guidance on Title IX that prohibited anti-transgender discrimination in access to school facilities,<sup>24</sup> and more recently declared, in an amicus brief, that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on sexual orientation.<sup>25</sup>

## Reproductive Rights

In *Burwell v. Hobby Lobby*,<sup>26</sup> for-profit corporations asserted the personal religious beliefs of their owners to challenge the Affordable Care Act's requirement that employer health insurance plans include coverage for contraceptives. Mr. Schwartz filed an amicus brief on behalf of four for-profit religious publishing companies.<sup>27</sup> The brief argued that for-profit corporations can deny insurance coverage for contraceptives by invoking the First Amendment's guarantee of free exercise of religion.<sup>28</sup> Mr. Schwartz's argument resurrected the long-discredited notion that personal religious beliefs can justify discrimination. As LDF pointed out in an amicus brief, similar arguments were used to justify race discrimination and to oppose the Civil Rights Act of 1964.<sup>29</sup>

Mr. Schwartz is also defending a Louisiana law that restricts women's access to reproductive healthcare by requiring doctors performing abortions to have admitting privileges at a local hospital.<sup>30</sup> The law is strikingly similar to the Texas law that the Supreme Court struck down as unconstitutional in *Whole Woman's*

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<sup>23</sup> Brief of LDF and the Asian American Legal Defense and Education Fund as Amici Curiae in Support of Respondent, *Gloucester Cty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 956145.

<sup>24</sup> U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER (Feb. 22, 2017), <https://www.justice.gov/opa/press-release/file/941551/download>.

<sup>25</sup> Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. 2017).

<sup>26</sup> 134 S. Ct. 2751 (2014).

<sup>27</sup> Brief for the Christian Booksellers Association et al. as Amicus Curiae Supporting Hobby Lobby and Conestoga, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354, 13-356), 2014 WL 343200.

<sup>28</sup> *Id.* at \*3.

<sup>29</sup> Brief Amici Curiae of Julian Bond, the American Civil Liberties Union, the ACLU of Pennsylvania, the ACLU of Oklahoma, LDF, and the National Coalition on Black Civic Participation, in Support of the Government, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354, 13-356), 2014 WL 491245.

<sup>30</sup> See *June Med. Servs. LLC v. Kliebert*, No. 14-CV-00525-JWD-RLB, 2017 WL 1505596 (M.D. La. Apr. 26, 2017).



*Health v. Hellerstedt*.<sup>31</sup> Earlier this year, a federal judge found that Louisiana’s law is likewise unconstitutional because it “would have a negative impact on women’s health . . . [and] substantially increase the burden on women who are able to receive licensed, safe abortions.”<sup>32</sup> These burdens would “fall most heavily on low-income women.”<sup>33</sup> On appeal, Mr. Schwartz is representing the Secretary of the Louisiana Department of Health in her attempt to make the law enforceable and restrict access to abortions.

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In sum, Mr. Schwartz’s nomination is the latest in a string of extreme, ultraconservative nominations showing that this administration aims to use the federal judiciary to further its attack on civil rights and government regulation. LDF opposes Mr. Schwartz’s confirmation to the Court of Federal Claims. We appreciate your consideration of our views. If you have any questions, please contact Senior Policy Counsel Kyle Barry at 202-682-1300.

Sincerely,

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

Sherrilyn A. Ifill  
President & Director Counsel

CC: Members of the Senate Judiciary Committee

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<sup>31</sup> 136 S. Ct. 2292 (2016).

<sup>32</sup> *June Med. Servs.*, 2017 WL 1505596, at \*56.

<sup>33</sup> *Id.*