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October 22, 2019

VIA EMAIL

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

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

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

Dear Chairman Graham and Ranking Member Feinstein:

On behalf of the National Women's Law Center, an organization that has advocated on behalf of women and girls for almost fifty years, we write in strong opposition to the nomination of Steven Menashi to the Second Circuit Court of Appeals.

Mr. Menashi has consistently argued for and taken positions that are harmful to women, communities of color, and other communities that face discrimination. He advised the Trump Administration on its roll back of Title IX's protections and its draconian immigration policies. He argued for using religion to deny the civil rights of others and wrote several college editorials and articles denouncing women's rights and campus diversity efforts. Lastly, Mr. Menashi's performance during the hearing raised questions about his legal judgment if he were confirmed. Given his deeply troubling record, we do not think that Mr. Menashi will be able to fairly decide matters involving important legal protections for those facing discrimination.

As Acting General Counsel of the Department of Education, Mr. Menashi worked with Secretary of Education Betsy DeVos to harm underrepresented students.

During his tenure as Acting General Counsel of the Department of Education, Mr. Menashi was heavily involved in the Department of Education's (the Department) dismantling of Title IX protections for students who experience sexual assault and other forms of sexual harassment.

Mr. Menashi was involved in the Department's decision to withdraw Obama-era guidance regarding schools' Title IX responsibilities in addressing sexual harassment, including sexual assault, and replace it with a Question and Answers guidance document (Title IX rescission guidance) on September 22, 2017.¹ The Title IX rescission guidance directly conflicted with earlier sexual harassment guidance and had dangerous implications for students, including no longer requiring schools to: 1) eschew mediation between rapist and rape survivor; 2) prohibit questioning of survivors about their sexual history; 3) respect students' request for confidentiality; 4) minimize the burden on students who were harassed when implementing interim measures to protect them during the course of the investigation; and 5) use

¹ NATIONAL WOMEN'S LAW CENTER, *Betsy DeVos Just Made it More Confusing for Schools to Address Sexual Assault*, Sep. 28, 2017, <https://nwlc.org/blog/betsy-devos-just-made-it-more-confusing-for-schools-to-address-sexual-assault/>

equitable standards of proof or equal appeal rights.² Several advocacy groups, including the National Women’s Law Center, sued the Department alleging that the “policy undermines the fundamental antidiscrimination aim of Title IX, makes schools less safe, and impedes women’s and girls’ access to education opportunities” and that the Department failed to acknowledge or explain its reasoning, in violation of the Administrative Procedure Act.

Although Mr. Menashi left the Department in July 2018, he has admitted to advising on the Notice of Proposed Rulemaking the Department released in November 2019 that proposed significantly weakening Title IX protections against sexual harassment and assault (Title IX NPRM).³ The Title IX NPRM would weaken civil rights protections for survivors of sexual harassment, including sexual assault, by, for instance, requiring schools to dismiss Title IX complaints of sexual harassment without investigation in many circumstances of off-campus and online sexual harassment.⁴

Mr. Menashi also admitted to providing legal advice on several Department actions that harm students of color and low-income students including:⁵

- The rescission of guidance on the consideration of race in college admissions, which rolled back the commitment to increasing diversity and equity for all students.⁶
- The delayed implementation of the 2016 Individuals with Disabilities Education Act rules, Equity in IDEA, which would have addressed disparities in the identification of minority students with disabilities.⁷
- The suspension of the borrower defense to repayment rule that provided loan relief to students who were defrauded by for-profit colleges.
- The rescission of the gainful employment regulations that protected students and taxpayers from predatory and ineffective for-profit colleges.⁸

Mr. Menashi, as Special Assistant and Associate Counsel to the President, worked and advised on the Administration’s harmful immigration actions.

Mr. Menashi is part of the White House’s immigration working group tasked with advancing the Trump Administration’s racist and xenophobic immigration policies. He provided legal advice on several matters including:⁹

- The Public Charge rule that would punish legal immigrants for accessing basic health care, stable housing, and adequate nutrition. Earlier this month, a court issued a nationwide injunction

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/>.

³ Steven Menashi Response to Senator Durbin Question For the Record 9d.

⁴ 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-devos-draft-title-ix-rules-would-hurt-survivors/>.

⁵ Steven Menashi Response to Senator Feinstein Question For the Record 1.

⁶ Press Release: NWLC Responds to Trump Administration Rescinding Diversity/Affirmative Action Guidance, July 3, 2018, <https://nwlc.org/press-releases/nwlc-responds-to-reports-that-trump-administration-will-rescind-diversity-affirmative-action-guidance/>

⁷ Press Release: COPAA challenges Secretary DeVos’s Decision to Delay Implementation of Equity in IDEA Regulations, July 12, 2018, <https://youthlaw.org/copaa-challenges-secretary-devos-decision-to-delay-implementation-of-equity-in-idea-regulations/>

⁸ Collin Binkley, DeVos Revokes Obama-era rule policing for-profit colleges, June 28, 2019, <https://www.apnews.com/a34589f6425144b2b9b376737c81be91>

⁹ Steven Menashi Response to Senator Feinstein Question For the Record 2.

preventing implementation of the Rule, calling it “repugnant to the American Dream of opportunity for prosperity and success through hard work and upward mobility.”¹⁰

- The revised Migrant Protection Protocols policy that placed asylum seekers in grave harm by forcing more than 50,000 asylum seekers to stay in Mexico pending their request for protection.¹¹
- Regulations that dramatically restrict asylum eligibility and limit the number of asylum seekers or refugees.
- Expansion of expedited removal that would eliminate due process in removal proceedings.
- Funding for a wall along the border of United States and Mexico.

Mr. Menashi’s college writings demonstrate radical views about marginalized communities, sexual assault, and reproductive rights.

As a college student, Mr. Menashi was the Editor-in-Chief of his college newspaper, the Dartmouth Review, during which he regularly wrote editorials espousing his radical views- from defending racist actions by fraternities to criticizing racial and socioeconomic diversity on campus to disparaging gender justice issues. After his Senate Judiciary Committee hearing, he has tried to distance himself from his writings by calling “some” of them “overstated and overwrought.”¹² Not only does he fail to identify which arguments were “overstated and overwrought,” but his career choices since college, which including undermining survivor protections and harming low-income students, suggest that he still firmly believes the views in his editorials.

- In one editorial entitled “Heteropatriarchal Gynophobes,” he completely disregarded the experiences of survivors of campus sexual assault and instead lamented that men live “in a state of permanent culpability.”¹³ 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 that, “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.”
- In another editorial entitled “Tolerance at Dartmouth,” he distorted free speech principles to defend racist actions by Dartmouth fraternities.¹⁴ He argued that a fraternity “ghetto party” where students wore fake afros and toy guns was “harmless and ultimately unimportant.” He also argued that the school’s derogatory chant, “Wah Hoo! Scalp ‘Em” did not stem from racists beliefs about the inferiority of American Indians.¹⁵ He claimed that “charges of racism are typically overblown” and that “[t]o restrict what can be thought and said, however, is to destroy the free expression of ideas on which liberal education rests.”¹⁶

¹⁰ *State of New York et al. v. U.S. Department of Homeland Security et al.*, No. 19 Civ. 7777 (GBD) (S.D.N.Y. Oct. 11, 2019), <https://www.courthousenews.com/wp-content/uploads/2019/10/PublicCharge-INJ.pdf>

¹¹ CBS NEWS, *Doctors risk lives tackling Trump policy sending migrants back to Mexico: ‘I’ve seen people kidnapped twice,’* Oct. 12, 2019, <https://www.cbsnews.com/news/remain-in-mexico-doctors-decry-trump-policy-of-sending-more-than-51000-migrants-back-to-mexico/>

¹² Steven Menashi Response to Senator Feinstein Question For the Record 14.

¹³ Editorial Board, *Heteropatriarchal Gynophobes*, THE DARTMOUTH REVIEW, October 2, 2000, <http://web.archive.org/web/20050112004027/http://www.dartreview.com/issues/10.2.00/editorial.html>.

¹⁴ Steven Menashi, *Tolerance at Dartmouth*, THE DARTMOUTH REVIEW, February 12, 2001, <http://web.archive.org/web/20020628001138/http://dartreview.com:80/issues/2.12.01/editorial.html>

¹⁵ *Id.*

¹⁶ *Id.*

- In an article entitled “Student Aid Discourages Savings,” he made offensive assumptions about low-income students, asserting that because “[f]amilies with higher incomes as well as more savings and fewer children qualify for less [financial] aid,” that “the system thus punishes families with the foresight and prudence to save for their children’s educations.”¹⁷
- He wrote an article entitled “The Yuck Factor,” in which he called into question the right to abortion and characterized the landmark *Roe v. Wade* case as codifying “radical abortion rights.”¹⁸
- In an article entitled “The College and the Pill,” he relied on statements from anti-women’s health advocates rather than expert scientific bodies like the FDA or NIH to critique his college’s decision to make emergency contraception available to students.¹⁹

Mr. Menashi has argued that religious beliefs should override non-discrimination and healthcare protections.

As a Federalist Society Olin-Searle Fellow, Mr. Menashi wrote a law review article arguing 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.”²⁰ 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.

Similarly, Mr. Menashi co-counseled an *amicus* brief in *Zubik v. Burwell* on behalf of former prosecutors and Department of Justice officials.²¹ The brief supported the employers who raised Religious Freedom Restoration Act (RFRA) challenges to the “accommodation” in the Affordable Care Act’s contraceptive coverage requirement – the accommodation allows certain employers with religious objections to birth control coverage to exclude that coverage from their health plans but still ensures that employees get the coverage from their regular insurance plan. In his *amicus* brief, Mr. Menashi argued that requiring the employers to fill out a form to opt-out of birth control coverage is the same as providing a getaway car to someone who is committing a crime. The absurdity of these arguments spurred other State Attorney Generals, formal DOJ officials, and criminal law professors to submit a responding *amicus* brief that rebuked his arguments for “misapprehend[ing] the law of secondary criminal liability, mischaracteriz[ing] how insurance coverage for contraceptive services is provided pursuant to the Accommodation, and ignor[ing] RFRA’s governing ‘substantial burden’ legal standard.”²²

¹⁷ Steven Menashi, *Student Aid Discourages Saving*, THE NEW YORK TIMES, November 29, 1998, <https://www.deseret.com/1998/11/29/19415113/student-aid-discourages-saving>

¹⁸ Steven Menashi, *The Yuck Factor*, THE DARTMOUTH REVIEW, January 15, 2001, <http://web.archive.org/web/20020621055938/http://dartreview.com/issues/1.15.01/editorial.html>

¹⁹ Steven Menashi, *The College on the Pill*, DARTMOUTH REVIEW, Jan. 15, 2001, <http://web.archive.org/web/20020621053413/http://dartreview.com/issues/1.15.01/pill.html>

²⁰ 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.

²¹ 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>.

²² 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)

Mr. Menashi's Unacceptable Hearing Performance

During his September 11 hearing, Mr. Menashi was evasive about his role in several Trump Administration policies and failed to assuage any of our listed concerns. His refusal to answer the Senators' questions and his analysis for why he could not answer raised serious concerns about his legal reasoning and judgment. And while he has since provided some answers as to the role he played in some of these policies, his responses to the Questions for the Record only confirm that he has played a role in rolling back critical protections.

Mr. Menashi's nomination poses a clear threat to gender justice. Mr. Menashi's record provides strong indication that, if given the opportunity, he would roll back survivors' rights, allow religion to override anti-discrimination protections, and rubberstamp the Administration's regressive agenda.

For all the foregoing reasons, the National Women's Law Center urges Senators to reject the confirmation of Steven Menashi to the Second Circuit U.S. Court of Appeals. Please feel free to contact me, or Theresa Lau, Senior Counsel, at (202) 956-3064 should you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Fatima Goss Graves". The signature is written in black ink and is positioned above the typed name.

Fatima Goss Graves