



October 30, 2019

United States Senate
Washington, DC 20510

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

Dear Senator:

On behalf of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), we urge you to oppose the nomination of Steven Menashi to the United States Court of Appeals for the Second Circuit. The Lawyers' Committee is a nonprofit civil rights organization founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, to help defend the civil rights of racial minorities and the poor. For over fifty years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination to secure equal justice.

Our mission and our history make us uniquely qualified to comment on this nomination. Mr. Menashi's inflammatory writings, anti-civil rights record of encouraging policies that limit educational opportunities for African-American students and harm communities of color, as well as his extreme anti-immigrant record cause us to strongly doubt his ability to serve as a fair and impartial judge on any matter involving African Americans and other communities of color. As such, we oppose his nomination.

Mr. Menashi's inflammatory writings evince a strong history of racial bias

Mr. Menashi has a long history of inflammatory writings attacking civil rights, multiculturalism and diversity. While in college at Dartmouth, Mr. Menashi served as executive editor and editor-in-chief of the Dartmouth Review where he wrote multiple editorials espousing his extreme ideological views on race. Mr. Menashi defended a fraternity that threw a "ghetto party," characterizing the event as "harmless and unimportant."¹ Mr. Menashi claimed that as a result of people saying these parties mocking African Americans were insensitive, a "hostile campus environment" was created, "where students are unwilling to express themselves, lest they be condemned as

¹ "Chilling Free Expression," The Dartmouth Review, Aug. 16, 1999, <https://lawyerscommittee.org/wp-content/uploads/2019/10/Chilling-Free-Expression.pdf>.

bigots.”² He compared universities’ use of race in the admissions process to Germany under Hitler, writing “[s]ixty years after the promulgation of the Nuremberg laws, universities persist in cataloguing students according to race on college applications and official documents.”³ In the same article, he blamed racial tension on college campuses on courses covering racial conflicts, writing “[w]hen students are taught to see all of history through the lens of racial conflict, it’s not surprising that they will adopt this view in their actual lives. Thus, campuses boil with racial tension, accusations of prejudice, and overt competition between ‘identity’ groups....”⁴

These writings evince a devaluation of the experience of racial and ethnic minorities in our society. He has also criticized education about multicultural awareness, writing it is about “denigrating Western culture to promote self-esteem among ‘marginalized groups.’”⁵ Mr. Menashi has espoused these disturbing views not only as a student and academic but also as an attorney, arguing against multiculturalism and diversity, writing that “ethnically heterogeneous societies exhibit less political and civic engagement, less effective government institutions, and fewer public goods.”⁶

These inflammatory writings are not one-off views of a young adult, they demonstrate a pattern of disturbing beliefs and biases. Mr. Menashi did not offer any apology for his past writings during his nomination hearing nor has he explicitly stated that his views on multiculturalism and diversity have evolved.

During Mr. Menashi’s tenure at the Department of Education, he actively worked to rollback civil rights protections for vulnerable students.

During the course of Mr. Menashi’s tenure at the Department of Education, he continued to actively oppose civil rights. While serving as Deputy General Counsel and Acting General Counsel under Secretary Betsy DeVos, Mr. Menashi, in his own words, was “responsible for providing legal advice related to all aspects of the Department’s operations, including litigation, rulemaking, regulation, and enforcement.”⁷ The Education Department that he served has sought to delay certain regulations and implement others in order to rollback civil rights protections for students most in need of those protections — students of color, LGBTQ students, women and low-income students. Mr. Menashi has actively worked to narrow the scope of civil rights

² *Id.*

³ “Matters of Life and Death,” *The Dartmouth Review*, Mar. 12, 2001, <https://lawyerscommittee.org/wp-content/uploads/2019/10/Matters-of-Life-and-Death.pdf>.

⁴ *Id.*

⁵ Steven Menashi, “The Empty Decade”, *Doublethink*, Summer 2002, <https://lawyerscommittee.org/wp-content/uploads/2019/10/The-Empty-Decade.pdf>.

⁶ Steven Menashi, “Ethnonationalism and Liberal Democracy,” *U. Pa. J. Int’l L.* vol. 32:1, p. 57 (2010), <https://lawyerscommittee.org/wp-content/uploads/2019/10/Ethnonationalism-Democracy.pdf>.

⁷ United States Senate Committee on the Judiciary, Steven Menashi Questionnaire for Judicial Nominees, Aug. 8, 2019, <https://www.judiciary.senate.gov/imo/media/doc/Steven%20Menashi%20Senate%20Questionnaire%20-%20PUBLIC.pdf>

enforcements and limit educational opportunities for all of those vulnerable students: The following are specific examples of those actions:

- In June 2017, Mr. Menashi worked to narrow the scope of civil rights investigations as the Department by no longer requiring civil rights investigators to obtain three years of complaint data to assess compliance with civil rights law.⁸
- In September 2017, Mr. Menashi worked to rescind Title IX guidance on a school's responsibility to protect students from sexual harassment and violence and proposed a rule narrowing the definition of sexual harassment, while also increasing protections for accused students rather than for the survivors.⁹ The proposed rule would require schools to dismiss sexual harassment complaints without any investigation if an incident of sexual harassment occurred off-campus or online.
- In February 2018, Mr. Menashi worked on delaying implementation of the Equity in IDEA rule that sought to expose the significant disproportionate placement of students of color in special education. The administration claimed that "racial disparities in the identification, placement, or discipline of children with disabilities are not necessarily evidence of, or primarily caused by, discrimination."¹⁰ The Department's efforts were unsuccessful as a district court found its actions arbitrary and capricious, and required the immediate implementation of the rule.¹¹
- In March 2018, Mr. Menashi worked on a regulation that sought to preempt state laws protecting student loan borrowers from loan servicers who fraudulently mislead students about their eligibility for various loan forgiveness programs.¹² Low income students, particularly African American and those of color, are disproportionately burdened by student loans. The federal government should be working together with the states to protect vulnerable borrowers instead of siding with misleading and predatory loan servicers.

Mr. Menashi's role as Special Assistant and Associate Counsel to the President demonstrates an extreme anti-immigrant record.

In Mr. Menashi's current role as Special Assistant and Associate Counsel to the President, he is, in his own words, "responsible for providing legal advice to senior staff in the Executive Office of the President and for managing legal issues involving

⁸ Department of Education, Office of Civil Rights Memo, *OCR Instructions to the Field re Scope of Complaints* <https://www.documentcloud.org/documents/3863019-doc00742420170609111824.html>

⁹ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

¹⁰ <https://www.govinfo.gov/content/pkg/FR-2018-07-03/pdf/2018-14374.pdf>.

¹¹ *Council of Parent Attys & Advocates, Inc. v. DeVos*, 2019 U.S. Dist. LEXIS 36318 (D.D.C. March 7, 2019).

¹² <https://www.federalregister.gov/documents/2018/03/12/2018-04924/federal-preemption-and-state-regulation-of-the-department-of-educations-federal-student-loan>.

executive branch agencies and components of the Executive Office of the President.”¹³ The current Administration has pursued and implemented cruel and inhumane immigration and asylum policies reflective of extreme anti-immigrant views that fall outside of the legal mainstream. Mr. Menashi has provided legal advice to advance these extreme views as a member of Stephen Miller’s “Immigration Strategic Working Group.” During his Senate Judiciary Committee hearing, Mr. Menashi was particularly evasive about the extent of his role in working on these policies despite being told by Chairman Lindsey Graham that the questions the Committee members asked were permissible. During Mr. Menashi’s tenure, the Administration issued:

- The “public charge” rule, which sought to make it more difficult for immigrants to receive green cards if they might need public assistance. This cruel and unnecessary rule is an attempt to curtail legal immigration and force families to choose between their basic needs and their ability to remain in the United States. Three federal judges have issued temporary injunctions blocking the “public charge” rule from taking effect.¹⁴
- The “Migrant Protection Protocols,” also known as the “Remain in Mexico” policy, forces asylum seekers to remain outside of the United States in dangerous border towns in Mexico while they await their hearings.¹⁵
- The “Safe 3rd Country” policy, which prohibits asylum to people who do not first apply for asylum in Mexico or another “safe” country they passed through to reach the United States. In September 2019, the Supreme Court allowed the policy to take effect as challenges to the policy are heard in the lower courts.¹⁶

Additionally, in August 2019, it was revealed the Administration had been seeking ways to block immigrant children from accessing public school in violation of the right guaranteed by *Plyler v. Doe*.¹⁷ In *Plyler*, the Supreme Court struck down a Texas law denying public school access to undocumented immigrants and guaranteed access to public schools to all United States residents.¹⁸

¹³ United States Senate Committee on the Judiciary, Steven Menashi Questionnaire for Judicial Nominees, Aug. 8, 2019, <https://www.judiciary.senate.gov/imo/media/doc/Steven%20Menashi%20Senate%20Questionnaire%20-%20PUBLIC.pdf>

¹⁴ “Federal Judges in 3 States Block Trump’s ‘Public Charge’ Rule for Green Cards,” NPR, Oct. 11, 2019, <https://www.npr.org/2019/10/11/769376154/n-y-judge-blocks-trump-administrations-public-charge-rule>. <https://oag.ca.gov/system/files/attachments/press-docs/120%20Order%20re%20PI.pdf>; https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/publicchargePI.pdf.

¹⁵ “How the U.S. Asylum System is Keeping Migrants at Risk in Mexico,” The New Yorker, Oct. 1, 2019, <https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico>.

¹⁶ “Supreme Court Says Trump Can Bar Asylum Seekers While Legal Fight Continues,” New York Times, Sept. 11, 2019, <https://www.nytimes.com/2019/09/11/us/politics/supreme-court-trump-asylum.html>.

¹⁷ “White House Looked Into Ways to Block Migrant Children From Going to School,” Bloomberg, Aug. 17, 2019, <https://www.bloomberg.com/news/articles/2019-08-17/white-house-mulled-ways-to-block-migrant-children-from-schools>.

¹⁸ *Plyler v. Doe*, 457 U.S. 202 (1982).

Mr. Menashi's evasive responses during his Senate Judiciary Committee hearing and written responses to the Questions for the Record,¹⁹ do nothing to convince us that he would not impose his ideological views from the bench. In fact, they show a disregard for the Senate's rights and responsibilities under the U.S. Constitution to provide advice and consent. As a racial justice organization fighting for equal justice on behalf of African Americans and other communities of color, we hope the Senate will closely review Mr. Menashi's views and actions and consider the harm that Mr. Menashi's confirmation would have on our country — and the integrity of the federal bench — if he obtains a lifetime appointment to the Second Circuit.

The American public expects and relies on the Senate to take its constitutionally mandated duty to vet judicial nominees seriously. Mr. Menashi's history of inflammatory writings on race, along with his anti-civil rights and anti-immigration record while serving at the Department of Education and the White House indicate he is not fit to serve as a fair and impartial appellate judge. Thank you for your consideration of our opposition to the nomination of Mr. Menashi to a lifetime appointment on the Second Circuit. We welcome the opportunity to discuss his nomination with your office further, if you have any questions or concerns please contact, Erinn D. Martin, Policy Counsel, at 202-662-8322 or emartin@lawyerscommittee.org.

Sincerely,

A handwritten signature in black ink that reads "Kristen Clarke". The signature is fluid and cursive, with the first name "Kristen" and last name "Clarke" clearly distinguishable.

Kristen Clarke
President & Executive Director

Lawyers' Committee for Civil Rights Under Law
Washington, D.C.

¹⁹ Nomination of Steven Menashi to the U.S. Court of Appeals for the Second Circuit, Questions for the Record, Sept. 18, 2019, <https://www.judiciary.senate.gov/imo/media/doc/Menashi%20Responses%20to%20QFRs.pdf>.