

September 26, 2019

VIA EMAIL

The Honorable Lindsey Graham
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C., 20510

Senator Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C., 20510

Re: Nomination of Steven Menashi to the Second Circuit Court of Appeals Letter of Concern

Dear Chairman Graham and Ranking Member Feinstein:

We, the 54 undersigned women's organizations, education advocacy organizations, reproductive health, rights, and justice organizations, and civil rights and anti-violence organizations, write to express serious concerns about the nomination of Steven Menashi to the Second Circuit Court of Appeals.

Mr. Menashi has a deeply troubling record dating back to his college writings and continuing through his work as Acting General Counsel at the U.S. Department of Education in the Trump Administration, and his current role as Special Assistant and Associate Counsel to the President. His involvement in the attempted rollback of Title IX's protections, his college writings disparaging marginalized communities, and his legal advocacy for using religion to deny the rights of others, raise questions about Mr. Menashi's ability, if confirmed, to fairly and impartially decide matters involving the civil rights and legal protections for women, LGBTQ individuals, people of color, and all people impacted by discrimination.

During his short tenure at the Department of Education (the Department) working under Education Secretary Betsy DeVos, Steven Menashi was regularly involved in weakening Title IX protections for students. For example, Mr. Menashi exchanged almost daily emails with Candice Jackson, who was Acting Assistant Secretary for Civil Rights for the Department, and other Trump appointees regarding a 2017 guidance on sexual assault and harassment.¹ This guidance exposed student survivors to harm, for instance, allowing schools to question survivors about their sexual history and schools to permit the person accused of assault to cross-examine the survivor.² Although Mr. Menashi left the Department in July 2018, given his role as Acting General Counsel, his fingerprints are on several the Department actions, including the broadly criticized November 2018 Notice of Proposed Rulemaking proposing amendments to Title IX regulations that weaken protections against sexual harassment and assault (Title IX NPRM). The Title IX NPRM would, among other things, require schools to dismiss Title IX complaints of

¹ Benjamin Wermund, *DeVos heads to Texas for 2-day tour*, POLITICO, June 5, 2019, <https://www.politico.com/newsletters/morning-education/2019/06/05/devos-heads-to-texas-for-two-day-tour-443498>; <https://subscriber.politicopro.com/f/?id=0000016b-240b-d047-a1fb-7defd1710001>

² Elizabeth Tang, *Betsy DeVos Just Made it More Confusing for Schools to Address Sexual Assault*, NATIONAL WOMEN'S LAW CENTER, Sep. 28, 2017, <https://nwlc.org/blog/betsy-devos-just-made-it-more-confusing-for-schools-to-address-sexual-assault/>.

sexual harassment, including sexual assault, without investigation in many circumstances, including many incidents of off-campus and online sexual harassment.³

Mr. Menashi also has a trove of problematic writings. In college, Mr. Menashi was the Editor-in-Chief of the *Dartmouth Review*, where he wrote editorials and articles that espoused his radical views. In one editorial, he distorted free speech principles to defend racist actions by Dartmouth fraternities.⁴ He also wrote articles calling into question the right to abortion and the science behind emergency contraception, in which he selectively quoted groups that oppose abortion and birth control.⁵ In another editorial, he completely disregarded the experiences of survivors of campus sexual assault and instead lamented that men live “in a state of permanent culpability.”⁶ In that same editorial, he criticized “Take Back the Night” marches and claimed that the marches “charge the majority of male students with complicity in rape and sexual violence (every man's a potential rapist, they say, it's part of the patriarchal culture.)” Additionally, he mocked the notion of widespread discrimination against women, sneering, “women may be the majority, they may be the beneficiaries of special academic programs and institutional support, but they remain, by definition, an oppressed minority.” These college writings show deeply troubling views around race, reproductive rights, sexual harassment, and women's equality.

In addition to his problematic college writings, Mr. Menashi also advocated that religious beliefs should override nondiscrimination and health care protections in his legal writings. In a 2010 law review article he published as a Federalist Society Olin-Searle Fellow, Mr. Menashi argued that religious schools that receive public funding should not be bound to nondiscrimination provisions in their hiring practices as a condition of receipt of funding, denouncing it as “standardiz[ing] education in accordance with majoritarian norms.”⁷ While his article focused on vouchers, many of the arguments set out therein would apply to other sources of federal funding and the nondiscrimination obligations that attach based on receipt of federal funding, such as Title IX and Title VI. He asserts that placing conditions on participation in public programs, such as nondiscrimination requirements, amounts to an unconstitutional condition if such requirements conflict with religious schools' beliefs or practices.

Mr. Menashi's zealous views on the ability of religious beliefs to trump other rights was also evident during his time as an associate at Kirkland & Ellis. While at Kirkland & Ellis, Menashi co-authored an

³ Elizabeth Tang, *Three Reasons Why Betsy DeVos's Draft Title IX Rules Would Hurt Survivors*, NATIONAL WOMEN'S LAW CENTER, Nov. 16, 2018, <https://nwlc.org/blog/three-reasons-why-betsy-devoss-draft-title-ix-rules-would-hurt-survivors/>.

⁴ Steven Menashi, *Tolerance at Dartmouth*, THE DARTMOUTH REVIEW, Feb. 12, 2001, <http://web.archive.org/web/20020628001138/http://dartreview.com:80/issues/2.12.01/editorial.html>

⁵ Steven Menashi, *The College on the Pill*, THE DARTMOUTH REVIEW, Jan. 15, 2001, <http://web.archive.org/web/20020621053413/http://dartreview.com/issues/1.15.01/pill.html>; Steven Menashi, *The Yuck Factor*, THE DARTMOUTH REVIEW, Jan. 15, 2001, <http://web.archive.org/web/20020621055938/http://dartreview.com/issues/1.15.01/editorial.html>.

⁶ Editorial Board, *Heteropatriarchal Gynophobes*, THE DARTMOUTH REVIEW, Oct. 2, 2000, <http://web.archive.org/web/20050112004027/http://www.dartreview.com/issues/10.2.00/editorial.html>.

⁷ Steven Menashi, *Toward a More Enlightened and Tolerant View*, NYU Annual Survey of American Law, Vol. 66:31, May 12, 2010, https://annualsurveyofamericanlaw.org/wp-content/uploads/2015/01/66-1_menashi.pdf.

amicus brief in *Zubik v. Burwell* on behalf of former prosecutors and Department of Justice officials,⁸ defending employers who wanted to impose their religious beliefs on their employees and block their employees from receiving coverage for contraception, which is guaranteed to them by the Affordable Care Act. The arguments in the brief – which presented an analogy between what it deemed “moral culpability” in *Zubik* and criminal culpability – were so “strained” that other State Attorney Generals, formal DOJ officials, and criminal law professors submitted an *amicus* brief rebuking the arguments.⁹

Mr. Menashi’s inflammatory editorials, prior legal writing and work, and his actions at the Department of Education raise serious concerns about whether he could be a fair and impartial judge for all people, were he to be confirmed to a lifetime position on the federal bench. Given the cases in the pipeline regarding Title IX and due process requirements in school settings and attempts to use personal beliefs to deny employment and health care coverage and services, Mr. Menashi’s nomination poses a clear threat to all people impacted by discrimination. Furthermore, during his September 11 hearing, Mr. Menashi was evasive about his role in the White House and failed to assuage any of our listed concerns. We continue to have grave concerns that Mr. Menashi would use his power as a federal judge to undermine and dismantle longstanding and critically important legal rights and protections.

Sincerely,

The National Women’s Law Center
9to5, National Assoc. of Working Women
Alliance for Justice
Arizona Coalition to End Sexual and Domestic Violence
Atlanta Women for Equality
Clearinghouse on Women's Issues
End Rape on Campus
Equal Rights Advocates
Equality California
Family Advocates, Inc.
Family Equality
Family Planning of South Central New York, Inc.
Feminist Majority Foundation
Futures Without Violence
Idaho Coalition Against Sexual And Domestic Violence
In Our Own Voice: National Black Women's Reproductive Justice Agenda
International Women's Day Coalition in New York City
Iowa Coalition Against Sexual Assault
Know Your IX
Louisiana Foundation Against Sexual Assault
Minnesota Coalition Against Sexual Assault

⁸ Brief of Amicus Curiae Former Justice Department Officials in Support of Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) <http://www.scotusblog.com/wp-content/uploads/2016/01/Former-Justice-Department-Officials-LSP-Amicus.pdf>.

⁹ Brief of Amicus Curiae Former States Attorneys General, Former United States Department of Justice Officials and Professors of Criminal Law in Support of Respondents, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) https://www.scotusblog.com/wp-content/uploads/2016/02/02.17.16_amicus_brief_in_support_of_respondents-ag_doj_criminal_law_profs.pdf.

National Abortion Federation
National Alliance to End Sexual Violence
National Asian Pacific American Women's Forum
National Center for Transgender Equality
National Council of Jewish Women
National Education Association
National Employment Law Project
National Employment Lawyers Association
National Institute for Reproductive Health
National Latina Institute of Reproductive Health
National Network of Abortion Funds
National Organization for Women
National Partnership for Women & Families
National Women's Political Caucus
Nebraska Coalition to End Sexual and Domestic Violence
New Beginnings APFV
New Mexico Coalition of Sexual Assault Programs, Inc.
New York State Coalition Against Sexual Assault
Ohio Alliance to End Sexual Violence
Oregon Attorney General's Sexual Assault Task Force
Parent-Child Center
Peer Health Exchange
Planned Parenthood Federation of America
Positive Women's Network-USA
Public Health Solutions
Rape Crisis Center, Inc.
Reproductive Health Access Project
Spouse Abuse Sexual Assault Crisis Center, Inc.
Stepping Stones, Inc.
Stop Sexual Assault in Schools
Victim Rights Law Center
Wisconsin Coalition Against Sexual Assault
Women's Law Project