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September 27, 2019

Senator Mitch McConnell
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

Senator Chuck Schumer
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators McConnell and Schumer:

On behalf of the NAACP Legal Defense & Educational Fund, Inc. (LDF), I write to strongly oppose the confirmation of Mr. Steven Menashi for a seat on the Second Circuit Court of Appeals.

LDF was founded in 1940 by Thurgood Marshall. It has been an entirely separate organization from the NAACP since 1957. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF was incorporated in the state of New York, and our headquarters has been located there for nearly 80 years.

There is no other civil rights legal organization that has the breadth and depth of litigation experience of LDF in vindicating the constitutional rights of African Americans in the federal courts, including in the Second Circuit Court of Appeals. The integrity of our work is premised on the operation of a legitimate and fair judiciary, and impartial judges who respect the rule of law and honor the civil rights laws that protect racial minorities and other groups.

LDF opposes the confirmation of Steven Menashi to the Second Circuit Court of Appeals. The confirmation of a judge to fill this seat is of particular significance to LDF. Our founder, Thurgood Marshall, was nominated to this very seat in 1961 by President John F. Kennedy. Marshall served on the Second Circuit with distinction until he was nominated to serve as the U.S. Solicitor General in 1965. Two years later he became the first African American confirmed to sit on the United States Supreme Court. When Marshall was nominated to the seat on the Second Circuit for which Mr. Menashi is now nominated, he brought with him a distinguished record as a ground-breaking, legendary civil rights lawyer. His accomplishments in the courtroom resulted in the most important transformative shift in our democracy in nearly 100 years. Marshall's work, including his landmark win in *Brown v. Board of Education* in the U.S. Supreme Court, changed the course of American democracy, moving us closer to the promise of equality set forth in the 14th amendment to the Constitution.

Thus, it is particularly alarming that Mr. Menashi, the nominee for this seat on the Second Circuit, has dedicated the majority of his legal career to rolling back critical civil rights protections for minority communities. He has an extensive portfolio of writings which offend and demean almost all protected classes, including the African-American community. During his confirmation hearing, Mr. Menashi made no serious effort to assuage any of the concerns of the civil rights community. He stubbornly refused to answer legitimate questions asked by Senators and provided evasive, and vague answers when pressed further.

To his credit, Mr. Menashi did not participate in the shameful ritual of many recent judicial nominees who have refused, in their testimony before the Committee to affirm the correctness of the Supreme Court's decision in *Brown v. Board of Education*. But although he affirmed that *Brown v. Board of Education* was correctly decided, this bare endorsement¹, cannot overcome his long record of writings, statements and actions that contravene the core principles of equality and opportunity that are at the heart of *Brown*.

In sum, Mr. Menashi's testimony before the Senate Judiciary Committee, and his well-documented record of animosity towards civil rights, demonstrate that he is unfit to serve as a judge on the federal circuit court.

Below we identify three specific areas of Mr. Menashi's record which compel our opposition to his confirmation. We urge the Committee to review each of these carefully and to reject his nomination.

Mr. Menashi's refusal to be transparent about his tenure as Special Assistant and Associate Counsel to the President should render his nomination null and void

As Special Assistant and Associate Counsel to the President since 2018, Mr. Menashi has been involved in and given advice on devastating attacks on civil rights. As a reported member of the White House's immigration working group, Mr. Menashi undoubtedly played a role in advancing many of the racist immigration policies advanced over the course of the past year.² During Mr. Menashi's time as Associate Counsel to the President, the White House pursued and implemented policies of separating families at the border, amending the public charge immigration rule, and attempting to limit the number of asylum seekers permitted to enter the United States. However, because of Mr. Menashi's persistent reticence during his nomination hearing, the extent of his involvement largely remains a mystery. LDF has vociferously opposed these policies and has repeatedly called attention to the undeniably racist underpinnings.

By refusing to answer direct questions about his role as Special Assistant and Associate Counsel, Mr. Menashi proved himself to be evasive, untrustworthy and an obstacle to transparency. Understanding the role Mr. Menashi played in the White House is critical, as

¹ At his confirmation hearing, Senator Blumenthal asked Mr. Menashi if *Brown v. Board* was correctly decided. Mr. Menashi responded in the following manner, "Yes Senator, so in general I think it is important to hue to the line of the principle that was maintained by prior nominees that judges, nominees should not give a thumbs up or thumbs down to specific cases but because of the special role of *Brown v. Board of Education* in our constitutional history, I think it's important for me to affirm that I believe it was correctly decided."

² Betsy Woodruff, Asawin Suebsaeng, *Trump Aide Who Floated Sending Migrants to Sanctuary Cities Gets Powerful New Job* The Daily Beast (Aug. 23, 2019) <https://www.thedailybeast.com/trump-aide-may-davis-a-stephen-miller-ally-who-floated-sending-migrants-to-sanctuary-cities-gets-promotion>

Senator Kennedy stated, to understand not how [Mr. Menashi is] going to rule but how [he is] going to think.”³ Indeed, as Chairman Graham noted, acknowledging for which specific issues Mr. Menashi gave advice would not betray attorney-client privilege. Mr. Menashi, however, repeatedly refused to answer questions regarding his time as Associate Counsel to the President. The Senate, as well as the general public, has a right to know which matters Mr. Menashi was involved in while counsel to the President.

Furthermore, Mr. Menashi’s willful lack of transparency and stubborn refusal to acknowledge involvement with certain policies during his tenure as a Special Assistant and Associate Counsel underscores concerns regarding his willingness to be forthcoming as a judge and recuse himself from issues he may have worked on should they come before the court. Mr. Menashi’s repeated stonewalling of members of the Senate Judiciary Committee and his flagrant lack of transparency, should nullify consideration of his nomination as a federal judge and we therefore oppose his nomination.

Mr. Menashi’s actions while at the Department of Education demonstrate a clear hostility toward civil rights and a startling lack of judgement

While Acting General Counsel and Principal Deputy General Counsel at the Department of Education (“the Department”), Mr. Menashi worked to narrow the scope of critical civil rights enforcements.⁴ His role at the Department cannot be overstated. Mr. Menashi has admitted, that he was “responsible for providing legal advice on *all* aspects of the Department’s operations, including litigation, rulemaking, regulation, and enforcement.”⁵

Notably, while at the Department, Mr. Menashi fought to delay implementation of a rule designed to help our nation’s schools eliminate racial disparities in discipline.⁶ Research shows that Black students in K-12 are 3.8 times more likely to receive an out of school suspension and 2.2 times more likely to be subjected to an out of school arrest than their white counterparts.⁷ The “Rethink School Discipline” guidance was meant to protect students of color from being disproportionately punished or subjected to racist disciplinary actions. Mr. Menashi also attempted to delay implementation of the “2016 Equity in IDEA” regulations which sought to prevent children of color from being disproportionately placed in special education settings.⁸ However, Mr. Menashi’s efforts did not withstand judicial

³ Jennifer Bendery *Steven Menashi Made His Senate Confirmation Hearing Even Worse Than Expected* The Huffington Post (Sep. 9, 2019) https://www.huffpost.com/entry/steven-menashi-senate-confirmation-hearing-protests-trump-judges_n_5d794e1be4b0a938a42d364b?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAIgfAX8JqicYrDTRE_uia2odhUYx8eeV12VYNq1Uh1k3N9V25PyIVzUYxnzt8aoRWzSEi6pkrBdLkJ_MA_jNT496o2ytNIWoQXTV EugJ9G-4nUibTtjapF5X8PN7FCpD1UhyxDCj8cOtOu-yheiQdT-sBjYL0RbOQQsRVPDGvp

⁴ Education Department, Office of Civil Rights Memo *OCR Instructions to the Field re Scope of Complaints* <https://www.documentcloud.org/documents/3863019-doc00742420170609111824.html>

⁵ Steven Menashi, *Questionnaire for Judicial Nominees* Senate Judiciary Committee <https://www.judiciary.senate.gov/imo/media/doc/Steven%20Menashi%20Senate%20Questionnaire%20-%20PUBLIC.pdf>

⁶ White House Fact Sheet, *President Donald J. Trump is Taking Immediate Actions to Secure Our Schools*, (Mar. 12, 2018) <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-immediate-actions-secure-schools/>.

⁷ Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo, and Reece L. Peterson *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* The Urban Review, Vol. 34, No. 4. (Dec. 2002) <http://www.indiana.edu/~equity/docs/ColorofDiscipline2002.pdf>

⁸ Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, ED-2017-OSERS-0128 (Feb. 27, 2018)

scrutiny. On March 9, 2018, a federal judge found that the Department “failed to provide a reasoned explanation for delaying the 2016 Regulations,” “fail[ed] to account for the costs to children, their parents, and society,” and therefore violated the law.⁹

Mr. Menashi also repeatedly attempted to repeal provisions that protect students from predatory online institutions. He fought to delay a rule that made it easier for students to receive debt relief after being defrauded by illegal or deceptive practices by colleges. Notably, Mr. Menashi’s efforts were again struck down by a federal judge who ruled that the delay was unlawful. Indeed, the judge found that Mr. Menashi’s defense of the delay contained “unacknowledged and unexplained” inconsistencies, and epitomized “the hallmark of arbitrary and capricious decision-making.”¹⁰

In March 2018, Mr. Menashi issued guidance attempting to make it harder for states to protect students from fraudulent loan companies. The guidance blocked states from protecting student federal loan borrowers, claiming it would “impede uniquely federal interests.” Yet again, Mr. Menashi’s guidance did not withstand judicial scrutiny. A federal court found Mr. Menashi’s actions illegal, writing that Mr. Menashi’s defense of this guidance was “not persuasive because it is not particularly thorough.”¹¹ Moreover, Mr. Menashi’s work—or rather neglect—to ensure that student loan borrowers committed to public service would have their student loans repaid after ten years of service, was reprimanded by the General Accountability Office and Consumer Financial Protection Bureau.

While at the Department Mr. Menashi also rescinded guidance on the measures schools are required to take in the case of sexual harassment or assault.¹² Under new guidance issued by Mr. Menashi, schools were instructed to treat many cases of sexual assault as sexual harassment, change which school employees would be responsible for reporting incidents of sexual harassment, and remove Title XI protections from places like off-campus housing.¹³ During his time at the Department of Education, Mr. Menashi also worked to weakened Title IX protections for transgender students.¹⁴

Finally, while at the Department of Education, Mr. Menashi worked on guidance specifying that federal funds could be used to militarize schools and arm teachers with guns. Allowing staff to carry guns in schools particularly endangers Black children. Research consistently shows that, even for people with good intentions, racial stereotypes can affect split-second decisions like discharging a weapon.¹⁵ Mr. Menashi’s tenure at the Department

<https://www.federalregister.gov/documents/2018/02/27/2018-04102/assistance-to-states-for-the-education-of-children-with-disabilities-preschool-grants-for-children>

⁹ *Council of Parent Attys & Advocates, Inc. v. Devos*, 2019 U.S. Dist. LEXIS 36318 (D.D.C. March 7, 2019)

¹⁰ *Bauer v. Devos*, 325 F. Supp. 3d 74 (D.D.C. 2018).

¹¹ See *Nelson v. Great Lakes Educ. Loan Servs.*, 928 F.3d 639 (7th Cir. 2019); *Student Loan Servicing Alliance v. District of Columbia*, 351 F. Supp. 3d 26 (D.D.C. 2018).

¹² U.S. Department of Education, Office for Civil Rights *Dear Colleague Letter* (Sep. 22, 2017)

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

¹³ Erica L. Green, *New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges* The New York Times (Aug. 29, 2018) <https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html>

¹⁴ Moriah Balingit *Education Department no longer investigating transgender bathroom complaints* The Washington Post (Feb. 12, 2018) <https://beta.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/?noredirect=on>

¹⁵ B. Keith Payne, *Weapons Bias: Split-Second Decisions and Unintended Stereotyping*, CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE, 2006, available at <http://www.psych.uncc.edu/pagoorka/cdps287.pdf>.

of Education demonstrates his hostility towards civil rights and the repeated inability to withstand judicial scrutiny demonstrates a deep issue with probity and therefore renders him ill qualified to serve as a federal judge.

The writings of Mr. Menashi establish a long and deep history of biased and offensive beliefs

Mr. Menashi has published racist, sexist, homophobic and Islamophobic writings for nearly 20 years. Notably, while in college, Mr. Menashi, compared the collection of race data in college admissions to the Nuremberg laws of Nazi Germany.¹⁶ In other college writings, Mr. Menashi defended a fraternity that threw a “ghetto party,” claiming the perpetuation of derogatory and racist stereotypes were “harmless and unimportant.”¹⁷ Although Mr. Menashi recanted some of his offensive rhetoric at his nomination hearing, claiming his writings were youthful transgressions, he has failed to acknowledge the severity of his past writings and furthermore, has failed to adequately or convincingly repudiate those views and beliefs.

Mr. Menashi also criticized “Take Back the Night” marches which condemn sexual assault.¹⁸ He further complained regarding schools ability to discipline students who harassed women, claiming such a practice put men “in a state of permanent culpability.”¹⁹ He rebuked the Supreme Court’s decision in *Roe v. Wade*, condemning it as “radical abortion rights advocated by campus feminists.”²⁰ Mr. Menashi also supported banning lesbian, gay and bisexual people from serving in the military²¹ and as recently as 2015, defended discrimination against LGBTQ Americans in public accommodations like restaurants.²²

Mr. Menashi’s writings also include Islamophobic sentiments. In 2002, Mr. Menashi applauded then-Italian Prime Minister Silvio Berlusconi for stating “the obvious” by defending “the superiority of Western civilization over Islam.”²³ Mr. Menashi also endorsed the deeply offensive myth that General John Pershing executed Muslims “with bullets dipped in pig fat” and “wrapped their bodies in pigskin before burial.”²⁴ Of particular concern is that Mr. Menashi defended the horrific, and entirely fictitious practice, as a sound tactic to ensure national security. Furthermore, rather than offer an apology for his hateful rhetoric, and affirm that such a practice was indeed a myth, at his nomination hearing Mr.

¹⁶ Steven Menashi, *Matters of Life and Death* The Dartmouth Review (Mar. 12, 2001) <https://afj.org/wp-content/uploads/2019/09/Matters-of-Life-and-Death.pdf>

¹⁷ Steven Menashi, *Chilling Free Expression*, The Dartmouth Review (Aug. 16, 1999) <https://afj.org/wp-content/uploads/2019/09/Chilling-Free-Expression.pdf>

¹⁸ Steven Menashi, *Heteropatricarchal Gynophobes!* The Dartmouth Review (Oct. 2, 2000) <http://web.archive.org/web/20050112004027/http://www.dartreview.com/issues/10.2.00/editorial.html>

¹⁹ Id.

²⁰ Steven Menashi, *The Yuck Factor* The Dartmouth Review (Jan. 15, 2001) <https://afj.org/wp-content/uploads/2019/09/The-Yuck-Factor.pdf>

²¹ Steven Menashi, *Dorm Double Standards* The American Enterprise, (Oct./Nov. 2000); Steven Menashi, *College’s Housing Hypocrisy* The Dartmouth Review (Oct. 2, 2000) <https://afj.org/wp-content/uploads/2019/09/Colleges-Housing-Hypocrisy.pdf>

²² Steven Menashi, *How Great is the Threat to Religious Freedom, Really?* Mosaic Magazine (Aug. 17, 2015) <https://mosaicmagazine.com/response/politics-current-affairs/2015/08/how-great-is-the-threat-to-religious-freedom-really/>

²³ Steven Menashi, *Defining ‘Culture’ but Not as Anthologists Would* The Washington Times (Dec. 15, 2002) <https://www.washingtontimes.com/news/2002/dec/15/20021215-110105-3898r/>

²⁴ Steven Menashi, *Teaching Evil* Policy Review, Hoover Institution (Apr. & May 2002) <https://www.hoover.org/research/teaching-evil>

Menashi simply stated that he “regretted having repeated” the myth. Again, Mr. Menashi’s mild expressions of regret fail to demonstrate an understanding of the deep offense with which his comments have been received by members of the Muslim American community. Finally, in a 1998 New York Times op-ed, Mr. Menashi suggested that need-based financial aid “punishes families with the foresight and prudence to save for their children’s education.”²⁵

Such an extensive record of offensive and irresponsible rhetoric is wholly unfitting of a federal appeal judge. Mr. Menashi has managed over the course of his adult life, to debase and disparage an astonishing array of marginalized communities – African Americans, Muslims, the poor and members of the LGBTQ community. To confirm a nominee with such an egregious record would denigrate the integrity of the court on which he seeks to serve, and the federal bench as a whole. No litigant appearing in Mr. Menashi’s court with a civil rights claim could trust that they would fairly, impartially or properly be provided equal justice under the law. This must disqualify Mr. Menashi for service on the federal bench.

Conclusion

Finally, for 100 years, the Senate Judiciary Committee would not consider a nominee who did not have the support from both his home-state senators. This practice is known as the blue slip process and it helped ensure that Senators were able to advise as to who would serve as a federal judge for their constituents and preserved the autonomy of courts by not confining judicial selection to the President and his political allies. Before Senate Republicans abandoned this century-old practice, only two judges had been confirmed despite a negative blue slip since 1951. That the Senate Judiciary Committee has again ignored the will of two home-state senators and is proceeding, against the wishes of Senator Schumer and Senator Gillibrand, with the nomination of Mr. Menashi is of particular alarm.

For all of the foregoing reasons, we strongly urge the Senate Judiciary Committee to vote against the confirmation of Mr. Menashi for a seat on the Second Circuit Court of Appeals.

Sincerely,



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²⁵ Steven Menashi, *Hide that College Fund!* The New York Times (Nov. 21, 1998) <https://afj.org/wp-content/uploads/2019/09/Hide-That-College-Fund.pdf>