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Regional Office**
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September 20, 2019

United States Senate
Washington, D.C. 20515

RE: Oppose Confirmation of Steven Menashi to the United States Court of Appeals for the Second Circuit

**National
Headquarters
Los Angeles
Regional Office**
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Los Angeles, CA 90014
Tel: 213.629.2512

Dear Senator:

I write on behalf of MALDEF (the Mexican American Legal Defense and Educational Fund) to urge you to oppose the confirmation of Steven Menashi to the United States Court of Appeals for the Second Circuit. Founded in 1968, MALDEF is the nation's leading Latino legal civil rights law firm. Often described as the "law firm of the Latino community," MALDEF promotes social change in the areas of immigrants' rights, education, employment, and political access.

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Since 2017, Steven Menashi has worked for the Trump Administration, as Acting General Counsel at the Department of Education (ED), as Principal Deputy General Counsel at ED, and now as Associate White House Counsel.¹ During that time, Menashi has been center-stage during some of the most controversial, immoral, and unpopular acts taken by the Trump Administration, on issues including immigration, education, women's rights, and LGBTQ rights. Additionally, many of his writings show a bias against the rights of women, LGBTQ persons, low-income children, and children of color. Because it is the role of a judge to be a neutral arbiter of the law, Mr. Menashi's record disqualifies him from becoming a federal judge.

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I. Immigrants' Rights

Mr. Menashi began working at the White House Counsel's Office on September 6, 2018,² where he worked in Stephen Miller's Immigration Strategic Working Group.³ During that time, the Administration:

- capped the total amount of refugees allowed into the United States at a record low (Sept. 17, 2018);⁴
- sent military troops to the southern border due to what it called an "invasion" of refugees seeking safety within the United States (Oct. 30, 2018);⁵

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¹ The Department of Education announced his role at ED on May 31, 2017, and the White House announced his role in the White House Counsel's Office on September 6, 2018. Andrew Kreighbaum, *Department of Education Announces More Hires*, INSIDE HIGHER ED (June 1, 2017), <https://www.insidehighered.com/quicktakes/2017/06/01/departments-education-announces-more-hires>; *President Donald J. Trump Announces Appointments for the Executive Office of the President*, WHITE HOUSE (Sept. 6, 2018) <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-appointments-executive-office-president-2/>. This letter assumes Mr. Menashi began these positions when announced, because Mr. Menashi's questions for the record do not give to-the-day or to-the-month details on when he had these positions. Steven Menashi, *Questionnaire for Judicial Nominees*, SENATE JUDICIARY COMMITTEE, 29 (Aug. 8, 2019) <https://afj.org/wp-content/uploads/2019/09/Steven-Menashi-Senate-Questionnaire.pdf>.

² *President Donald J. Trump Announces Appointments for the Executive Office of the President*, WHITE HOUSE (Sept. 6, 2018) <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-appointments-executive-office-president-2/>.

³ See Niels Lesniewski, *Appeals court nominee won't answer questions about role in White House immigration policies*, ROLE CALL (Sept. 11, 2019) (saying "I did sometimes provide advice on issues . . . related to immigration," but refusing to go into further detail) <https://www.rollcall.com/news/appeals-court-nominee-wont-answer-questions-role-white-house-immigration-policies>. See also Betsy Woodruff and Asawin Suebsaeng, *Trump Aide Who Floated Sending Migrants to Sanctuary Cities Gets Powerful New Job*, DAILY BEAST (Aug. 23, 2019) ("Steven Menashi [is a] lawyer in the White House Counsel's Office who has also participated in . . . the [Stephen] Miller-led Immigration Strategic Working Group.") <https://www.rollcall.com/news/appeals-court-nominee-wont-answer-questions-role-white-house-immigration-policies>.

⁴ Julie Hirschfeld Davis, *Trump to Cap Refugees Allowed Into U.S. at 30,000, a Record Low*, N.Y. TIMES (Sept. 17, 2018) (noting that 30,000 is a record low) <https://www.nytimes.com/2018/09/17/us/politics/trump-refugees-historic-cuts.html>. See also *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted 1980-Present*, MIGRATION POLICY INSTITUTE (Sept. 11, 2019) (providing a chart of the refugee resettlement ceilings from 1980 to present, showing a high of 230,000 in 1980, and fluctuating between 70,000 and 90,000 from 2000 to 2016).

- threatened an unconstitutional executive order that would end birthright citizenship for U.S. citizens (Oct. 26, 2018);⁶
- enacted its “remain in Mexico” policy violating the rights of refugees under U.S. asylum law by forcing refugees from Central America to remain in Mexico to await immigration proceedings (Dec. 20, 2018);⁷
- shut down the government over funding for an ineffective and racist border wall (Dec. 22, 2018);⁸
- usurped the power of Congress by declaring a state of emergency to fund a border wall using other funds after Congress expressly rejected funding the wall (Feb. 15, 2019);⁹
- effectively banned asylum claims for all refugees who travel through Mexico (July 15, 2019);¹⁰
- ended medical deferred action, an action that would deport children who require lifesaving medical procedures (Aug. 7, 2019);¹¹
- greatly expanded the definition of who would be classified as a “public charge,” thus curtailing legal immigration and forcing families to choose between their basic needs and their ability to remain within the United States (Aug. 12, 2019);¹²
- threatened to block immigrant children from accessing public school, in violation of the right guaranteed by *Plyler v. Doe*, the 1982 Supreme Court case litigated by MALDEF that guarantees equal access to education for immigrant students regardless of their immigration status (Aug. 17, 2019);¹³ and
- attempted to allow the indefinite detention of immigrant children (Aug. 21, 2019).¹⁴

It is highly likely that Mr. Menashi worked on many, if not all, of these issues at his time in the White House Counsel’s Office, given that he worked on Stephen Miller’s Immigration Strategic Working Group.¹⁵ Work on any of those issues is

⁵ Nancy Youssef and Alicia Caldwell, *Trump to Deploy 5,200 Troops to Southern Border*, WALL STREET JOURNAL (Oct. 30, 2018)

<https://www.wsj.com/articles/military-to-deploy-5-000-troops-to-southern-border-u-s-officials-say-1540820650>.

⁶ See e.g. William Cummings and David Jackson, *President Trump says he plans to end birthright citizenship with an executive order*, USA TODAY (Oct. 30, 2019) <https://www.usatoday.com/story/news/politics/2018/10/30/trump-birthright-citizenship-executive-order/1816666002/>; Patrick Lyons, *Trump Wants to Abolish Birthright Citizenship. Can He Do That?*, N.Y. TIMES (Aug. 22, 2019) <https://www.nytimes.com/2019/08/22/us/birthright-citizenship-14th-amendment-trump.html>.

⁷ Maria Sacchetti and Nick Miroff, *As Trump administration pushes to return more migrants to Mexico legal battle over policy intensifies*, WASH. POST (June 20, 2019) https://www.washingtonpost.com/immigration/as-trump-administration-pushes-to-return-more-migrants-to-mexico-legal-battle-over-policy-intensifies/2019/06/20/a486829a-92b7-11e9-b570-6416efdc0803_story.html.

⁸ *US government shutdown: A timeline*, AL JAZEERA ENGLISH (Jan. 25, 2019) <https://www.aljazeera.com/news/2019/01/government-shutdown-timeline-190121191642933.html>.

⁹ Philip Marcelo, *Administration ends protection for migrant medical care*, PBS (Aug. 26, 2019) <https://www.pbs.org/newshour/nation/administration-ends-protection-for-migrant-medical-care>.

¹⁰ Sadie Gurman and Ciudad Juarez, *Trump Administration Plans Tighter Asylum Rules at Southern Border*, WALL STREET JOURNAL (July 15, 2019) <https://www.wsj.com/articles/trump-prepares-new-rule-for-asylum-seekers-at-southern-border-11563195494>.

¹¹ Shannon Dooling, *Trump Administration Ends Protection For Migrants' Medical Care*, NPR (Aug. 27, 2019) <https://www.npr.org/2019/08/27/754634022/trump-administration-ends-protection-for-migrants-medical-care>. This action was condemned by the American Medical Association (AMA). See Letter from James L. Madara, CEO, AMA, to Kenneth Cuccinelli, Acting Director, USCIS (Sept. 6, 2019) (“The AMA believes that the discontinuation of medical deferred action will lead to the termination of needed care for vulnerable patients. This includes the termination of care and deportation of individuals receiving life-saving treatments, whose safety and continuity of care cannot be assured following abrupt deportation. . . .”) available at <https://www.ama-assn.org/delivering-care/population-care/new-immigration-policy-endangers-patients-needing-life-saving-care>.

¹² Nathaniel Weixel, *Critics fear widespread damage from Trump 'public charge' rule*, THE HILL (Aug. 24, 2019) <https://thehill.com/policy/healthcare/458627-critics-fear-widespread-damage-from-trump-public-charge-rule>; Andrea Senteno, *Comments in Response to Proposed Rulemaking: Inadmissibility on Public Charge Grounds*, MALDEF (Dec. 10, 2018) (arguing that the rule would drastically and negatively change long-standing practice by making it more difficult for immigrants to avoid being barred as a public charge) <https://www.regulations.gov/document?D=USCIS-2010-0012-55722>.

¹³ *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that the equal protection clause guarantees access to public schools regardless of a person’s immigration status); Jennifer Jacobs and Justin Sink, *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>. This is particularly concerning given that on May 22, 2018, a week before Menashi started at the Department of Education, Secretary DeVos made the legally incorrect statement that it was a “local decision” whether or not schools could call ICE on their students. Michael Stratford, *DeVos: Schools should decide whether to report undocumented kids*, POLITICO (May 22, 2018) <https://www.politico.com/story/2018/05/22/undocumented-children-schools-devos-immigration-603277>. DeVos did not fully correct that statement until a hearing on June 5, 2018, a week after Menashi began as Acting General Counsel at ED, where DeVos seemed to be coached not to answer the question; Senator Chris Murphy had to ask DeVos five times whether the protection in *Plyler* prevented schools from calling ICE on their students. Moriah Balingit, *Can educators call ICE on students? Betsy DeVos finally answers*, WASH. POST (June 5, 2018) (“Murphy: [Y]ou seem to be very purposefully not giving a yes or no answer. . . . It’s not — why are you so — why are you not answering the question?”) <https://www.washingtonpost.com/news/education/wp/2018/06/05/can-educators-call-ice-on-students-betsy-devos-finally-answers/>.

¹⁴ Richard Gonzales, *19 States And D.C. Sue Administration To Stop Indefinite Detention Of Migrant Children*, NPR (Aug. 26, 2019) <https://www.npr.org/2019/08/26/754518950/19-states-and-dc-sue-administration-over-plan-to-detain-migrant-children-indefinite>.

¹⁵ Under normal circumstances, MALDEF would limit itself to commenting solely on issues it knew Mr. Menashi worked upon. However, Mr. Menashi refused to answer questions related to his work on immigration, when asked by Senator Dianne Feinstein, Ranking Member of the Senate Judiciary Committee. See Niels Lesniewski, *Appeals court nominee won’t answer questions about role in White House immigration policies*, ROLE CALL (Sept. 11,

disqualifying for a lifetime appointment to a federal judgeship; no immigrant before Mr. Menashi could feel that he or she could get a fair and impartial hearing before him. Mr. Menashi's unprecedented refusal to answer specific questions about his work on Stephen Miller's Immigration Strategic Working Group, without invoking privilege, is no defense.¹⁶ Instead, it is further evidence of his lack of judicial candor and temperament.

II. Education

Mr. Menashi's record on education is equally concerning. He criticized need-based financial aid as "penalizing" and "punishing" wealthy students.¹⁷ He compared affirmative action to the anti-Semitic Nuremberg laws.¹⁸ In his time as Acting General Counsel at the Department of Education, he oversaw all litigation, rulemaking, regulation, and enforcement.¹⁹ This included advising Secretary DeVos on whether schools could call ICE on their students,²⁰ narrowing the scope of civil rights enforcement in schools,²¹ rescinding protections for sexual assault survivors,²² and rescinding protections for transgender students.²³

III. LGBTQ Rights

Mr. Menashi's record also shows an anti LGBTQ bias. In addition to rescinding protections for transgender students while at the Department of Education,²⁴ he has also described transgendered persons as "ignor[ing] reality."²⁵ He condemned one of the leading LGBTQ rights groups, the Human Rights Campaign (HRC), for protesting the torture and murder of a gay man because of his sexual orientation.²⁶ He argued that schools should be free to discriminate against LGBTQ persons under the guise of religious freedom.²⁷

IV. Women's Rights

Mr. Menashi's record on women's rights also raises concerns. He condemned Take Back the Night marches, which aim to highlight the prevalence of sexual violence on college campuses, as being anti-male.²⁸ He has argued that schools should be

2019) <https://www.rollcall.com/news/appeals-court-nominee-wont-answer-questions-role-white-house-immigration-policies>. Mr. Menashi invoked no executive privilege, nor attorney client privilege, he simply refused to answer the questions, stating "I can't, consistent with my duty of confidentiality to the White House, talk about particular, you know, particular instances on which I worked." *Id.* Ranking Member Feinstein responded that in 26 years of being on the Judiciary Committee she had "seen a lot of nominees [and] no one has ever used, 'Well, I'm not authorized to talk about it.'" *Id.*

¹⁶ *Id.* See also Jennifer Bendery, *GOP Senator 'Doubtful' He'll Support Trump Court Pick Steven Menashi*, HUFFINGTON POST (Sept. 18, 2019) ("Sen. John Kennedy (R-La.) said . . . he was 'very annoyed' by Menashi's performance in his confirmation hearing . . . [and that] 'He should answer the questions.'") https://www.huffpost.com/entry/steven-menashi-trump-judicial-nominee-john-kennedy_n_5d82621be4b0849d47223dfd77u.

¹⁷ Steven Menashi, *Hide That College Fund!*, N.Y. TIMES (Nov. 21, 1998) available at <https://afj.org/wp-content/uploads/2019/09/Hide-That-College-Fund.pdf>.

¹⁸ Steven Menashi, *Matters of Life and Death*, DARTMOUTH REVIEW (Mar. 12, 2001) ("Sixty years after the promulgation of the Nuremberg laws, universities persist in cataloguing students according to race on college applications and official documents.") <https://afj.org/wp-content/uploads/2019/09/Matters-of-Life-and-Death.pdf>.

¹⁹ Steven Menashi, *Questionnaire for Judicial Nominees*, SENATE JUDICIARY COMMITTEE, 29 (Aug. 8, 2019) <https://afj.org/wp-content/uploads/2019/09/Steven-Menashi-Senate-Questionnaire.pdf> - page=29.

²⁰ See note 13 and accompanying text.

²¹ OCR Instructions to the Field re Scope of Complaints, ED. DEPT., <https://www.documentcloud.org/documents/3863019-doc00742420170609111824.html>.

²² Dear Colleague, ED. DEPT. (Sept. 22, 2017) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

²³ Moriah Balingit, *Education Department no longer investigating transgender bathroom complaints*, WASH. 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>.

²⁴ *Id.*

²⁵ Steven Menashi, *Defining 'culture,' but not as anthropologists would*, WASH. TIMES (Dec. 15, 2002) ("These pages are full of warnings about the tendency to ignore reality. Mr. Kimball mentions the incipient normalization of 'gender reassignment surgery.'") available at <https://afj.org/wp-content/uploads/2019/09/Defining-culture-but-not-as-anthropologists-would.pdf>.

²⁶ Steven Menashi, *Matters of Life and Death*, DARTMOUTH REVIEW (Mar. 12, 2001) ("The gay rights group Human Rights campaign [sic] . . . has incessantly exploited the slaying of Mathew [sic] Shepard. . . .") <https://afj.org/wp-content/uploads/2019/09/Matters-of-Life-and-Death.pdf>; Jude Sheerin, *Matthew Shepard: The murder that changed America*, BBC (Oct. 26, 2018) (describing how Shepard was kidnapped and assaulted due to his sexual orientation, tied to a log fence, struck in the face with the butt of a revolver 20 times which fractured his skull and crushed his brain stem, then left for dead like "the Western custom of nailing a dead coyote to a fence to ward off intruders" for 18 hours in the frigid cold before he was found unconscious, and later died in the hospital, never regaining consciousness) <https://www.bbc.com/news/world-us-canada-45968606>.

²⁷ Steven Menashi, *Toward a "More Enlightened and Tolerant View": Educational Choice and the Regulation of Religious Institutions*, 66 N.Y. ANN. SURV. AM. L. 31 available at https://annualsurveyofamericanlaw.org/wp-content/uploads/2015/01/66-1_menashi.pdf.

²⁸ Steven Menashi, *Heteropatriarchal Gynophobes!*, DARTMOUTH REVIEW (Oct. 2, 2000) ("'Take Back the Night' 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)—not to mention the 'Frats Rape; accusation that's chalked on the sidewalks from time to time. And while campus gynocentrists can throw around these accusations, there's no similar leeway for men. Offhand remarks or jokes can create a 'hostile environment' or 'stigmatize' women—and can be punished through official disciplinary action.") available at <http://web.archive.org/web/20050112004027/http://www.dartmouth.edu/issues/10.2.00/editorial.html>.

free to discriminate against women because of their relationship and reproductive life choices.²⁹ He has argued in court that the religious right of a business to not fill out a form is greater than a women's right to contraceptive coverage.³⁰

* * *

Given Steven Menashi's record on immigration, education, LGBTQ rights, and women's rights, he has proven he cannot be a neutral arbiter of the law on those issues. Furthermore, his unprecedented refusal to answer questions about his work in Stephen Miller's Immigration Strategic Working Group during his time at the Office of White House Counsel, without invoking privilege, also shows he lacks the candor to be a judge.³¹ **We strongly urge you to vote "no" on the confirmation of Steven Menashi to the United States Court of Appeals for the Second Circuit.** If you have any questions regarding this letter, please contact me at afernandez@maldef.org. Thank you for your time and consideration.

Sincerely,

Adam Fernandez
MALDEF Legislative Staff Attorney

²⁹ Steven Menashi, *Toward a "More Enlightened and Tolerant View": Educational Choice and the Regulation of Religious Institutions*, 66 N.Y. ANN. SURV. AM. L. 31 available at https://annualsurveyofamericanlaw.org/wp-content/uploads/2015/01/66-1_menashi.pdf.

³⁰ Brief of Amici Curiae Former Justice Department Officials In Support of Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) available at <https://www.scotusblog.com/wp-content/uploads/2016/01/Former-Justice-Department-Officials-LSP-Amicus.pdf>.

³¹ See notes 15-16 and accompanying text.