

**Nomination of Stephen S. Schwartz,
to be a Judge of the United States Court of Federal Claims
Questions for the Record
Submitted August 1, 2017**

QUESTIONS FROM SENATOR WHITEHOUSE

1. Based on your record, it does not appear that you have ever litigated a case before the Court of Federal Claims. Is that the case?

Response: I have not litigated in the Court of Federal Claims. I have litigated in the U.S. Court of Appeals for the Federal Circuit, which resolves appeals from the Court of Federal Claims. I have also litigated a variety of matters that involved fields of law that the Court of Federal Claims regularly addresses, legal standards it regularly applies, and the federal trial court procedures that its cases involve.

2. You wrote an amicus brief in support of Hobby Lobby in *Burwell v. Hobby Lobby* arguing that the Government’s position “threatens not only to strip for-profit activities of free exercise protection, but to undermine the doctrinal basis of free exercise protections for religious bodies themselves.”

- a. In your view, to what extent does the law protect a for-profit organization’s speech rights?

Response: The Supreme Court has held as recently as this year that for-profit organizations have free speech rights protected by the First Amendment. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017). It has also explained that “[t]he proper question ... is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [a given law] abridges expression that the First Amendment was meant to protect.” *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). I would faithfully apply all applicable precedents if I am fortunate enough to be confirmed.

- b. What are the legal differences, if any, between a corporate and natural person?

Response: The Supreme Court has held that the answer to that question depends on the precise legal context. Where constitutional rights are concerned, “[w]hether or not a particular guarantee” protects both corporations and natural persons “depends on the nature, history, and purpose of the particular constitutional provision.” *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978). No comprehensive accounting of the differences is possible. In any event, many such issues are subject to litigation and it would not be appropriate for a judicial nominee to comment on them. I would faithfully apply all applicable precedents if I am fortunate enough to be confirmed.

3. In *Horne v. United States Department of Agriculture*, you represented California-based farmers in a Supreme Court case arguing that the Takings Clause applies not just to real property, but also to personal property. You've since written that the government might be required to compensate gun owners whose firearms are removed because the owners pose a danger to themselves or others.

- a. Are there any instances in which you understand the government to legally be able to take control of private property without compensation?

Response: This question concerns an issue which may be presented to the Court of Federal Claims and on which it would not be appropriate for a judicial nominee to comment. However, the Supreme Court has stated that “legislatures can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment.” *United States v. Locke*, 471 U.S. 84, 106, n.15 (1985). I would faithfully apply all applicable precedents if I am fortunate enough to be confirmed.

- b. In the aftermath of *Horne*, are personal and real property synonymous for takings purposes?

Response: This question concerns is an issue which may be presented to the Court of Federal Claims and on which it would not be appropriate for a judicial nominee to comment.

4. You represented the Gloucester County School Board in an effort to maintain its discriminatory policy of preventing transgender students from using the restroom of their choice.

- a. In a brief you filed in *G.G. v. Gloucester County School Board*, you claimed that Title IX is a “straightforward prohibition intended to erase discrimination against women in classrooms, facilities, and athletics” and suggested that Title IX protects nothing beyond that interpretation. Do you understand the law to be, as several courts have held, that the sex discrimination prohibited by Title IX includes not only discrimination for being a particular gender, but also sexual harassment and discrimination for failing to conform to gender stereotypes?
- b. In the same brief, you argued that the Fourth Circuit erred in affording *Auer* deference to the Department of Education. Do you believe that *Auer* remains valid law? Do you believe there are situations—as you wrote “theoretically” may be the case in your brief—where *Auer* deference extends to a greater degree than *Chevron* deference would under similar circumstances?
- c. As a judge, would you follow *Auer* and give executive agencies deference when interpreting their own regulations?

Response to (a)-(c): This question refers to a pending case in which I currently represent one of the parties. My obligations as an advocate make it inappropriate for me to answer this question in detail. If I am fortunate enough to be confirmed, I will afford executive agencies the level of deference called for by all applicable precedents of the Supreme Court and the U.S. Court of Appeals for the Federal Circuit.

5. You wrote an amicus brief criticizing the Obama Administration's Deferred Action for Childhood Arrivals (DACA) program, which protects from deportation certain undocumented immigrants who entered the country as minors. You argued that the program was an unconstitutional extension of executive power.
- What about the DACA program is unconstitutional in your view?
 - How far do you understand executive power on immigration to extend? Do you agree with the Fourth and Ninth Circuit opinions concerning President Trump's Muslim travel ban?
 - If not, please explain how you distinguish those cases from your view of President Obama's action with the DACA program.

Response to (a)-(c): This question refers to a pending case in which I represent a client as an *amicus*. My obligations as an advocate make it inappropriate for me to answer this question in detail.

6. In a cert petition to the Supreme Court arguing for reversal of the Fourth Circuit in *North Carolina v. North Carolina State Conference of the NAACP*, you recently defended restrictive voting regulations implemented by North Carolina, including a photo-ID requirement. The Supreme Court denied certiorari.
- Do you believe fraudulent voting is a major problem affecting our elections today? If so, on what evidence do you base your conclusion?

Response: I have not had occasion to study this issue sufficiently to reach an informed opinion. Additionally, this question refers to political matters about which ethically I cannot opine as a nominee. See Canon 5 of the Code of Conduct for United States Judges.

- Do you believe that millions of fraudulent votes were cast in last year's election? If so, on what evidence do you base your conclusion?

Response: I have not had occasion to study this issue sufficiently to reach an informed opinion. Additionally, this question refers to political matters about which ethically I cannot opine as a nominee. See Canon 5 of the Code of Conduct for United States Judges.

- Do you believe that Hillary Clinton legitimately won the popular vote in last year's election?

Response: I understand that, according to the vote totals certified by United States jurisdictions, a plurality of votes cast in the 2016 general election appear to have been for electors pledged to support Hillary Clinton. I understand that a majority of the electors chosen by the people in the 2016 general election cast their votes for Donald J. Trump, who was accordingly elected president.

- The court found that North Carolina's restrictions "target[ed] African Americans with almost surgical precision," but you argued that the court's finding of discriminatory intent by the North Carolina legislature was in error. Under what

circumstances would you have been satisfied that discriminatory intent was present?

Response: The Supreme Court has established a test for evaluating claims of discriminatory intent under the Voting Rights Act. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Claims of discriminatory intent should be evaluated consistently with all applicable precedents. If I am fortunate enough to be confirmed, I will faithfully do so.

7. Your work at Kirkland & Ellis LLP included representing clients such as BP.
- a. Will you commit to recusing yourself on any cases that concern BP or other former clients that come before you as a judge?

Response: If confirmed, I will address circumstances potentially calling for recusal under 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any and all other applicable laws, rules, and practices governing such circumstances.

8. Besides your work on *Goethel v. Pritzker* and *Rhea Lana, Inc. v. Department of Labor*, what other matters did you work on while at the Cause of Action Institute?

Response: While at Cause of Action Institute, I was regularly called upon for analysis and assistance in pending or potential matters involving novel or complex legal issues. Other matters where I recall that my name appeared on briefs included *Cause of Action Institute v. Eggleston*, No. 1:16-cv-871 (D.D.C), *United States ex rel. Cause of Action v. Chicago Transit Authority*, No. 16-131 (S. Ct.), and *United States v. Sierra Pacific Industries, Inc.* No. 15-15779 (9th Cir.). I was also involved in a number of investigations under the Freedom of Information Act that did not involve litigation.

9. Please explain the significance of your argument in *Mutual Pharmaceutical Co. v. Bartlett*, as adopted by Justice Alito's opinion for the Court, for future state law-based product defect suits.

Response: The application of that case is subject to current litigation, and is therefore not an appropriate subject for comment by a judicial nominee.

10. Please explain more fully your argument that the Constitution's Supremacy Clause does not provide citizens a "free-standing cause of action," as you wrote in an amicus brief in the *Douglas v. Independent Living Center* case.

Response: As the Supreme Court later held in *Armstrong v. Exceptional Child Center, Inc.*, where I assisted in submitting a similar amicus brief, "the Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." 135 S. Ct. 1378, 1383 (2015) (quotes and citation omitted). The arguments I made on behalf of certain clients in the Supreme Court in the referenced *amicus* brief speak for themselves. The

applicable law in the area comes not from the *amicus* brief, but from the binding decisions of the Supreme Court and the U.S. Court of Appeals for the Federal Circuit. If I am fortunate enough to be confirmed, I would faithfully apply all applicable precedents, regardless of the arguments I previously made on behalf of clients.

11. On your public Facebook page you write, under the “About Stephen” section, “[p]rogress is perverse.”
- a. What is the meaning of that statement?

Response: That statement refers to a personal matter that occurred many years ago between me and a small number of friends. It is not a statement of my judicial philosophy, and if I am fortunate enough to be confirmed it would have no bearing on my work as a judge. As a lawyer and a student of history, I am aware of the ways in which the human condition has improved over time.

- b. Do you think that is an appropriate statement for a would-be judge to make publicly?

Response: Public statements by judges are governed by a body of rules, practice, and custom including Canon 5 of the Code of Conduct for United States Judges. If I am fortunate enough to be confirmed, I will ensure that my public statements conform to those standards.

12. You list as one your ten most significant cases your representation of the State of Louisiana in *June Medical Services v. Gee*. You write that you have “been handling much of the dispositive motion briefing with the client, state regulators, and outside interested parties.” However, your name does not appear on any briefs or motion that have been filed in the Middle District of Louisiana or the Fifth Circuit in this case.

- a. Please explain the nature of your involvement in this case, given your apparent lack of documented participation.

Response: My name appears on the docket of *June Medical Services v. Gee*, No. 3:16-cv-00444 (M.D. La.), the case identified on my Questionnaire. I was admitted *pro hac vice* on February 9, 2017. See ECF No. 31. My name appears on a number of documents submitted by the State defendants after that date. See ECF Nos. 36, 40, 50, 53, 58, 61, 65. My Questionnaire accurately describes the nature of my involvement in the case.

- b. How do you understand the Supreme Court’s decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) to affect *Gee* and similar abortion cases?

Response: The scope of that decision is an issue that is subject to current litigation, including litigation in which I currently represent various parties. My obligations as a judicial nominee, see Code of Conduct of United States Judges Canon 3(A)(6), and as an advocate make it inappropriate for me to answer this question in detail. However, I would faithfully apply all applicable precedents if I am fortunate enough to be confirmed.

