

October 22, 2019

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

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

RE: 21 LGBT Groups Oppose Confirmation of Steven Menashi

Dear Chairman Graham and Ranking Member Feinstein:

We the undersigned 21 national, state and local advocacy organizations representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and everyone living with HIV, urge you to oppose the nomination of Steven Menashi to the U.S. Court of Appeals for the Second Circuit. Mr. Menashi's troubling record leaves little doubt in our minds that he is incapable of administering fair and impartial justice towards LGBT people and other marginalized communities.

Mr. Menashi has clearly and consistently expressed his animosity towards the LGBT people and people living with HIV through his personal writings. For example, in one article, Mr. Menashi argued that the creation of LGBT-specific housing on campuses undercuts the position that lesbians, gays and bisexual LGB people should be able to serve openly in the military.¹ Specifically, Mr. Menashi argued that the arguments offered in support of LGBT-specific campus housing—namely, the desire to avoid tensions and conflict around sexual orientation that can come from living in close quarters—rendered efforts by LGBT people to seek integration into the military completely hypocritical. When asked about this position by Senator Feinstein, Mr. Menashi doubled-down by continuing to maintain there is a “tension” between these policies.² The fact that Mr. Menashi is unable to distinguish between an affirmative policy establishing *optional* housing for LGBT students where their identities would be affirmed and where they could have some assurance of safety from harassment, and a discriminatory government policy *denying* LGB people the opportunity to serve their country based on the prejudice or discomfort of others (whether framed as privacy or “unit cohesion” arguments) is highly revealing of how Mr. Menashi would approach issues affecting LGBT litigants, and causes us grave concern that we would be unable to administer justice in a fair and impartial manner.

¹ Steven Menashi, *Double Dorm Standards*, THE AMERICAN ENTERPRISE (2000), available at <https://afj.org/wp-content/uploads/2019/09/Double-Dorm-Standards.pdf>.

² Mr. Menashi responded to a question for the record from Senator Feinstein by asserting there is a “tension between the specific arguments that colleges had made in litigation and the specific arguments those colleges were making to establish separate housing for LGBT students.” See Questions for the Record, available at <https://www.judiciary.senate.gov/imo/media/doc/Menashi%20Responses%20to%20QFRs.pdf> (p. 9).

In another article, Mr. Menashi accused the Human Rights Campaign (“HRC”) of exploiting the murder of Matthew Shepard for financial benefit and of applying a double standard by failing to criticize a murder by two gay men.³ In response to a specific question for the record from a member of the Senate Judiciary Committee, Mr. Menashi attempted to distance himself from the shameful position he took in the article, but it is hard to find convincing this purported change of heart, which appears to have been motivated more by political expediency than a genuine regret for his prior position.

In another article, Mr. Menashi praised a book for its “warnings about the tendency to ignore reality” giving special appreciation for the author’s specific warning against the “the incipient normalization of ‘gender reassignment surgery.’”⁴ Mr. Menashi repeated this theme a year later, stating that “...gender theorists argue that institutions like marriage and the family—and indeed gender itself—are ‘social constructs’ that can be uprooted and rearranged...”⁵ Mr. Menashi has also unambiguously asserted his opposition to marriage equality.⁶ In a 2015 article, Mr. Menashi warned against the dangers of “nine unelected lawyers in Washington” making policy in favor of marriage equality for the nation which “only makes the political fights more bitter.”⁷

These personal statements demonstrate Mr. Menashi’s animus towards LGBT people and clearly show that LGBT people would not receive equal justice in his courtroom. Mr. Menashi’s language is the language of a partisan advocate, not of a federal judge. If Mr. Menashi believes that judges are simply partisan when they rule in decisions like *Obergefell v. Hodges*, then we should be concerned about how Mr. Menashi would view his own role as a neutral arbiter. Mr. Menashi’s disturbing writings on these subjects not only shed light on his personal views and his inability to set them aside, but also demonstrate a temperament and lack of judgment that renders him fundamentally unsuitable for a lifetime position of public trust on the federal bench.

We are also concerned with Mr. Menashi’s role in the promulgation of a regulation issued by the Department of Homeland Security that expanded significantly the number of people who are considered a “public charge,” thereby limiting their ability to seek permanent legal status in the United States.⁸ This sweeping rule places LGBT people and people living with HIV at disproportionate risk of being kept out of the U.S. and torn apart from their families, and fails to consider the discrimination and bias

³ *Matters of Life and Death*, THE DARTMOUTH REVIEW, (Mar. 12, 2001), available at <https://afj.org/wp-content/uploads/2019/09/Matters-of-Life-and-Death.pdf>

⁴ *Defining ‘culture,’ but not as Anthropologists Would* (Dec. 2002), THE WASHINGTON TIMES, available at <https://afj.org/wp-content/uploads/2019/09/Defining-culture-but-not-as-anthropologists-would.pdf>

⁵ *Humans, Animals, and the Human-Animal*, (Feb 1, 2003), HOOVER INSTITUTION POLICY REVIEW, available at <https://www.hoover.org/research/humans-animals-and-human-animal>

⁶ Steven Menashi, *Toward A “More Enlightened and Tolerant View”: Educational Choice and the Regulation of Religious Institutions*, 66 N.Y.U. Ann. Surv. Am. L. 31, 35 (2010).

⁷ *Democracy, State by State*, NEW YORK SUN (Nov. 8, 2004), available at <https://www.nysun.com/editorials/democracy-state-by-state/4427/>

⁸ Senator Feinstein asked Mr. Menashi in a question for the record if he worked or advised on the Administration’s public charge rule and Mr. Menashi responded by stating, “yes, insofar as this question asks whether I provided legal advice.”



LGBT people and people living with HIV experience that contribute to economic insecurity, which could be used against them in the rule.⁹

Lastly, we are deeply concerned about Mr. Menashi's writings on other civil rights matters that also impact LGBT women and LGBT people of color, especially when those writings have been operationalized in the policy issue areas within the Trump Administration. For example, Mr. Menashi's work to delay the implementation of a rule designed to help schools eliminate racial disparities in school discipline must be viewed in light of the fact that, as a college student, Mr. Menashi defended a fraternity that held a "ghetto party" by claiming that such racist stereotypes were harmless.^{10,11} Likewise, Mr. Menashi's attempts to deflect scrutiny of his role in helping to rescind the Title IX sexual harassment guidance and the Department's proposed rule on campus assault ring hollow in light of his earlier writings as a college student that were critical of efforts by so-called "campus gynocentrists" to call attention to sexual assault at Dartmouth College and beyond.¹²

For the foregoing reasons, we urge you to reject the nomination of Steven Menashi to the U.S. Court of Appeals for the Second Circuit.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sasha Buchert, Senior Attorney for Lambda Legal, at sbuchert@lambdalegal.org.

Very truly yours,

Lambda Legal

American Atheists
Athlete Ally
CenterLink: The Community of LGBT Centers
Equality California
EqualityMaine
Equality North Carolina
Family Equality
interACT: Advocates for Intersex Youth
The LGBT Bar Association of New York
Louisiana Trans Advocates
Mazzoni Center
National Center for Transgender Equality

⁹ See Lambda Legal Comment on the public charge proposed rule (Dec. 10, 2018), available at <https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/lambda-legal-public-charge-grounds-comment-letter.pdf>.

¹⁰ See DeVos to Rescind Obama-Era Guidance on School Discipline (Dec. 18, 2018), NPR available at <https://www.npr.org/2018/12/18/675556455/devos-to-rescind-obama-era-guidance-on-school-discipline>

¹¹ Steven Menashi, *Chilling Free Expression*, THE DARTMOUTH REVIEW (Aug. 16, 1999), available at <https://afj.org/wp-content/uploads/2019/09/Chilling-Free-Expression.pdf>

¹² Mr. Menashi criticized "Take Back the Night" marches when he was at Dartmouth University. See Steven Menashi, *Heteropatriarchal Gynophobes!* THE DARTMOUTH REVIEW (Oct. 2, 2000), available at <https://afj.org/wp-content/uploads/2019/09/Heteropatriarchal-Gynophobes.pdf>.



The National Equality Action Team
National Latina Institute for Reproductive Health
National LGBTQ Task Force Action Fund
Oasis Legal Services
Sexuality Information and Education Council of the United States (SIECUS)
Silver State Equality-Nevada
The Trevor Project
Whitman-Walker Health