



October 16, 2019

VIA EMAIL

Re: National Employment Lawyers Association (NELA) Opposes Nomination of Steven Menashi to the U.S. Court of Appeals for the Second Circuit

Dear Senator:

On behalf of the National Employment Lawyers Association (NELA), and its 4,000 circuit, state, and local affiliate members across the country, we write to express our strong opposition to the confirmation of Steven Menashi to the United States Circuit Court for the Second Circuit. NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Our members litigate daily in every circuit, affording NELA a unique perspective on how employment cases actually play out on the ground and an accurate understanding of the profound impact of the judiciary on the daily lives and the rights of working people. This letter represents the views of NELA national. I have also attached for your consideration, a letter from our affiliate, NELA/NY.

Because of the profound effect of the federal judiciary on the lives of working people, NELA is invested in ensuring that lifetime appointments to the federal judiciary will adhere to the rule of law, especially in matters of civil rights and the well-established doctrines protecting underrepresented communities in the workplace. Mr. Menashi has no judicial experience, but his public record as a lawyer and as an advocate reflects a consistent and troubling point of view seeking to diminish well-settled civil rights law and the rights of minorities.

Mr. Menashi's public record demonstrates a deeply troubling hostility toward the rights of workers, as well as the day to day conditions faced by vulnerable working people, and, by extension, their families. His public record demonstrates a clear ideology that cannot be reconciled with mainstream civil rights or with other workers' rights protections. If confirmed, Mr. Menashi will have the power to make decisions that will adversely impact laws and regulations that provide critical public protections to ensure that workplaces are free from discrimination and retaliation, and that safeguard workplace health and safety. There is no reason to believe that this perspective would not be evident in his judgements and role as a judge.

In a dispute between an employer and employee, the employer typically has the benefit of being the entity that has systems of records and far more financial resource than employees who find themselves in conflict with the employer. This asymmetry is a fact of life, and the inherent advantage of employers over employees in workplace disputes only further underscores the importance of impartiality on the part of the judge.

A judge, regardless of his or her personal and political views, *must* serve as a neutral check on the power and views of the Executive and Legislative branches of government, uphold the spirit of the U.S. Constitution, and protect the rights of the individuals who appear before them. Impartiality is the central promise of the judiciary and is critical to the structure of our democracy.

Many recent nominees have intoned Justice Roberts's words, articulated during his confirmation hearing, that a judge's function is merely to call "balls and strikes," and to articulate the difference between his or her past work as an advocate and present role as a judge. Mr. Menashi has a record which is consistently extreme and out of the mainstream, and his ideology is evident in his record. There is simply no basis whatsoever to suggest that he could or would serve as a neutral and impartial decision maker regarding civil and workers' rights plaintiffs.

The decision to confirm a nominee for this lifetime appointment requires more than merely evaluating a nominee's academic and legal qualifications. It demands more than having the nominee recite a general statement about future neutrality. Rather, every senator has an obligation to all of his or her constituents to carefully consider how a nominee's past advocacy and affiliations will affect the nominee's sensibilities as a judge. As Professor Ogletree remarked in the context of a different nomination, "[It is] obvious that people's life experiences will inform their judgments in life as lawyers and judges" because law is more than "a technical exercise," citing Justice Oliver Wendell Holmes Jr.'s famous aphorism: "The life of the law has not been logic; it has been experience."¹

Mr. Menashi's "life experience" is consistently contrary to settled civil rights laws. His track record of inflammatory rhetoric undermining equity for communities of color, women, and LGBTQ Americans is outside of the mainstream. It portends poorly for a judicial nominee who is tasked with impartiality. Moreover, Mr. Menashi has no experience as a judge and only 11 years' experience as a lawyer (including two years as a law clerk), some of it in the Trump White House.

1. Mr. Menashi's Published Record Demonstrates His Rejection of Mainstream Civil Rights Doctrine

Much has been written about Mr. Menashi's college writings, and some say such writings are not relevant.² If his record provided evidence that his views on the matters about which we have

¹ Charlie Savage, "A Judge's View of Judging is on the Record," *The New York Times* (May 14, 2009). Professor Ogletree's comment was occasioned by concerns raised during hearings on then-Judge Sotomayor's nomination to the U.S. Supreme Court, when much was made over her statement about being a "wise Latina woman" of a certain socioeconomic background. Unlike Mr. Duncan's situation, however, Justice Sotomayor's nomination, supported by her extensive record of more than 150 opinions she authored as both a District Court and Second Circuit judge, as well as by statements by her colleagues on the Second Circuit and other prominent law professors, made clear that she was not ideological, that she would call cases as she saw them, and that she was outstandingly prepared and qualified. See generally, White House Press Release, May 27, 2009 (collecting and annotating sources).

²See, e.g., Menashi, Steven. "Heteropatriarchal Gynophobes!" *The Dartmouth Review*, 2 Oct. 2000, <http://web.archi ve.org/web/2005011 2004027/http://www.dartreview.com /issues/10.2.00/editorial.html>

concern had changed, we would give such indications serious consideration. Unfortunately, this is not the case, and there is no indication of a change of heart or fresh viewpoint regarding many of his extreme views. Mr. Menashi continues to articulate clear and fundamental opposition to American ideals of plurality, tolerance, and civil rights, and to specific legal protections for American employees.

In an article published in 2002 in *The Washington Times*, Mr. Menashi ridiculed the rights of the LGBTQ community by describing "gender reassignment surgery" (his quotes) as a "tendency to ignore reality" and warned against its "incipient normalization."³ In a 2002 article in the magazine *Doublethink*, he derided the Family and Medical Leave Act as an example of a law that was not consistent with "broad national interests" but instead focused on "private comforts."⁴ In this era in which anti-Muslim sentiment plays a significant and difficult role in the working lives of Muslim workers and Muslim job applicants, Mr. Menashi's writings concerning non-Western culture, and Islamic culture in particular, are particularly offensive and derogatory. For example, he wrote that Italian Prime Minister Silvio Berlusconi should *not* have been criticized for his comment that Western civilization is *superior* [emphasis added] to that of Islamic countries, a statement for which Berlusconi himself apologized.⁵

Mr. Menashi, however, has continued to preach the superiority of Western culture, and to attack multiculturalism, which he derogates:

It is now evident that multiculturalism was never about understanding non-Western cultures; it was about denigrating Western culture in order to promote self-esteem among "marginalized" groups (his quotes).⁶

Finally, and perhaps most disturbingly, Mr. Menashi has repeatedly argued against racial and ethnic diversity, emphasizing that societies function best when they are homogeneous, writing these extremist words as recently as 2010:⁷

"Offhand remarks or jokes can create a "hostile environment" or "stigmatize" women-and can be punished through official disciplinary action. After all, 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. So men at Dartmouth and similar schools live, as Sommers has written, "in a state of permanent culpability."

³ Menashi, Steven. "Defining 'Culture.'" *The Washington Times*, 15 Dec. 2002, <https://www.washingtontimes.com/news/2002/dec/15/20021215-110105-3898r/>.

⁴ Menashi, Steven. "The Empty Decade." *Doublethink*, 2002, pp. 21-23., at p. 21, <J.lttRs://afi.org/wpcontent/uploads/2019/09/The-Empty-Decade.pdf>.

⁵ Menashi, Steven. "Defining 'Culture'"; Kaczynski, Andrew, and Em Steck. "Trump Court Pick Denounced Feminists, Gay-Rights Groups and Diversity Efforts in 1990s, 2000s Editorials." *CNN*, 22 Aug. 2019, <http://www.cnn.com/2019/08/22/politics/kfile-steven-menashj-judge-nominee/index.html>.

⁶ Menashi, "The Empty Decade," 22.

⁷ Menashi, Steven. "Ethnonationalism and Democracy." *University of Pennsylvania Journal of International Law*, vol. 32, no. 1, 15 Nov. 2010, pp. 57-122., at pp. 119-120, <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1081&context=jil>.

[I]nhabitants of diverse communities tend to withdraw from collective life, to distrust their neighbours. Ethnically heterogeneous societies exhibit less political and civic engagement, less effective governing institutions, and fewer public goods.

Mr. Menashi seeks confirmation to the seat previously held by Justice Thurgood Marshall. His stated ideology is in brazen contrast to the ideals for which Justice Marshall stood, reflecting fundamental opposition to well-established civil rights laws. If confirmed, he will hold a position that will entail his deciding cases in which employees rely on the civil rights laws that are so essential for employees to get fair treatment in the workplace.

2. Mr. Menashi's Nomination Should Not Be Advanced

Due to his extreme record, Mr. Menashi's confirmation is opposed by Senators Schumer and Gillibrand, his home-state senators. In light of the opposition of both home-state senators, as well as his extreme anti-civil rights perspective, Mr. Menashi should not be confirmed, and in fact, his nomination should not be granted a vote.

Conclusion

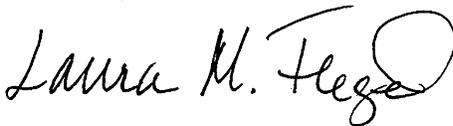
If confirmed, Mr. Menashi's extreme views will cause incalculable harm to civil and employee rights doctrines that have been part of the mainstream for decades. It will serve as a serious blow to our judicial system. It will dishonor the legacy of Justice Marshall.

Our nation, and each one of us, functions on a daily basis thanks to the every-day working people who are NELA members' clients. Servers in restaurants, parking attendants, teachers, nurses, and millions of other working people keep our society intact. The working people of our nation and their families who depend on them deserve federal judges who clearly demonstrate that they respect both the rule of law and the intent of Congress in passing our civil and workplace rights laws. Loyalty to our Constitution and civil rights laws is a baseline qualification for a federal judge. Steven Menashi's record is inconsistent with these most basic expectations. NELA strongly urges you to stand on behalf of working people across this country and to oppose the confirmation of Steven Menashi. If you have questions or wish to discuss this letter, please contact Laura Flegel, Legislative & Public Policy Director at lflegel@nelahq.org. Thank you for your consideration.

Sincerely,



Wade B. Cowan
President, NELA Executive Board



Laura M. Flegel
Legislative & Public Policy Director