

February 12, 2020

The Honorable Lindsey Graham  
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: 20 National LGBT Groups Oppose Confirmation of Stephen S. Schwartz**

Dear Chairman Graham and Ranking Member Feinstein:

We, the undersigned 20 national 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. 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.<sup>1</sup> Therefore, 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.

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.<sup>2</sup> Mr. Schwartz left Cause of Action in 2016 to become a partner at Duncan Scharr 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.

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<sup>1</sup> 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). 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.

<sup>2</sup> Josh Israel, *New Filings Show Koch Brothers Give Millions to Anti-gay, Anti-choice Groups*, THINKPROGRESS, available at <https://thinkprogress.org/new-filings-show-koch-brothers-give-millions-to-anti-gay-anti-choice-groups-4181b2cc96f9>.

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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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."<sup>6</sup>

It should be noted that Mr. Schwartz worked closely on the HB2 litigation and on the *G.G.* case with Judge Kyle Duncan at Duncan Schaerr LLP. Judge Duncan's nomination was vehemently opposed by civil rights groups because, like Mr. Schwartz, Duncan's record clearly demonstrated he would not be able to administer fair and impartial justice. Indeed, his record as a judge has tracked his record as a partisan. Following his confirmation, Judge Duncan was presented with a request from a transgender litigant seeking to be recognized with feminine pronouns during the proceeding. Judge Duncan seized upon this opportunity to misrepresent her request as a demand and he proceeded to issue an unwarranted and mean-spirited screed harshly denying her request and using improper pronouns.<sup>7</sup> There is little reason to believe that Mr. Schwartz, who worked hand in glove with Judge Duncan, will be able to set aside his partisan views in order to provide equal justice under the law to LGBT litigants in his courtroom.

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<sup>3</sup> 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/>.

<sup>4</sup> Jim Morrill and Colin Campbell, *NCAA Gives North Carolina a Deadline to Repeal HB2 or Lose Events Until 2022*, CHARLOTTE OBSERVER, (March 23, 2017), available at <http://www.charlotteobserver.com/news/politics-government/article140383638.html>.

<sup>5</sup> Brief of Petitioner at 1, *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 65477.

<sup>6</sup> *Id.* at 41.

<sup>7</sup> *United States v. Varner*, No. 19-40016 (5th Cir. Jan. 15, 2020).



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 Sasha Buchert, Senior Attorney for Lambda Legal, at [sbuchert@lambdalegal.org](mailto:sbuchert@lambdalegal.org).

Very truly yours,

Lambda Legal  
Alliance for Justice  
Athlete Ally  
CenterLink: The Community of LGBT Centers  
Equality California  
Equality Federation  
EqualityMaine  
Equality North Carolina  
Freedom For All Americans  
FORGE, Inc.  
Mazzoni Center  
National Center for Transgender Equality  
National Council of Jewish Women  
National Equality Action Team (NEAT)  
National LGBTQ Task Force Action Fund  
People For The American Way  
Pride At Work  
Silver State Equality-Nevada  
The Trevor Project  
Whitman-Walker Health

cc: United States Senate Judiciary Committee Members