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# The Case of Rosika Schwimmer

## Alien Pacifists Not Wanted!

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¶ Among all the decisions of the Supreme Court since the war adverse to civil liberty, none violate the old traditions more squarely than this.

¶ In a country founded on principles of religious freedom and liberty of conscience, the Supreme Court has now refused to admit to citizenship persons who disbelieve in bearing arms in its defense. And this in the case of a 50 year old woman who would never be called on to bear arms!

¶ The decision would apply equally to Quakers and members of other religious sects whose principles forbid taking part in war.

¶ Already in recent years for the first time in our history courts have refused to grant citizenship to an Irish Quakeress, a Mennonite woman, a Seventh Day Adventist and a member of the Church of the Brethren,—all because of their religious objections to bearing arms.

¶ And yet most of our state constitutions and the draft act during the war specifically exempted members of such sects from bearing arms. Our law recognized that in a conflict between a citizen's duty to his God and his duty to his State, God should prevail.

*Congress can change the naturalization law. A bill has been introduced to overcome the Supreme Court decision. Support it.*

*Read the facts of this case and help!*

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100 FIFTH AVENUE  
NEW YORK CITY

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## The Case of Rosika Schwimmer

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THE Supreme Court of the United States handed down on May 27, 1929, a decision denying citizenship to Mme. Rosika Schwimmer, well-known Hungarian pacifist, solely because of her refusal to bear arms in defense of the country. The decision is sweeping. It applies to all aliens holding such views, whether qualified for military service or not, and on any grounds, religious or humanitarian. Three justices dissented,—Holmes, Brandeis and Sanford.

The decision, applied as it was to a fifty year old woman who would never be called on to bear arms, appears incredible on its face. But the court evidently chose to close the doors to any applicant with such views. And in the case of Mme. Schwimmer, the court was plainly influenced by what the solicitor general described as a "secondary consideration," Mme. Schwimmer's influence as a writer and lecturer on others qualified to bear arms.

The decision is of profound significance to all who profess opposition to war, challenging them to action to overcome a decision which strikes at their faith in a warless world. It is of significance to all Quakers and members of religious sects opposed to bearing arms, for none of their alien members can now become citizens. Yet during all our history till recent years no court ever refused to admit the members of such sects to citizenship. Indeed they are counted among our most distinguished citizens,—not ignoring the fact that the President of the United States is of their faith, though not of their traditional view on bearing arms.

The decision should not be regarded as brought about by Mme. Schwimmer's personal views and well-known activities for world peace, conspicuously as the organizer of the ill-fated "Ford Peace Ship." It is in line with similar recent decisions of lower courts in three states, which have refused citizenship to an Irish Quakeress, secretary of the Y. W. C. A. in Portland, Oregon, to a Mennonite woman in Ohio, a Seventh Day Adventist in Wisconsin and to a Canadian member of the Church of the Brethren in the state of Washington.

These decisions reflect the prejudice against extreme pacifists aroused during the war, and capitalized since by professional patriotic and militarist organizations. The Supreme Court decision gives

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point to the comment of the dean of a leading law school to the effect that in the last analysis "The law in the United States is the combined prejudices of five old gentlemen on the Supreme Court."

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The American Civil Liberties Union is planning two courses of action to overcome the Supreme Court decision. One, and the most promising, is to back a bill in Congress to prohibit the denial of citizenship to aliens because of their views on bearing arms. Such a bill, in a form not yet satisfactory, has already been introduced by Representative Anthony J. Griffin.

The other line of action is to get an alien member of a religious sect, preferably a woman, to apply for citizenship in a state, not a federal court, and in a state with a constitutional exemption from military service for religious objectors. Such a case would raise the constitutional issue squarely, and might well achieve a favorable result in the state, and if it reached the U. S. Supreme Court a possible modification of the Schwimmer decision.

For the sake of making clear the issues raised by the Schwimmer case, we give here the essential parts of the proceedings and decisions in all three courts through which it went.

The case was handled by Mme. Schwimmer's attorney, Mrs. Olive H. Rabe of Chicago, who volunteered her services without fee. The American Civil Liberties Union and friends of Mme. Schwimmer contributed the expenses. Mr. Gemmill of Chicago, who assisted Mrs. Rabe, gave his services for a nominal fee.

The original proceeding was before the federal district court at Chicago, which refused citizenship. Carried to the Circuit Court of Appeals at Chicago, the three judges reversed the lower court and ordered Mme. Schwimmer admitted to citizenship. The Government then applied to the Supreme Court for a review, which the court granted. Altogether thirteen judges passed on the case, seven holding against her, six for her.

The issue is best stated by giving first the portions of the Supreme Court decision which deal directly with Mme. Schwimmer's views, together with the dissenting opinion of Justice Holmes, concurred in by Justice Brandeis. Justice Sanford also dissented, merely approving the reasoning of the Court of Appeals.

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### The Supreme Court Decision

The majority opinion was written by Justice Butler, who, it is interesting to note, was formerly a law partner of William D. Mitchell, now attorney general, who as solicitor general handled the government's case against Mme. Schwimmer in the Supreme Court.

The court said, after rehearsing the facts and reviewing previous related decisions:

"We quite recently declared that: 'Citizenship is a high privilege and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant.' (United States *v.* Manzi, 276 U. S. 463, 467). And when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

### *Duty to Defend Country*

"That it is the duty of citizens by force of arms to defend our Government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

"The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the Government and regulation of the land and naval forces, to provide for organizing, arming and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and navy and of the militia of the several States when called into the service of the United States; it declares that a well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

"Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital

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importance, for if all or a large number of citizens oppose such defense the 'good order and happiness' of the United States cannot long endure.

### *Influence on Others*

"And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others. It is clear from her own statements that the declared opinions of respondent as to armed defense by citizens against enemies of the country were directly pertinent to the investigation of her application.

"The record shows that respondent strongly desires to become a citizen. She is a linguist, lecturer and writer; she is well educated and accustomed to discuss government and civic affairs. Her testimony should be considered having regard to her interest and disclosed ability correctly to express herself.

"Her claim at the hearing that she possessed the required qualifications and was willing to take the oath was much impaired by other parts of her testimony. Taken as a whole it shows that her objection to military service rests on reasons other than mere inability because of her sex and age personally to bear arms.

"Her expressed willingness to be treated as the Government dealt with conscientious objectors who refused to take up arms in the recent war indicates that she deemed herself to belong to that class. The fact that she is an uncompromising pacifist with no sense of nationalism but only a cosmic sense of belonging to the human family justifies belief that she may be opposed to the use of military force as contemplated by our Constitution and laws. And her testimony clearly suggests that she is disposed to exert her power to influence others to such opposition.

"A pacifist in the general sense of the word is one who seeks to maintain peace and to abolish war. Such purposes are in harmony with the Constitution and policy of our Government. But the word is also used and understood to mean one who refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal. And one who is without any sense of nationalism is not well bound or

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held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that is required of aliens seeking naturalization.

### *War Records Cited*

“It is shown by official records and everywhere well known that during the recent war there were found among those who described themselves as pacifists and conscientious objectors many citizens—though happily a minute part of all—who were unwilling to bear arms in that crisis and who refused to obey the laws of the United States and the lawful commands of its officers and encouraged such disobedience in others. Local boards found it necessary to issue a great number of noncombatant certificates, and several thousand who were called to camp made claim because of conscience for exemption from any form of military service.

“Several hundred were convicted and sentenced to imprisonment for offenses involving disobedience, desertion, propaganda and sedition. It is obvious that the acts of such offenders evidence a want of that attachment to the principles of the Constitution of which the applicant is required to give affirmative evidence by the Naturalization Act.

“The language used by respondent to describe her attitude in respect of the principles of the Constitution was vague and ambiguous; the burden was upon her to show what she meant and that her pacifism and lack of nationalistic sense did not oppose the principle that it is a duty of citizenship by force of arms when necessary to defend the country against all enemies, and that her opinions and beliefs would not prevent or impair the true faith and allegiance required by the act. She failed to do so. The District Court was bound by the law to deny her application.

“The decree of the Circuit Court of Appeals is reversed.

“The decree of the District Court is affirmed.

### **The Dissenting Opinion of Justice Holmes**

“The applicant seems to be a woman of superior character and intelligence, obviously more than ordinarily desirable as a citizen of the United States. It is agreed that she is qualified for citizenship except so far as the views set forth in a statement of facts may show that the applicant is not attached to the principles of the Constitution of the United States and well disposed to the

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good order and happiness of the same, and except in so far as the same may show that she cannot take the oath of allegiance without a mental reservation.'

"The views referred to are an extreme opinion in favor of pacifism and a statement that she would not bear arms to defend the Constitution. So far as the adequacy of her oath is concerned I hardly can see how it is affected by the statement, inasmuch as she is a woman over 50 years of age, and would not be allowed to bear arms if she wanted to. And as to the opinion the whole examination of the applicant shows that she holds none of the now-dreaded creeds but thoroughly believes in organized government and prefers that of the United States to any other in the world.

"Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be. Her particular improvement looking to the abolition of war seems to me not materially different in its bearing on this case from a wish to establish cabinet government as in England, or a single house, or one term of seven years for the President to touch a more burning question, only a judge mad with partisanship would exclude because the applicant thought that the eighteenth amendment should be repealed.

"Of course the fear is that if a war came the applicant would exert activities such as were dealt with in *Schenck v. United States*, 249 U. S. 47. But that seems to me unfounded. Her position and motives are wholly different from those of *Schenck*. She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues.

"I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. But most people who have known it regard it with horror, as a last resort, and even if not yet ready for cosmopolitan efforts, would welcome any practicable combinations that would increase the power on the side of peace.

"The notion that the applicant's optimistic anticipations would make her a worse citizen is sufficiently answered by her examination which seems to me a better argument for her admission than any that I can offer. Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree



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with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.

“And recurring to the opinion that bars this applicant’s way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant’s belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.”

### The Original Proceedings at Chicago

Mme. Schwimmer’s application for citizenship was first heard before Federal Judge George A. Carpenter in the district court at Chicago in October, 1927. The judge examined her only on one issue, that of her pacifist views. In all other respects he conceded she qualified for citizenship.

The hearing brings out so clearly the conflict between Mme. Schwimmer’s views and the judge’s notions of good citizenship that the pertinent parts bear quotation.

Here is the colloquy between the judge and Mme. Schwimmer:

Q. Of course, I do not believe the time is ever coming when this country, this Government, is going to send its women to fight. We have not as yet a regiment of Amazons.

A. I hope you don’t have.

Q. But we may have to send them as nurses to look after our fighters. We may have to send them in the various religious organizations, like the Y. M. C. A. or the Knights of Columbus, to give succor and aid to our fighters. Now, are you willing to be sent on missions of that sort by this Government to look after the boys that are fighting for this country?

A. I am willing to do everything that an American citizen has to do, except fighting.

Q. Well, our women do not fight. We do not expect you to shoulder a musket.

A. Oh, I am willing to obey every law that the American Government compels its citizens to do.

Q. Are you willing to do anything that an American woman is called upon to do? I mean an American citizen, a woman of this country.

A. Yes, I am, because I have not found that anything was

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asked that was against—I mean it is only the fighting question. That is, if American women would be compelled to do that, I would not do that.

Q. You say you are an uncompromising pacifist?

A. Yes.

Q. How far does that go? Does it refer only to yourself?

A. Yes.

Q. That you are not going to use your fists on somebody?

A. Yes.

Q. Or that you disapprove of the Government fighting?

A. It means that I disapprove of the Government asking me to fight.

Q. You mean fight personally?

A. Yes, physically.

Q. Carrying a gun?

A. Yes.

Q. Is that as far as it goes?

A. That is as far as it goes.

Q. Or is it more deep seated?

A. No.

Q. Really, of course, none of us wants war—

A. Yes.

Q. But there are a great many of us when war comes and our country is in danger who get our backs to the wall—

A. Yes.

Q. And we fight until there is nothing but the wall left.

A. Yes.

Q. Now are you willing to do that?

A. I am afraid, your Honor, I did not catch the point of the question. I am awfully sorry.

Q. I don't mean to bear arms for the country.

A. Yes.

Q. The time will never come, I venture to say, when the women of the United States will have to bear arms.

A. Well, I am not willing to bear arms. In every other single way, civic way, I am ready to follow the law and do everything that the law compels American citizens to do. I am willing to do that. That is why I say I can take the oath of allegiance because as far as I, with the able help of my lawyers, could find out there is nothing that I could be compelled to do that I could not do.

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Q. Your lawyer can't search into your heart any more than I can. You are the only one that can answer these questions.

A. I am opening my heart very frankly because there is nothing to hide. As I said when the question came up, if it is a question of fighting, as much as I desire American citizenship I would not seek the citizenship.

Q. Now, is it a question of fighting personally?

A. Yes.

Q. You yourself?

A. Myself.

Q. You do not care how many other women fight?

A. I don't care because I consider it a question of conscience. If there are women fighters, it is their business.

Q. Do you expect to spread this propaganda throughout this country with other women?

A. Which propaganda may I ask?

Q. That you are an uncompromising pacifist and will not fight.

A. Oh, of course, I am always ready to tell that to anyone who wants to hear it.

Q. What is your occupation, Madame?

A. I am a writer and lecturer.

Q. And in your writings and in your lectures you take up this question of war and pacifism?

A. If I am asked for that, I do.

Q. You know we have a great deal to give—at least we think so—

A. I think so, too.

Q. —when we confer citizenship upon people of other countries.

A. I think so, too.

Q. And we expect when we do that, that they come in on an equal footing, and out of regard to the other stockholders in this Great United corporation we have to see to it that any partners or stockholders coming in are willing to do what those who are already here are willing to do. Now, it seems that your general views—

Now, I am not at all against people writing. There are a great many American citizens who are now decrying the possibility of the occurrence of war. They are against it. We have a great many of pacifists in this country, but when the time comes, and they are called out for the country, they forget all their views,

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all of the things they have been talking about, and start in on the defense of the home.

Now, you can't come in half way. You must come in the whole distance, because there you are and under that flag is our country, and you can't get under that flag unless you promise to do every single thing that the citizens of this country not only have permission to do, but are willing to do.

A. Well, I can only repeat what I said: that I am willing to do everything that, to my knowledge to this day, American women are asked to do.

THE COURT: Well, can we ask anything more than that?

The naturalization examiner then pushed the issue of her refusal to fight, and the judge then put this question:

Q. If you were called to the service, and the kind of work that women usually can perform better than the men can—say as a nurse or as some one to give cheer to the soldiers—and you were at some place in a war, which I hope never will come, and you saw someone coming in the headquarters or the barracks, wherever it was, with a pistol in his hand to shoot the back of an officer of our country, and you had a pistol handy by, would you kill him?

A. No, I would not.

THE COURT: The application is denied.

Her attorney, W. B. Gemmill, associated with Mrs. Olive H. Rabe, her chief counsel, then sought to bring out just what she meant. Following is the colloquy between the judge, her attorney, the naturalization examiner, Mr. Jordan, and herself:

MR. GEMMILL: I mean to say, your Honor, I am trying to explain her answer. It wasn't the cold blooded murder of the United States officer that Mrs. Schwimmer had in mind. It was her feeling against the killing of any one.

THE WITNESS: Yes.

THE COURT: I raised a question that might arise in any war, and asked her what she would do if in order to save the life of an officer of this country, whether it was a general officer or the lowest man in the ranks, and she had the opportunity to kill the enemy before he killed our soldier would she do it, and she said "No."

THE WITNESS: Yes.

MR. GEMMILL: May I ask one or two more questions?

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THE COURT: Yes.

MR. GEMMILL: Under that same case, Mrs. Schwimmer, would you have given the officer any warning, if it was possible?

A. Certainly.

Q. So that he could defend himself?

A. Certainly.

THE COURT: That is, you would have given him—

A. I would try to hit the pistol out of the man's hand who tries to shoot. That is what I would try to do.

Q. Let me ask you this: Would you have thrown yourself on the assailant?

A. Yes, I might do that.

Q. And run the risk of being shot yourself?

A. Yes, I might do that. Yes.

MR. JORDAN: You say you might do that?

A. Well, I speak of a possibility. I can't say I would do that. We speak of hypothetical things. I can't say I "will" do that, because there is no occasion for it.

THE COURT: One never can tell until the occasion arises what will be done.

THE WITNESS: If it would happen this moment I would do it.

THE COURT: But my first question referred not to your trying to stop the man from reaching the American soldier.

THE WITNESS: I understand.

THE COURT: —because he may have been ten feet off—

THE WITNESS: I understand.

THE COURT: —and the American soldier would have been killed before you could have reached his assailant.

THE WITNESS: Yes.

THE COURT: I am asking if you had the weapon, if it were handy by—

THE WITNESS: Yes.

THE COURT: —would you have killed the assailant—

THE WITNESS: No.

THE COURT: —before he reached the American soldier?

THE WITNESS: No.

THE COURT: Then I am of the same opinion.

MR. GEMMILL: Supposing that pistol had been pointed at you and you had a pistol?

A. I would not defend myself. I mean I wouldn't take a

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pistol to defend myself even if you handed it to me; under no circumstances.

THE COURT: That question is not involved at all. This is a very close question, gentlemen, and I am really refusing this because the Government, I think, has no appeal, but it is an attitude—the attitude of the applicant—that I think is not common with the women of this country.

The judge graciously wound up the proceedings with this:

“You understand, Madame, that while the Court may have said some things that shock, perhaps, your views of nationalism, we are here to administer the law as we see it. We have taken an oath for that purpose and we try to live up to it. There is nothing personal about it all.”

### In the Court of Appeals

Mme. Schwimmer appealed at once from Judge Carpenter's denial of citizenship to the Court of Appeals at Chicago. The case was argued by her attorneys, Olive H. Rabe and W. B. Gemmill early in 1928. The unanimous decision of the three judges, Anderson, Alschuler and Baltzell, was handed down in June 1928. They reversed Judge Carpenter and ordered Mme. Schwimmer admitted to citizenship.

After stating the facts and referring to Supreme Court decisions, the Court of Appeals said: (*underscoring ours*)

“The question for judgment was, Did she make it appear that she had behaved, that is, conducted herself, as a person of good moral character, attached and disposed as the statute requires during the time fixed by it? Assuming that the time to be covered by the inquiry ended with the hearing, her views, expressed then or before that time, might be important as disclosing whether her conduct was that required of applicants; *but mere views are not, by the statute, made a ground for denying a petition.*

“The views expressed by the applicant at most reveal an unwillingness personally to bear arms, and it being agreed that she has shown herself in every other way qualified for citizenship, unless her expressed unwillingness to bear arms makes her conduct that of a person not attached to the principles of the Constitution of the United States, or not well disposed to the good order and happiness of the same, her petition should have been granted. . . .

“We do not have before us the case of a male applicant for

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admission who is able to bear arms and is within the usual conscription age, but the case of a woman fifty years of age.

“Women are considered incapable of bearing arms. Male persons of the age of appellant have not been compelled to do so. Appellant, if admitted, cannot by any present law of the United States be compelled to bear arms. Judging by all the conscription acts of which we have knowledge, she never will be required to do so; yet she is denied admission to citizenship because she says she will not fight with her fists or carry a gun.

“In other words, there is put to her a hypothetical question—what would she do under circumstances that never have occurred and probably never will occur—and upon her answers to this supposed case her petition is denied. *A petitioner's rights are not to be determined by putting conundrums to her.*

*“The views of appellant relied upon to support the denial of her application have no substantial relation to the inquiry authorized by the statute. They were immaterial to that inquiry and do not furnish sufficient basis for the decree.*

“Reversed and demanded, with direction to grant appellant's petition.”

### The Issue

The case went up to the Supreme Court on appeal by the Government. The Department of Labor pushed it, evidently desiring to settle an issue that had already arisen in other cases. The Department was not neutral. It took the view that persons refusing to bear arms were not qualified for citizenship, and had opposed their naturalization before the courts. The issue was stated by the Solicitor General in his brief in the Supreme Court as follows:

“The question presented in this case is whether it is a fundamental principle of the Constitution and of our organized Government that they be defended by force of arms against armed invasion or armed insurrection, and whether an alien pacifist who will not bear arms in their defense and who is opposed to any citizen bearing arms for that purpose, and whose willingness to take the oath to support and defend the Constitution and laws against all enemies, foreign and domestic, must be qualified by a refusal to bear arms in defense of the Constitution or to support such a requirement of others, is attached to the principles of the Constitution and a believer in organized government within the

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meaning of the naturalization laws so as to be eligible to citizenship.

“A secondary question is presented, and that is whether a woman who is a writer, author and propogandist of the doctrine that armed force should not be used to maintain the Constitution and Government should nevertheless be naturalized because incapable of bearing arms by reason of age and sex.”

Mme. Schwimmer’s attorney, Mrs. Rabe, put the issue in her brief thus:

“The question presented by this case is whether Congress, which alone has the power to prescribe qualifications for citizenship, has prescribed that an applicant for citizenship shall be willing to bear arms in defense of the United States even if such applicant be incapable of bearing arms by reason of sex and age. In other words, the question to be decided is whether a woman, fifty years of age, in every other way qualified to become a citizen is to be denied citizenship because of her views on pacifism.”

Whichever way the issue is stated, the Supreme Court has answered. The decision is a challenge to change the naturalization law to express the purpose of Congress to abide by the old tradition, by granting the privilege of citizenship, as we always did, to those conscientiously opposed to bearing arms.

Those interested in this issue and who want further information as to when and how to help overcome the Supreme Court decision, please indicate it by filling out the form below. Tear off and mail.

<i>Date</i> .....
<i>To the</i> <i>American Civil Liberties Union</i> <i>100 Fifth Avenue</i> <i>New York City.</i>
Send me further information as to when and how I can help in the campaign to overcome the decision of the Supreme Court in the Schwimmer case.
<i>(Signed)</i> .....
<i>Address</i> .....
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